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**THE LAW**  
**OF**  
**SURETYSHIP AND GUARANTY**

**AS**  
**ADMINISTERED BY COURTS OF COUNTRIES**  
**WHERE THE COMMON LAW PREVAILS**

**BY**  
**GEORGE W. BRANDT,**  
**OF THE CHICAGO BAR**

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**THIRD EDITION**

**VOLUME I**

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**CHICAGO**  
**CALLAGHAN & COMPANY**  
**1905**



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# PREFACE

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The object sought in this work is to present a comprehensive view of the law of Suretyship and Guaranty, as administered by courts of countries where the common law prevails.

To that end all the reports have been examined by the author, and the points decided in such cases as related to sureties and guarantors have been carefully noted.

The following pages, it is believed, contain references to substantially all the reported cases bearing on the subject treated of herein.

It is hoped that the great difficulty of arranging into a convenient form for reference the mass of material, covering, as it does, almost every phase of the transactions of men with each other, has been in a measure overcome.

GEORGE W. BRANDT.

Chicago, July, 1878.

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In preparing the second edition of this work the same course has been pursued as in the construction of the original volume, the examination of the authorities having been continued to this date.

GEORGE W. BRANDT.

Chicago, September, 1891.

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In this, the third edition, one hundred and eighty-seven new sections have been added and many others enlarged or rewritten. The authorities are brought down to date and cite not only the Official Reports, but also the National Reporter System, The American Decisions, American Reports, American State Reports and Lawyers' Reports Annotated.

GEORGE W. BRANDT.

Chicago, February, 1905.



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**§ 1. What is a surety or guarantor—How the relation of principal and surety is created.**—A surety or guarantor is one who becomes responsible for the debt, default or miscarriage of another person.<sup>1</sup> The relationship of principal and surety

<sup>1</sup> A surety, as the term is commonly used, may be defined also as one who becomes answerable for the debt, obligation or conduct of another. This includes the surety in the restricted technical sense, the guarantor, the accommodation maker, the endorser, and persons whom the law treats as sureties, though they have not in terms bound themselves as such, such as joint makers of a note, or the mortgagor who sells mortgaged property to a vendee who assumes. In *Jones v. Whitehead*, 4 Ga. 397, Lumpkin, J., says: "Suretyship has been defined to be a lame substitute for a thorough knowledge of human nature." In *Smith v. Sheldon* (1876), 35 Mich. 42, 47, an action by a creditor to recover from a retired partner a firm debt which the continuing partner had agreed to pay and had not paid, Cooley, J., said that a surety "is a person who, being liable to pay a debt or perform an obligation, is entitled, if it is enforced against him, to be indemnified by some other person, who ought himself to have made payment or performed before the surety was compelled to do so. It is immaterial," he continued, "in what form the rela-

tion of principal and surety is established, or whether the creditor is or is not contracted with in the two capacities, as is often the case when notes are given or bonds taken; the relation is fixed by the arrangement and equities between the debtors or obligors, and may be known to the creditor or wholly unknown. If it is unknown to him, his rights are in no manner affected by it; but if he knows that one party is surety merely, it is only just to require of him that in any subsequent steps he may take regarding the debt, he shall not lose sight of the surety's equities." It was accordingly held that the retiring partner was a mere surety and was discharged by the creditor's giving time to his principal, the continuing partner, by taking his one-day note. In *Wendlandt v. Sohre*, 37 Minn. 162. after dissolution of a partnership, one partner paid the whole of a partnership debt and brought suit against his co-partner for contribution. In affirming his right to it, Mitchell, J., said that "Whenever, as between two debtors liable to the creditor for the same debt, it is the debt of one of them, the other may be said to be his surety."

is created by the positive act of the parties, as where they in terms bind themselves to the creditor or obligee as principal and surety respectively, or it results from the position the parties

\* \* This is precisely the case here. Plaintiff has paid his half; defendant should pay the other half. Hence, as to that half, plaintiff bears to defendant the relation of surety, and as such is entitled to maintain this action for indemnity." See also note to § 246 post; *Canadian Bank of Commerce v. Coumbe*, 47 Mich. 358; *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. Rep. 665; *Carson v. Maxwell*, 39 Minn. 391, 393. The California Code, 1901, §§ 2831, 2887, 2788, defines suretyship and guaranty thus: "A surety is one who at the request of another, and for the purpose of securing to him a benefit, becomes responsible for the performance by the latter of some act in favor of a third person, or hypothecates property as security therefor." "A guaranty is a promise to answer for the debt, default or miscarriage of another person." "A person may become guarantor even without the knowledge or consent of the principal." All three of which sections are copied into the codes of North Dakota (§§ 4625, 4626, 4649), and Montana (§§ 3600, 3601, 3670). See also cases cited in the notes to the foregoing sections in *Pomeroy's Cal. Civ. Code*, 1901, wherein the distinctions between code and common law suretyship and guaranty are pointed out. The Georgia Code of 1895, § 2966, says: "The contract of suretyship is that whereby one obligates himself to pay the debt of another in consideration of credit or indulgence, or other benefit given to his principal, the principal remaining

bound therefor. It differs from a guaranty in this, that the consideration of the latter is a benefit flowing to the guarantor." The Louisiana Code definition is as follows (§ 3035, *Merrick's Rev. Code*): "Suretyship is an accessory promise by which a person binds himself for another already bound, and agrees with the creditor to satisfy the obligation, if the debtor does not." *Gay & Co. v. Blanchard*, 32 La. Ann. 497. In *Fowler Nat'l Bank v. Brown*, 19 Ind. App. 433, 49 N. E. Rep. 833, *Brown* wrote and signed upon a note: "The within warrant is O. K. and will be paid promptly when due." Held, a mere expression of opinion, not making him liable as surety. "You may rest assured that you will get your pay for all work done" does not amount to a guaranty when written in answer to an inquiry by plaintiff whether he "would be paid for his work" if he cut certain grain for defendant's tenant. *Switzer v. Baker*, 95 Calif. 529, 30 Pac. Rep. 761. In *Consolidated Electric Storage Co. v. Atlantic Trust Co.*, 161 N. Y. 605, 56 N. E. Rep. 145, affirming 53 N. Y. Supp. 1102, it was held that a written agreement there under consideration made the defendant a stakeholder and not a guarantor of the payment of certain royalties. In *Kirkbride v. Moss*, 113 Calif. 432, 45 Pac. Rep. 812, it was held that a promise to refund money paid by the promisee for stock if it proved worthless was an original promise and not a guaranty. "The contract of guaranty is a collateral

have assumed towards each other or towards the property out of which the debt or obligation due to the obligee is to be paid. Thus where a mortgagor conveys the mortgaged property to a

undertaking," said the court. "It cannot exist without the presence of a main or substantive liability to which it is collateral. If there is no such substantive liability on the part of a third person, either express or implied, that is to say, if there is no debt, default, or miscarriage, present or prospective, there is nothing to guarantee, and hence can be no contract of guaranty.

\* \* The corporation simply sold plaintiff 6,000 shares of its stock and received payment therefor. It was the defendant who entered into contract with him; whereby, as an inducement for plaintiff to purchase, he promised to refund his money should the stock become worthless. This was an original contract." Citing *Moorehouse v. Crangle*, 36 Ohio St. 130, 38 Am. Rep. 564. See also *Spencer v. McLean*, 20 Ind. App. 626, 50 N. E. Rep. 769, where a bond executed by stockholders of a corporation for the protection of sureties on its paper was held to express a contract neither of suretyship nor guaranty, but an original undertaking on the part of each signer. See also *Shearer v. R. S. Peele & Co.*, 9 Ind. App. 282, 36 N. E. Rep. 455. In *Neale v. Head*, 133 Calif. 110, 65 Pac. Rep. 131 and 576, The California Mutual Life Insurance Co. was organized with a "guaranty fund," which, as required by statute, consisted of fifty "notes of solvent parties approved by the board of directors and by each other," each for \$5,000, payable to the order of the company "five days after actual demand." The statute provided that until the

"fixed capital" of the company had been obtained none of such notes should be withdrawn unless another note of equal solvency was substituted for it with the consent of all the directors and all the makers of the other notes. The makers of the notes received 5 per cent of their face thereof per year and 12 per cent of any money they might pay into the company on them out of the earnings. The company surrendered five of the notes to the makers thereof without any substitution and without defendant's consent and transferred one of them made by defendant, so that it reached plaintiff, for a consideration of \$300. In a suit on defendant's note it was held by a majority of the court that the several makers of the "guaranty notes" were sureties and that defendant was released by the corporation's allowing part of the notes to pass out of its hands without his consent. A dissenting minority held that the makers of the guaranty notes were sureties for the company and not to it; that the notes, though payable to the company, were held for the benefit of the policy holders or other creditors, and that the company, so holding them as trustee, had no power to surrender or cancel any of them; that the attempted release of them, being of no legal efficacy, did not affect the liability of the makers of the other notes as co-sureties, and that the defendant was therefore liable on his note and had a right to enforce contribution from the makers of the other guaranty notes.

grantee who assumes the mortgage debt, the grantee becomes the principal debtor and the mortgagor becomes a surety for the payment of the mortgage debt.<sup>2</sup> A and B make their joint note payable to the order of C. Each is principal debtor as to half the amount of the note and surety for the payment of the other half.<sup>3</sup> A and B are partners. They dissolve partnership. B takes the assets and assumes the debts. B thereby becomes the principal debtor and A is henceforth only a surety for the payment of the debts.<sup>4</sup> A and B are parties to a non-negotiable contract between them. B assigns his interest in it to C. C by accepting the assignment becomes a principal obligor as to the engagements of B, his assignor, and B's liability thereafter is, as to all who have notice of the assignment, that of a surety.<sup>5</sup> Where a statute makes the stockholders of a corporation liable upon failure of the corporation to pay its debts it has been held that the stockholders are sureties for

<sup>2</sup> Dean v. Walker, 107 Ill. 540; Williams v. Naftzger, 103 Calif. 438, 37 Pac. Rep. 411. Compare Shepherd v. May, 115 U. S. 505, 29 L. Ed. 456, 6 Sup. Ct. Rep. 119; Woods, J., holding that the mortgagor does not become a mere surety without the consent of the mortgagee. And to the same effect, see Forrester v. Ivey (1901), 2 Ontario Law Rep. 480; Watson v. Bell, 32 Ont. Rep. 181, and note. Barber v. McCuaig, 31 Ont. Rep. 593, 24 Ont. App. Rep. 492, 29 Sup. Ct. Can. 126. Post, § 47, note 64 to § 43.

<sup>3</sup> Clark v. Dane, 128 Ala. 122, 28 So. Rep. 960. See note to § 38, *infra*. Compare § 48, note 39; and see Brownlee v. Young, 25 Mont. 38, 63 Pac. Rep. 798.

<sup>4</sup> Smith v. Sheldon, *supra*, 35 Mich. 42, 47; Wendlandt v. Sohre, *supra*, 37 Minn. 162. See § 46, *infra*.

<sup>5</sup> In Cutting Packing Co. v. Packer's Exchange, 86 Calif. 574, 25 Pac. Rep. 52, plaintiff, in 1881, bought from Blackwood his crops of apricots for the years

1882-5 and assigned his contract, which was evidenced by bought and sold notes, to the Packers' Exchange, which Blackwood refused to accept as buyer in place of plaintiff. Plaintiff thereupon took the apricots as they were delivered by Blackwood and tendered them as they were received to its assignee, the Produce Exchange, which refused to accept any of them, whereupon plaintiff sold them in the open market at \$2,300 less than the contract price, and brought suit against defendant for that amount. It was held that although the contract was non-negotiable, yet it was assignable and that the assignment of it to the Produce Exchange by plaintiff had the effect of making the Produce Exchange principal and plaintiff, the Cutting Packing Co., surety, as to each other, and that when the Produce Exchange, as such principal, neglected and refused to perform the duties that devolved upon it as assignee of the contract, the Cutting Packing Co., as surety, might perform the as-

the corporation and are released by the same acts that release sureties in other cases.<sup>6</sup> The lessee by assignment of his lease to a sub-tenant becomes a surety to the landlord that his principal, the sub-tenant, will pay the rent thereafter accruing.<sup>7</sup> Where railways consolidate under the usual form of statute, each of the constituent companies is thereafter liable as a mere surety for the payment of its debts; the resultant company's liability for the debts of each of the constituent companies is that of a principal.<sup>8</sup> A party may become surety by estoppel,—may so conduct himself as to be estopped from denying that he is a surety or guarantor, though he did not intend to bind himself as such, as, for instance, where he fails to disaffirm the act of an unauthorized agent who has assumed to bind him as surety.<sup>9</sup> Suretyship is always a matter of agreement between

signed contract, and hold its principal liable for the loss measured by the difference between the contract price and the best market price obtainable, less commissions. The court cited and relied upon § 1589, Calif. Code, as follows: "A voluntary acceptance of the benefit of a transaction is equivalent to a consent to all the obligations arising from it, so far as the facts are known, or ought to be known, to the person accepting." Compare note 25 to § 47, post, and *Wilson v. Land Security Co.*, 26 Can. Sup. Ct. 149, there cited.

<sup>6</sup> *Hanson v. Donkersley* (1877), 37 Mich. 184, in which case Campbell, Graves and Cooley, JJ., concurred in holding that the stock liability of the shareholder was released by the creditor's giving time to the corporation, Marston, J., dissenting. Cited and followed in *Harpold v. Stobart* (1889), 46 Ohio St. 397, 405, 15 Amer. St. Rep. 618, 21 N. E. Rep. 637, in which case it was held that the shareholders of a corporation being sureties for the payment of the corporation's debts incurred while they were such shareholders, each

had the right to insist that each of the others contribute, and bear his proportion of the common liability. The assignee of stock in an Illinois corporation not fully paid does not assume liability to creditors of the corporation unless he knew that the stock was not fully paid when he acquired it. *Higgins v. Illinois Trust & Savings Bank*, 193 Ill. 394. See § 49, *infra*. And see *Neale v. Head*, 133 Calif. 110, 65 Pac. Rep. 131 and 576, cited in note 1, § 1, *supra*.

<sup>7</sup> *Brosnan v. Kramer*, 135 Calif. 36, 66 Pac. Rep. 979.

<sup>8</sup> *Compton v. Jesup*, 15 C. C. A. 397, at 451; 68 Fed. Rep. 263, 318; S. C. sub. nom. *Compton v. Wabash Railroad Co.*, 31 U. S. App. 486, 584.

<sup>9</sup> In *Lynch v. Smith*, 25 Colo. 103, 54 Pac. Rep. 634, defendant's name was signed as surety to a bond given to secure the release of property in an attachment suit by an agent who acted wholly without authority in signing it, but subsequently told defendant thereof who did not take any steps to repudiate such signature. Held, that the jury were justified in find-

the parties expressed in terms or implied by their conduct or by circumstances. There is no such thing as principal and surety without a contract relation between them expressed or implied.<sup>10</sup> When the contract of suretyship arises by the positive act of the parties it must be in writing to satisfy the requirements of the statute of frauds; when it is implied the statute of frauds has no application. The purpose for which the contract of suretyship is entered into, unless it is unlawful, does not usually affect the rights or obligations of either party.<sup>11</sup> It is almost needless to say that in the absence of statute or express contract to that effect, the creditor has no lien on the real or personal property of the surety for the performance of his contract of suretyship or guaranty. The surety is therefore free to dispose of his property and the creditor cannot, except under unusual circumstances, prevent him from doing so.<sup>12</sup>

ing defendant liable. In *Fontano v. Robbins*, 18 App. Cases (D. C.), 402, it was held that a woman who, with the approval of church authorities, had entered into a contract with plaintiff for interior marble work, describing herself therein as "owner" and had therein stipulated that the outer walls and roof of the church would be finished within a certain time, "took the place of the real owner and, at least, became an absolute guarantor of the necessary construction preliminary to the commencement of plaintiff's work" and liable for loss to plaintiff caused by delay in finishing such outer walls and roof. And see note 44 to § 7, note 66 to § 9, note 50 to § 19, § 37.

<sup>10</sup> In *Tulare County v. Kings County*, 117 Calif. 195, 49 Pac. Rep. 8, where a new county was carved out of an old one without any provision being made by the legislature for the indebtedness already existing, it was held that the courts could not apportion it. It was argued that since the

debt was a joint obligation resting on the territory composing both counties the new county ought to be forced to contribute its share, but the court held that this argument presupposed some contractual relation between the two counties whereas none existed. The old county was not surety for the new county in any legal sense.

<sup>11</sup> Thus the surety's rights are unaffected by the fact that the principal's contract has been entered into to enable him to raise money to pay to the surety. *Shepley v. Hurd*, 3 App. Rep. (Ontario) 549. Compare § 129.

<sup>12</sup> In *Guilmartin v. Middle Georgia and Atlantic Railroad Company*, 101 Ga. 565, 29 S. E. Rep. 189, defendant railroad had bought a branch railroad whose bonds were held by plaintiffs and had guaranteed payment of the bonds. Before any default had been made in the payment of the bonds it entered into a contract to sell its entire property to the Central of Georgia Railroad. It was held that the plaintiffs were not en-



**§ 2. Difference between surety and guarantor.**—The words surety and guarantor are often used indiscriminately as synonymous terms; but while a surety and a guarantor have this in common, that they are both bound for another person, yet there are points of difference between them which should be carefully noted. A surety is usually bound with his principal by the same instrument, executed at the same time and on the same consideration. He is an original promisor and debtor from the beginning, and is held ordinarily to know every default of his principal. Usually the surety will not be discharged, either by the mere indulgence of the creditor to the principal, or by want of notice of the default of the principal, no matter how much he may be injured thereby.<sup>13</sup> On the other hand, the contract of the guarantor is his own separate undertaking, in which the principal does not join. It is usually entered into before or after that of the principal, and is often founded on a separate consideration from that supporting the contract of the principal. The original contract of the principal is not the guarantor's contract, and the guarantor is not bound to take notice of its non-performance. The guarantor is often discharged by the mere indulgence of the creditor to the principal,<sup>14</sup> and is usually not liable unless noti-

titled to an injunction restraining such sale on the ground that it might result in default in the future in the payment of the bonds held by them. They might have reserved a lien on defendant's property as security for the payment of their bonds, but, not having done so, a court of equity could not interpose and create a lien for them, especially when there is no showing that the road which originally issued the bonds was insolvent. The court said (p. 569) that the case "falls within the general rule in equity, that a general creditor who has no lien, and has not reduced his claim to judgment, has no right to apply to a court of equity to aid him in the collection of his unsecured debts." See § 245, note post. See *Cummings v. May*, 110 Ala. 479, 20 So.

Rep. 307; *Randolph v. Billingsley*, 115 Ala. 677, 22 So. Rep. 524, and *Bell v. Cassem*, 158 Ill. 45, 41 N. E. Rep. 1089, construing statute provisions for liens. In the absence of statute a judgment against the principal constitutes no lien on the real estate of the surety and of course in the absence of statutory provision the execution of the bond constitutes no such lien as against either principal or surety. *United States v. Ingate* (Ala.), 48 Fed. Rep. 251.

<sup>13</sup> *Town of Sullivan v. Cluggage*, 21 Ind. App. 667, 52 N. E. Rep. 110.

<sup>14</sup> A distinction of practical importance between the contracts of a surety and a guarantor is that the creditor ordinarily owes to the surety no duty of diligence in pursuing the principal, but he cannot,



fied of the default of the principal.<sup>15</sup> "The rules of the common law as to sureties are not strictly applied to guarantors, but rather the rules of the law merchant, and the true distinc-

ordinarily, charge the guarantor at all without a showing of due diligence. In *Kramph v. Hatz*, 52 Pa. St. 525, the holder of a mortgage for \$4,000 waited nine years after the debt was due before bringing suit. Held, that it was a question for the jury whether or not the delay was unreasonable and whether or not the guarantors of the mortgage debt were prejudiced by it. "In some circumstances," said Woodward, J., "this [delay] might work the release of a guarantor, because the contract of guaranty is conditioned upon the creditor's diligent use of means to collect the debt out of the principal debtor. Such a contract creates only a contingent liability; and it becomes absolute only by due and unsuccessful diligence to obtain satisfaction from the principal or by circumstances that excuse diligence. *Gilbert v. Henck*, 6 Casey (Pa.) 205. Hence a delay of more than two years to enter judgment notes against a failing debtor was held in *Miller v. Berkey*, 3 Casey (Pa.) 317, to discharge the guarantor; and in *Iselt v. Hoge*, 2 Watts (Pa.) 128, a delay to sue a note for eight years was attended with the same result. In these respects the contract of a guarantor is to be carefully distinguished from that of a surety; for whilst both are accessory contracts, and that of a surety is in some sense conditional, as that of a guarantor is strictly so, yet mere delay to sue the principal debtor does not discharge a surety. The surety must demand proceedings, with notice

that he will not continue bound unless they are instituted. *Cope v. Smith*, 8 S. & R. (Pa.) 110. By his contract he undertakes to pay if the debtor do not—the guarantor undertakes to pay if the debtor cannot. The one is an insurer of the debt, the other an insurer of the solvency of the debtor. It results, as a matter of course, out of the latter contract, that the creditor shall use due diligence to make the debtor pay, and failing in this he lets go the guarantor." The evidence was held not sufficient to discharge the guarantor on the ground of negligence in *McDonald v. Tootle Weakley Millinery Co.*, Neb., May, 1902, 90 N. W. Rep. 547, and *Burns v. Cole*, Iowa, May, 1902, 90 N. W. Rep. 73. In *Friend v. Smith*, 59 Ark. 86, at 92, 26 S. W. Rep. 374, the surety was held not released by mere delay in bringing suit. But see cases cited in note to § 112, *infra*. An Illinois Statute of 1897 requires the creditor, in order to hold the surety, to prove his claim against the estate of the deceased principal. In *Watts v. Bolin*, 86 Ill. App. 474, it was held that where the principal's estate was insolvent the principal might hold the surety without so proving his claim; the fact that the widow of the principal afterwards paid all claims proved made no difference. § 112 *post et seq.* and notes.

<sup>15</sup> *McMillan v. Bull's Head Bank*, 32 Ind. 11; *Reigart v. White*, 52 Pa. St. 438; *Gaff v. Sims*, 45 Ind. 262; *Kramph's Ex'x v. Hatz's Ex'rs*, 52 Pa. St. 525; *Allen v. Hu-*

tion seems to be this: That a surety is in the first instance answerable for the debt for which he makes himself responsi-

bert, 49 Pa. St. 259; Harris v. Newell, 42 Wis. 687. For a similar statement of the differences between the contracts of suretyship and guaranty, see *The Markland Mining & Mfg. Co. v. Kimmel et al.*, 87 Ind. 560, 566; *White's Adm'r v. Life Association of America*, 63 Ala. 419, 423; *Weik et al. v. Pugh et al.*, 92 Ind. 382; *La Rose et al. v. The Logansport Nat. Bank et al.*, 102 Ind. 332, 335. See also *Hall v. Weaver* (U. S. C. C., Ore.), 34 Fed. Rep. 107, *Deady, J.*, and *Cox v. Weed Sewing Machine Co.*, 57 Miss. 350, both cases citing the text. *Curtis v. Dennis*, 7 Metc. (Mass.), 510, 518; *Maury v. Waxelbaum Co.*, 108 Ga. 14, 33 So. Rep. 701. In *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 10 So. Rep. 539, a collector employed by appellee endorsed upon his contract of employment the following, signed by himself and four other defendants: "For value received, and in consideration of the within contract," names of defendants "hereby guarantee to the Wheeler & Wilson Manufacturing Company, its successors or assigns, the full and faithful performance of the foregoing contract, including all damages which may result to the said company from any failure on the part of said Saint to perform any of the provisions of said agreement, to the amount of \$1,000; hereby waiving all necessity on the part of said company of instituting legal proceedings against said Saint before having recourse on us." Construing this, the court, *McClellan, J.*, said: "The contract sued on is not a guaranty but one of suretyship. Crosswaite and the other defendants, who undertake

that Saint shall faithfully perform his contract with the company, are sureties of Saint and not guarantors. The distinction between the two classes of undertakings is often shadowy, and often not observed by judges and text writers; but that there is a substantive distinction, involving not infrequently important consequences, is, of course, not to be doubted. It seems to lie in this: that when the sponsors for another assume a primary and direct liability, whether conditional or not in the sense of being immediate or postponed till some subsequent occurrence, to the creditor, they are sureties; but, when this responsibility is secondary and collateral to that of the principal, they are guarantors. Or, as otherwise stated, if they undertake to pay money or do any other act, in the event their principal fails therein, they are sureties; but if they assume the performance only in the event the principal is unable to perform, they are guarantors. Or, yet another and more concise statement, a surety is one who undertakes to pay if the debtor do not; a guarantor, if the debtor can not; the first is sponsor, absolutely and directly, for the principal's acts, the latter only for the principal's ability to do the act; 'the one is the insurer of the debt, the other an insurer of the solvency of the debtor.' This is the essential distinction. There is another going as well to its form. The contract of suretyship is the joint and several contract of the principal and surety. 'The contract of the guarantor is his own separate undertaking, in which the principal does not join.' Indeed

ble, and his contracts are often specialties, while a guarantor is only liable when default is made by the party whose undertaking is guarantied, and his agreement is

it has been held, pretermittting all other considerations, that no contract joined in by the debtor and another can be one of guaranty on the part of the latter \* \* though we apprehend that a case might be put involving only secondary liability on the sponsors, though the undertaking be signed also by the principal. However that may be, it is certain that in most cases the joint execution of a contract by the principal and another operates to exclude the idea of a guaranty, and that in all cases such fact is an index pointing to suretyship. \* \* Applying these principles to the bond sued on, the conclusion must be that it is not a guaranty but a suretyship on the part of Cross-thwaite, Wright, Hall and Spraggins. It is not their separate undertaking, but the principal also executes it. While they employ the word 'guarantee,' they directly obligate themselves along with Saint to pay, absolutely and wholly irrespective of Saint's solvency or insolvency, all damages which may result to the obligee from his default. Not only so, but they expressly stipulate that the company need not exhaust its remedies against Saint before proceeding against them. It is, in other words, and, in short, a primary undertaking on their part, not secondary and collateral, to pay to the company in the event of Saint's failure, and not an undertaking to pay only in the event of Saint's default and inability to pay. They are sureties of Saint, and not his guarantors, and their

rights depend upon the law applicable to the former relation, and not upon the law controlling the latter.' The court therefore held that being a contract of suretyship and not of guaranty no acceptance of it by the company was necessary, and that one of the signers who had notified the company that he would not be bound was not thereby released from liability, but that all of the sureties were released by the company's retention of the collector in its employ after it had notice of his dishonesty through another of its agents. In *McIntosh-Huntington Co. v. Reed* (C. C., W. D., Pa.), 89 Fed. Rep. 464, Schlaudecker having ordered certain bicycles from plaintiff, defendant Reed signed and placed in his hands a writing as follows: "For the purpose of obtaining credit for Mr. Leo Schlaudecker of Erie, Pa., I hereby guaranty his account with the McIntosh-Huntington Co. to the extent of \$4,000 to cover all purchases made between Dec. 6, 1895, and Jan. 15, 1897. In the event of the said McIntosh-Huntington Co. having a claim against the said Leo Schlaudecker unsettled on January 15th, 1897, I agree to pay same ten days after demand has been made upon me." It was held that, since a suretyship is a direct contract to pay the debt of another and insures the particular claim, the contract quoted was a contract of suretyship and not of guaranty, and that, therefore, no notice of acceptance was necessary to charge defendant. Compare *Barnes Cycle Co. v. Reed*, 91 Fed.

one of simple contract."<sup>16</sup> The principal and surety, being directly and equally bound, may be sued jointly in the same suit, while the guarantor, being bound by a separate con-

Rep. 481, 33 C. C. A. 646, reversing 84 Fed. Rep. 603, by which a similar writing was held to be a contract of guaranty. In *Wheeler v. Rohrer*, 21 Ind. App. 477, 52 N. E. Rep. 780, the court held an agreement to "pay and indemnify" a tobacco firm if the principal failed to pay for goods to be purchased by him, was a contract of suretyship, not of guaranty. "A guarantor," said Robinson, J., "undertakes to pay such damages as result from the principal's default. A surety undertakes to do the particular thing if the principal fails." See also *Durand & Kasper Co. v. Rockwell*, 23 Ind. App. 11, 54 N. E. Rep. 771. It has been held that the obligors in the usual forms of official bonds are in strictness continuing guarantors and not sureties, because their engagement is not to perform the principal's duties in the event of his default, and that therefore they may without any stipulation to that effect in their contract, relieve themselves from future liability by due and reasonable notice of revocation to all concerned. See *LaRose v. Logansport National Bank*, 102 Ind. 332, 1 N. E. Rep. 805, at 812, by Mitchell, C. J. Cited and followed in *Conduit v. Ryan*, 3 Ind. App. 1, 29 N. E. Rep. 160. In *Fiala v. Ainsworth*, Neb. (Nov., 1901), 88 N. W. Rep. 135, at 137, the obligors on a bank officer's bond are said by the court to "guaranty" not only his honesty but his competency. See also *Singer Manufacturing Co. v. Littler*, 56 Iowa 601, 9 N. W. Rep. 905; *Locke v. McVean*, 33 Mich.

473; *Farmers' & Mechanics' Bank v. Kercheval*, 2 Mich. 505; *Gage v. Lewis*, 68 Ill. 606. Compare *The Queen v. Black*, 6 Exchq. Rep. of Can. 236, at 245; *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, supra, 10 So. Rep. 539, and see *Yager v. Kentucky Title Co.*, Ky., March, 1902, 66 S. W. Rep. 1027, to the effect that where the guarantor's obligation amounts to an absolute unconditional promise to pay the debt he is not released by want of notice of acceptance or by want of diligence in pursuing his principal after default. Evidence that a guarantor did not receive notice of the default of his principal until a year after it occurred held inadmissible where the only plea was general issue. That "is affirmative proof which can only be introduced when such defence has been specially pleaded." *Mamerow v. National Lead Co.*, 98 Ill. App. 460, 466. Mr. Ackley, editor of this edition, makes no apology for the length of these notes; he believes that the study of cases is far more profitable than the study of abstract propositions of law.

<sup>16</sup> Hubbard, J., in *Curtis v. Dennis*, 7 Metc. 510. In *Kearnes v. Montgomery*, 4 W. Va. 29, Maxwell, J., said: "The contract of a guarantor is collateral and secondary. It differs in that respect from the contract of a surety which is direct; and in general the guarantor contracts to pay if by the use of due diligence the debt cannot be made out of the principal debtor, while the surety undertakes directly for the payment, and so is

tract and only collaterally liable, can not usually be joined in the same suit with the principal.<sup>17</sup>

**§ 3. Contracts of surety and indorser—Difference between stated.**—The rights, duties and liabilities of ordinary indorsers and sureties are so nearly alike that most acts which will discharge the one will also discharge the other. But there are points of distinction between them that are important to observe, “lest a principal exclusively applicable to one be perverted. For instance, without due demand and notice, at the maturity of a note, an indorser will be discharged—a surety continues liable upon his contract, though the creditor sleeps. A surety may spur the creditor into activity by notice to pursue the principal debtor, on pain, for neglect, that the surety will be no longer bound—not so an indorser. The latter cannot call upon the holder of a protested note to sue the drawer, and, if he refuses, thereby relieve himself; for, if he wishes

responsible at once if the principal debtor makes default.” See also *Conduit v. Ryan*, 3 Ind. App. 1, 29 N. E. Rep. 160, by New, C. J. In *Shearer v. R. S. Peele & Co.*, 9 Ind. App. 282, 36 N. E. Rep. 455, defendant wrote and signed on the back of a third party’s order for goods, before it was delivered, the following: “The above is endorsed by the undersigned, who, in consideration of the agent being allowed the time for payment herein indorsed, hereby guaranties payment of the amount within thirty days from the receipt of the shipment at the above-named express or freight office. Notice of non-payment by the agent is hereby waived.” Held, that this was an undertaking not that the agent should pay, but that the debt should be paid, and that, therefore, it was an original undertaking and not a guaranty. See a very excellent statement of the difference between direct and collateral guaranties in *Milroy v. Quinn et al.*, 69 Ind. 406, 410, 411, per Biddle, J.

<sup>17</sup> *Read v. Cutts*, 7 Greenleaf, 186. To similar effect see *Clark et al. v. Morgan*, 13 Ill. App. 597; *Abbott v. Brown*, 30 Ill. App. 376. But under statute in Minnesota, an absolute guarantor, upon the same instrument with the maker of a promissory note, may be joined as defendant in the same action with the maker. *Hammel v. Beardsley*, 31 Minn. 314. So, also, a guarantor of the payment of rent accruing on a written lease, whose undertaking is indorsed thereon, may be sued jointly with the principal debtor. *Lucy v. Wilkins*, 33 Minn. 21. That the guarantor of an open account cannot be sued jointly with his principal, that he is not a joint debtor so as to be suable in the county where the debtor resides and where he does not reside, see *Sims v. Clark*, 91 Ga. 302, 18 S. E. Rep. 158. Non-joinder of one of several sureties on a joint and several bond held ground of demurrer. *Gray v. Sharp*, 62 N. J. Law, 602, 40 Atl. Rep. 771.

instant recourse to the principal, it is his duty to pay the note and sue for himself.”<sup>18</sup> Again it is said: “The liability of an ordinary indorser is greater than that of a surety. A surety becomes bound simply for the accommodation of his principal, and receives no consideration for the favor he bestows. He is bound only to the same extent as his principal, and whatever defense the principal succeeds in making inures to the benefit of the surety, whose undertaking is identical with that of the principal. By signing the paper he enters into no new or different contract to the payee from that into which his principal has entered. Their obligation is generally contemporaneous, and is joint, or it may be both joint and several. But with an indorser it is different; he usually receives a consideration for his promise. If the note he indorsed is for any cause invalid, he is nevertheless bound; as, for instance, if it is without consideration, or is founded upon a gaming or usurious consideration, or was forged, he would be liable on his indorsement, notwithstanding the principal might on that account be released from its payment; or if, when he indorsed the paper, it had been barred by the statute of limitations, and no action could have been maintained on it against the maker, he would nevertheless have been bound by his contract to pay the money it was made to secure, according to its terms and stipulations.”<sup>19</sup> A third party signing a note on the back is prima

<sup>18</sup> Trunkey, J., in *Stephens v. Monongehela Nat. Bank*, 88 Pa. St. 157, 163. Read a classification of guarantors with respect to the duty of diligence owed to them in *Wright v. Shorter*, 56 Ga. 72, note to § 219 post.

<sup>19</sup> *Graham v. Robinson*, 79 Ga. 72, 73, per Hall, J. In *Tanner v. Gude*, 100 Ga. 157, 27 S. E. Rep. 938, Collins made his note to the order of Tanner, who indorsed it to Gude, all parties understanding that Tanner was a mere surety. After the note became due, Gude, its holder, extending it to December 1, 1895, in consideration of Collins' paying all accrued interest and 90 days' interest in advance. Held, that the indorser was there-

by released. “The contention of counsel for the defendant in error was, that if the indorsement was for value, the indorser was not a surety and therefore was not discharged by the extension,” said the court. “It is true there is a distinction between an ordinary indorser and one who is merely a surety, but a contract of suretyship is necessarily included in every unqualified indorsement of a negotiable instrument \* \* and the principle which protects sureties from any act of the creditor tending to injure the surety, or increase his risk, is applicable as well to indorsers for value as to those whose indorsement is for accommodation merely. Following



facie a guarantor and when his signature is made before delivery the consideration for the note is sufficient to support the guaranty.<sup>20</sup> Where a mistake is made as to whether de-

*Stallings v. Johnson*, 27 Ga. 564, where the same facts were held to discharge an indorser who was also payee. In *March v. Barnet*, 121 Calif. 419, 53 Pac. Rep. 933, it was held that an indorser is not liable for the note of the principal paid by the surety, even where the surety takes an assignment of a judgment against both maker and indorser. See also *Rice v. Dorrian*, 57 Ark. 541, 22 S. W. Rep. 213, holding that where a statute gives a "surety" right to bring suit before debt due or paid, the same right is not conferred upon an indorser.

<sup>20</sup> *Maher v. Building & Loan Assn.* 79 Ill. App. 231; *Duncanson v. Kirby*, 90 Ill. App. 16, following *Swigart v. Weare*, 37 Ill. App. 258; *Varley v. Title Guarantee & Trust Co.* 60 Ill. App. 564; *Featherstone v. Hendrick*, 59 Ill. App. 497; *Kankakee Coal Co. v. Crane Bros. Mfg. Co.* 138 Ill. 207, 27 N. E. Rep. 935, reversing 38 Ill. App. 555; *Rogers v. Schulenberg*, 111 Calif. 154, 43 Pac. Rep. 899. A third party indorsing a note may show that his real contract is that of an indorser. Thus, in *Milligan v. Holbrook*, 168 Ill. 343, plaintiff said to Holbrook, "You indorse these notes, do you not?" to which Holbrook replied, "I indorse these notes because I consider Mr. Day good. You have got to exhaust him before you can collect of me." To which plaintiff answered, "All right." Held, that Holbrook was an indorser. Affirming, 68 Ill. App. 631. Compare *Varley v. Title Guarantee & Trust Co.*, 60 Ill. App. 564, in which

case *Wakeley*, the maker, took appellant *Varley* to the bank, whose clerk asked: "How long do you want to indorse this note for, Mr. Varley?" to which he replied, "Sixty days," whereupon *Martin* said: "If we cannot get the money out of *Wakeley* we will then proceed against you." Then *Varley* indorsed his name on the note. *Gary, J.*, said that since the proof did not show any contract, by parol, the contract implied by law is to govern, and defendant was held liable as guarantor. See also *Kingsland v. Koeppe*, 137 Ill. 344, 28 N. E. Rep. 48, reversing 35 Ill. App. 81. The guarantor's contract being distinct, he may stipulate to be liable for a different rate of interest, as in *Cozzens v. Chicago Hydraulic Press Brick Co.*, 166 Ill. 213, and *Davis v. Wolff Mfg. Co.*, 84 Ill. App. 579. The presumption is that the guaranty was made at the time of the execution of the note and upon the same consideration. *Duncanson v. Kirby*, 90 Ill. App. 16; *Swigart v. Weare*, 37 Ill. App. 258. In *Hately v. Pike*, 162 Ill. 241, a corporation made its note payable to the order of "Adolph Pike, President," who indorsed it "Adolph Pike, President, Adolph Pike." Held, following *Johnson v. Glover*, 121 Ill. 283, and disapproving *Falk v. Moebs*, 127 U. S. 597, that the liability of *Pike* was that of indorser, and that parol evidence was not admissible to show that he was a guarantor. Compare *Milligan v. Holbrook*, 168 Ill. 343, 48 N. E. Rep. 157, *supra*.



fendant is liable as surety or as endorser the courts are liberal in permitting amendment of the proceedings.<sup>21</sup>

**§ 4. Origin and requisites of the contract—Parties, contract, consideration, writing, public policy.**—The party to whom the surety or guarantor becomes bound is called the creditor or obligee. The party for whom he becomes bound is called the principal or principal debtor. As has been already shown, the surety or guarantor becomes such by means of contract. Some of the earliest contracts mentioned in history were those of suretyship, and the origin of the contract is shrouded in the mists of antiquity. Some at least of the incidents of suretyship were well understood in the remotest times. In the Bible it is written, "He that is surety for a stranger shall smart for it, and he that hateth suretyship is sure."<sup>22</sup> To constitute the contract of suretyship or guaranty, the same things are necessary as to constitute any other contract, viz.: That the parties be competent to contract; that they actually do contract; and that the contract, if not under seal, be supported by a sufficient consideration.<sup>23</sup> Any one competent to contract generally

<sup>21</sup> In *Cheney v. Thompson-Hiles Co.*, 101 Ga. 370, 28 S. E. Rep. 1017, plaintiffs sued defendant as indorser and amended their declaration so as to charge him as surety. The proof showed that he was an indorser. The supreme court affirmed the judgment with directions that the declaration might be amended to its original form. Citing as a precedent *Ware v. City Bank of Macon*, 59 Ga. 840.

<sup>22</sup> Proverbs XI, 15. The supreme court of Iowa says: "It is doubtless a hardship on him [the surety] that he should be required to pay the debt, but he assumed liability for it when he signed the note. He is but paying the penalty which all men incur when they assume the relation of suretyship for others." *Auchampaugh v. Schmidt*, 77 Iowa, 13, 17.

<sup>23</sup> Where the guarantee accepts the guaranty, and, acting upon the

faith of it, performs the consideration upon which it is given, the contract of guaranty is completed. *Snyder v. Click*, 112 Ind. 293. A moral consideration is not good, either at law or in equity. *Hart v. Strong*, 183 Ill. 349, reversing *Strong v. Hart*, 83 Ill. App. 349. A party who is already bound for a judgment appealed from cannot be surety on the appeal bond,—an appeal so taken is a nullity and the appeal bond is not amendable because there is nothing to amend by. *Harvely v. Daly*, 112 Ga. 822, 38 S. E. Rep. 41. Surety on replevy bond to distress warrant cannot be surety on appeal bond in the same case; appeal so entered is a nullity. *Osborne v. Hughes*, 93 Ga. 445, 21 S. E. Rep. 65, following *Eufala Home Ins. Co. v. Cubbedge*, 36 Ga. 623. And where two or more parties jointly appeal from the same criminal conviction

may enter into the contract of suretyship or guaranty.<sup>24</sup> Such contract must be in writing<sup>25</sup> and not opposed to public policy.<sup>26</sup> If the contract of the principal is void the contract of the surety is void also.<sup>27</sup> If there is no contract by the principal in existence at the time the guaranty is made, it has been held, the guaranty constitutes, at best, only an offer that may become binding, not as a guaranty, but as an original undertaking, upon its due acceptance.<sup>28</sup> But a guaranty may be

they cannot be sureties for each other. *McHam v. State*, Tex. Crim. App., Dec., 1901, 65 S. W. Rep. 911; *Stanly v. State*, Tex. Crim. App., Oct., 1899, 53 S. W. Rep. 345. Where the surety signed the note after the contract between the principal and the payee had been completed and without other consideration than that passing to the principal it was held there could be no recovery against him. *Savage v. First Nat'l Bank*, 112 Ala. 508, 20 So. Rep. 398. In *Kaestner v. First Nat'l Bank*, 170 Ill. 322, it was held that the surrender of an old note of the principal was sufficient consideration for the guaranty of a new one given in place of it.

<sup>24</sup> A sister-in-law may become bound as surety for a brother to whom she looks for protection. *Campbell & Jones v. Murray et al.*, 62 Ga. 86.

<sup>25</sup> *Ingersoll v. Baker*, 41 Mich. 48; *Bonine v. Denniston*, 41 Mich. 292.

<sup>26</sup> As where sureties to an administrator's bond became such in consideration that the administrator deposit with them the proceeds of the estate during the pendency of proceedings in administration, they paying interest thereon and using the proceeds in their business. *Deobold v. Oppermann*, 111 N. Y. 531. For other cases involving the same

principle, see *Board of Education v. Thompson*, 33 Ohio St. 321; *Rouse v. Glissman*, 29 Ill. App. 321. And see § 20 and note, 37 to § 6 post.

<sup>27</sup> *McCanna & Frazer Co. v. Citizens' Trust & Surety Co.*, 76 Fed. Rep. 420, 24 C. C. A. 11, 39, U. S. App. 332, post § 19.

<sup>28</sup> Thus, in *Campbell v. Mercer*, 108 Ga. 107, 33 S. E. Rep. 871, an executor having published an offer of reward for the arrest of the murderer of his testator, defendant, the mother of the murdered man, signed and delivered to plaintiff the following writing: "Georgia, Jasper County, July 29th, 1896. I hereby guarantee the payment of the \$500 reward as offered by J. M. Campbell in the Jasper County News of July 23rd, 1896, for the arrest, with evidence to convict, of the person or persons who shot and killed W. C. Campbell, of said state and county, on the afternoon of July 1st, 1896." Plaintiffs having arrested her only remaining son and furnished the evidence upon which he was convicted, it was held that defendant was liable. The court treated the instrument not as a guaranty, but as an offer of reward. "When Mrs. Campbell executed the instrument," said the court, "there was no contract. The executor had only proposed a contract. Hence, if it should be held

valid where the guarantee is unknown to the guarantor, as in case of a guaranty to the general public that the stock of a certain corporation will earn a specified dividend.<sup>29</sup> A plea that a guaranty was never fully executed states a good defense.<sup>30</sup> The presumption is that the seals were put upon the bond by the parties signing it.<sup>31</sup> It is immaterial where the seals are placed on the instrument by a corporation executing it. If seals are omitted by mistake the instrument may be reformed and enforced.<sup>32</sup>

**§ 5. Contracts of Indemnity.—Contracts of suretyship and**

that the instrument was a contract of guaranty, it could, at the time, guarantee nothing more than a proposition. To guaranty a proposition is nothing more than to make a proposition.” In *Way v. Lewenberg*, 168 Mass. 472, 47 N. E. Rep. 500, it was held that an unincorporated association of individuals may bind itself as principal on a bond to release its property from attachment, and therefore the surety is bound.

<sup>29</sup> In *Rogers v. Chambers*, 112 Ga. 258, 37 S. E. Rep. 429, defendants guaranteed in writing the annual payment of 8 per cent dividends for three years from December 1, 1889, as an inducement for the general public, including plaintiff's intestate, to subscribe. Held, that they were bound, though the full amount of a stock subscription was not paid, by reason of the subscriber's death, until a few days after the date named, and though some of them had no actual notice that the plaintiff's intestate was a subscriber.

<sup>30</sup> *Nipp v. Parish*, 63 Fed. Rep. 677, 11 C. C. A. 398.

<sup>31</sup> In *Moses v. United States*, 166 U. S. 571, 41 L. Ed. 1119, 17 Sup. Ct. Rep. 682, the official bond of a signal officer was presented without seals and was returned to the principal to have the seals put on.

Subsequently the principal returned it with the seals on. Held, the surety being dead, the presumption was that the seals were placed upon the instrument with the consent of the parties. Signature by mark on replevin bond attested by the sheriff taking it held sufficient. *Hester v. Ballard*, 96 Ala. 410, 11 So. Rep. 427.

<sup>32</sup> In *Union Guaranty & Trust Co. v. Robinson*, 79 Fed. Rep. 420, 24 C. C. A. 650, 49 U. S. App. 148, the principal, a corporation, stamped its seal “opposite the attestation clause, between the obligatory part and the condition,” and at the close of the instrument were the signatures of its officers, “Charles B. Peet, President, James R. Pitcher, Secretary.” Held, that the surety's claim that the bond was not executed by the principal was not supported by the facts. Compare *Way v. Lewenberg*, 168 Mass. 472, 47 N. E. Rep. 500, *supra*. In *Keith v. Henkleman*, 173 Ill. 137, and in same case, *Henkleman v. Peterson*, 154 Ill. 419, it was held that where all the seals have been accidentally omitted from an injunction bond a court of equity has power to reform it by adding seals and, having so acquired jurisdiction, to proceed and assess damages, with or without a jury in its discretion.

guaranty are both to be distinguished from contracts of indemnity. In a contract of indemnity the indemnitor, for a consideration, promises to indemnify and save harmless the indemnitee against liability of the indemnitee to a third person or against loss resulting from such liability.<sup>33</sup> The contract of the indemnitor is an original undertaking. The indemnitor is liable only to the indemnitee, and his assigns, and, unless he has stipulated for it, he has no remedy over against the party for whose benefit the contract was made. The indemnitee may sue the indemnitor as soon as the specified loss or liability has occurred and need not wait to sue any other person who may be liable.<sup>34</sup> Within this class fall most of the fidelity and like bonds executed by surety companies hereinafter referred to.<sup>35</sup> The indemnitor, upon making good the loss of the indemnitee, becomes subrogated to the rights of the indemnitee against the party whose default caused the loss.<sup>36</sup> A contract of indemnity must not be against public

<sup>33</sup> Joseph Walker McGrath, in 16 Am. & Eng. Enc. Law, 2d Ed. 168; post § 143. Instances of contracts of indemnity: Foster Black Co. v. Fennessy, 159 Mass. 538, 34 N. E. Rep. 1077; Derry v. Morrison, 8 Ind. App. 50, 34 N. E. Rep. 107. In Solary v. Webster, 35 Fla. 363, 17 So. Rep. 646, the indemnity bond was conditioned to save harmless from mechanic's liens &c. an owner who paid the contractor in full. Held, that a count alleging suit by a materialman, judgment and payment thereof by the owner states a cause of action. Defences open to indemnified surety: Louisiana Soc'y &c. v. Moody, 52 La. Ann. 1815, 28 So. Rep. 224.

<sup>34</sup> In city of Springfield v. Boyle, 164 Mass. 591, 42 N. E. Rep. 353, the Sacred Heart society having obtained a license to occupy part of a street with building materials, defendant executed a writing in which he agreed that the society should "indemnify the city from all loss, cost or expense

that it may suffer by reason of the occupancy described in such license." Construing this as an agreement by defendant to make good any loss so occurring, the court held that defendant became liable when the city had paid a judgment recovered against it for personal injuries caused by the society's occupancy of the street, for the amount of the judgment, and that the city might show by parol evidence that the injury on account of which the judgment had been recovered against it was due to the society's fault.

<sup>35</sup> Tebbets v. Mercantile Credit Guaranty Co., 19 C. C. A. 281, 73 Fed. Rep. 95, Peckham, J.; Guaranty Co. v. Wood (N. Y.), 15 C. C. A. 563, 68 Fed. Rep. 529. Bond of indemnity against losses by sales or credit construed. Rice v. Nat'l Credit Insurance Co., 164 Mass. 285, 41 N. E. Rep. 276.

<sup>36</sup> Jones v. Bacon, 145 N. Y. 446, 40 N. E. Rep. 216, affirming, 25

policy.<sup>37</sup> If the indemnitor defends a suit against the indemnitee upon the agreement that the indemnitee shall appeal from an adverse judgment, a breach of that agreement by the indemnitee releases the indemnitor.<sup>38</sup>

**§ 6. Liability of surety or guarantor who is an infant—Unsoundness of mind of surety.**—The contract of suretyship or guaranty made by an infant is not void, but may be ratified by him upon arriving at majority. But in order to charge one who was an infant when he made such a contract, it is necessary to show that subsequent to the time he became of age he

N. Y. Supp. 212. The court said: "This stands upon the most obvious principles of natural justice."

<sup>37</sup> In *Ray v. McDevitt*, 126 Mich. 417, 85 N. W. Rep. 1086, a sheriff had an execution that was in fact valid. Being honestly doubtful of its validity, he took from the judgment debtor an indemnity bond and refused to make a levy. By reason of such refusal, the sureties on his official bond were forced to pay the amount of the execution. They afterwards brought suit, as the sheriff's assignees, upon the indemnity bond. Held, by a divided court, that the indemnity bond was not void as against public policy. A Massachusetts statute designed to prevent gambling in stocks provides that the party putting up money for margins may recover it back. To obviate the effect thereof, a broker required the party buying stock on margins to furnish a bond conditioned to indemnify the broker against all claims and demands which might be enforced under the statute. Held that the bond was void as against public policy. *Corey v. Griffin* (Mass.), 63 N. E. Rep. 420. Compare § 20 post, note 26 to § 4, supra.

<sup>38</sup> In *American Surety Co. v. Ballman*, 115 Fed. Rep. 292 (C. C. A.), the American Surety Company

having been sued on a bond for \$50,000, which it had executed as surety to the Burlington Elevator Co., notified defendants who had given it an indemnity bond, to come in and defend the action, whereupon defendants procured an attorney, who assisted plaintiff's attorney in defending the suit, upon an agreement that if the judgment should be adverse to plaintiff, a writ of error would be sued out in the appellate court. Judgment was rendered against the surety company in the trial court, and on the day the case was to be argued in the appellate court, the surety company, without the knowledge or consent of defendants, paid the judgment. Held, that the sureties on the indemnity bond were thereby discharged. "In view of the agreement of the parties," said the court, "this action on the part of the plaintiff clearly estops it from now asserting any claim against the defendants based on the judgment of the Burlington Elevator Company against it. Under the facts found by the circuit court, the payment of that judgment by the plaintiff was a waiver of any claim against the defendant based on it. \* \*

By compelling them to defend the former action, and then depriving them of the benefit of a full de-

had full knowledge that he was not bound, and afterwards distinctly ratified the contract.<sup>39</sup> The undertaking of an infant as surety for another on a note,<sup>40</sup> or on a recognizance for the appearance of a defendant named therein,<sup>41</sup> or for a stay of execution,<sup>42</sup> is not void, but only voidable, and if ratified and confirmed by him upon attaining his majority becomes a valid contract and enforceable against him. A person of unsound mind who becomes surety on a note cannot ordinarily be held liable thereon, even though the person taking the note had no knowledge of the surety's unsoundness of mind.<sup>43</sup>

**§ 7. When guaranty by railroad company and bank valid, and by city void.**—Where, under the laws of Iowa, a railroad company had power to issue its own bonds to pay for the construction of its road, it was held it might guaranty the bonds of cities and counties which had been lawfully issued and were the means of accomplishing the same end.<sup>44</sup> A bank may guaranty the payment of bonds pledged by its debtor to a third person as collateral security for money with which the debtor pays the bank, even though the bonds have never been assigned to the bank.<sup>45</sup> In the last two cases the guarantor ac-

fense, it deprived itself of the right to pursue these sureties, and discharged them from liability: *Stark v. Fuller*, 42 Pa. 320. The case of *Boyle v. Edwards*, 114 Mass. 373, is not in point, because the sureties in that case were not vouched in to defend, but volunteered to do so."

<sup>39</sup> *Owen v. Long*, 112 Mass. 403; *Hinely v. Margaritz*, 3 Pa. St. 428; *Fetrow v. Wiseman*, 40 Ind. 148.

<sup>40</sup> *Williams v. Hanison*, 11 S. C. 412; *Maples v. Wightman*, 4 Conn. 376.

<sup>41</sup> *Patchin v. Cromach*, 13 Vt. 330; *Reed v. Lane*, 61 Vt. 481; *State v. Satterwhite*, 20 S. C. 536.

<sup>42</sup> *Harner v. Dipple*, 31 Ohio St. 72.

<sup>43</sup> *Van Patton & Marks v. Beals & Hammer*, 46 Ia. 62. The insanity of a surety whose share of the principal's debt has been paid by a co-surety, held not to excuse de-

lay on the latter's part to demand contribution. *Pickering v. Leiberman*, 41 Fed. Rep. 376 (Dist. Ct. D. Del.).

<sup>44</sup> *Railroad Company v. Howard*, 7 Wall. 392. In *Arnot v. Erie R. Co.*, 5 Hun, 608, one railroad company guarantied the interest coupons on certain bonds of another railroad company. The bonds afterwards came into possession of the guarantor, and it transferred them for value. Held, it was estopped to deny its liability upon the guaranty of the coupons. And see *Taylor v. Railroad Company*, 11 Lea (Tenn.), 186, where the Memphis & Charleston Railroad Company guarantied the prompt payment and interest of bonds issued by the city of Memphis.

<sup>45</sup> *Talman v. Rochester City Bank*, 18 Barb. 123.



completed a legitimate object by means of its guaranty, and did not assume any more onerous obligation than if it had issued its own bonds in the one case or guaranteed bonds assigned to it in the other. But where the municipal government of New Orleans guaranteed certain notes of a corporation whose purpose it was to open up navigation through a portion of the city, it was held the guaranty was void, because the city had no authority to make it, although the city might lawfully have opened up the navigation. The court said: "It can hardly be maintained as a legal proposition that for every act for which an agent may expend money for his principal, he can bind his principal in a contract of suretyship. \* \* The open and direct appropriation and expenditure of money by officers of a municipal corporation has nothing in it in common with the contingent and long-enduring contract of suretyship."<sup>46</sup> Where one railroad company is by statute authorized to guaranty the obligations of another, the formalities prescribed by the statute must be observed; otherwise the guaranty is voidable.<sup>47</sup>

**§ 8. Guaranty by railroad company and bank continued.—**

A railroad company has no authority, in the absence of an explicit grant of such power, to guaranty a specified dividend on its stock as an inducement to purchasers.<sup>48</sup> And it is like-

<sup>46</sup> *Louisiana State Bank v. Orleans Navigation Company*, 3 La. Ann. 294, per Eustis, C. J. This on the principle that, the principal contract being void, the guaranty falls with it. *Joslyn v. Dow*, 19 Hun (N. Y.), 494.

<sup>47</sup> In *Louisville &c. R. R. v. Ohio Valley Improvement &c. Co.* (C. C. Ky.), 69 Fed. Rep. 431, an Indiana statute authorized the directors of any Indiana railroad company to authorize the guaranty by such company of the bonds of any other railroad company in any adjoining state to an amount not exceeding half the par value of the stock of the guaranteeing company, provided a majority of the stockholders of such guaranteeing company should first petition its board of directors to make such guar-

anty. The directors of plaintiff railroad, without any such petition, caused the guaranty of their company to be indorsed upon \$1,185,000 bonds of a Kentucky railroad. Held, that the guaranty was not binding on plaintiff company, and that plaintiff was entitled to an injunction restraining the negotiation of such bonds with the plaintiff's guaranty indorsed thereon. In *Central Railroad and Banking Co. of Georgia v. Farmers Loan & Trust Co.*, 114 Fed. Rep. 263, C. C. A., it was held that a bank's guaranty of the bonds of a railroad that it controlled was void.

<sup>48</sup> *Elevator Company v. Memphis & Charleston R. R. Co.*, 85 Tenn. (1 Pickle) 703.

wise beyond its power to guaranty the payment of the expenses of a musical festival.<sup>49</sup> In selling and disposing of bonds and other negotiable paper received by a railroad company in the transaction of its legitimate business, it may properly guaranty that they are genuine; and a guaranty of the payment of the same would be valid and binding on the company.<sup>50</sup> So a railroad company may, in consideration that a steamboat company carry passengers and freight for it, guaranty that the gross earnings of such steamboat company shall amount to a certain sum within a certain time.<sup>51</sup> Under statute authorizing railroad companies to lease and operate the roads of other companies, a contract of lease wherein a railroad company guaranties the payment of interest on bonds given in payment for the construction of a road is valid.<sup>52</sup> A guaranty by the directors of a railway company of the payment of rent of rolling stock is valid.<sup>53</sup> A bank may lawfully guaranty the payment of a note.<sup>54</sup> And it is held that the directors of a joint-stock bank may, where there are extensive powers conferred upon them, guaranty the payment of interest on the bonds of another company, when the company organized is of importance to the bank.<sup>55</sup>

**§ 9. Liability of married woman who becomes surety.**—A married woman cannot, unless enabled by statute, become surety for her husband or for a stranger.<sup>56</sup> She cannot bind herself or her separate property either at law or in equity by such

<sup>49</sup> *Davis v. Old Colony R. R. Co.*, 131 Mass. 258.

<sup>50</sup> *Atchison, Topeka & Santa Fe R. R. Co. v. Fletcher*, 35 Kan. 236.

<sup>51</sup> *Green Bay & Minn. R. R. Co. v. Union Steamboat Co.*, 107 U. S. 98.

<sup>52</sup> *Eastern Township Bank v. St. Johnsbury & L. C. R. Co.* (U. S. Cir. Ct. D. Vt.), 40 Fed. Rep. 423.

<sup>53</sup> *Yorkshire Railroad Wagon Co. v. Maclure*, Law Rep. (19 Ch. Div.) 478.

<sup>54</sup> *People's Bank v. National Bank*, 101 U. S. 181. Though it is held in New York that a national bank cannot become an accommodation indorser of a promissory

note. *National Bank of Gloversville v. Wells*, 79 N. Y. 498, reversing 15 Hun, 51.

<sup>55</sup> *In re West of England Bank and Ex parte Boaker*, Law Rep. (14 Ch. Div.) 317. See further on this subject, *Dobell et al. v. The Ontario Bank et al.*, 3 Ont. (Can.) 299.

<sup>56</sup> *Firemen's Ins. Co. v. Cross*, 4 Rob. (La.) 508; *Gosman v. Cruger*, 7 Hun, 60, affirmed in 69 N. Y. 87, wherein it was held that she was not liable even though she became surety in compliance with an order of court. Married woman cannot in Arkansas become surety on an official bond. *Hyner v. Dickinson*, 32 Ark. 776.



a contract.<sup>57</sup> Her contract of suretyship is absolutely void at law, and equity will not charge her separate estate where she has received no benefit.<sup>58</sup> In many states, by statute, a married woman may hold, manage and contract with reference to her separate property the same as if she were unmarried. She cannot, however, by virtue of such a statute become a surety. The intention was, by such statutes, to remove her disabilities for her interest, and not to enable her to contract onerous obligations from which she derived no benefit.<sup>59</sup> But where a statute provided that a married woman might contract the same as a feme sole, it was held that she might lawfully mortgage her homestead for an existing debt of her son.<sup>60</sup> So where a statute provided that the "contract of any married woman made for any lawful purpose \* \* [should] be valid and binding and \* \* [might] be enforced in the same manner as if she were sole," it was held that a married woman might

<sup>57</sup> *Stone v. Billings*, 167 Ill. 170, at 180; *Barlow Bros. Co. v. Parsons*, 73 Conn. 696, 49 Atl. Rep. 205.

<sup>58</sup> *Yale v. Dederer*, 18 N. Y. 265; same case again, 22 N. Y. 450; *Perkins v. Elliot*, 8 C. E. Green (N. J.), 526. It is the generally established doctrine that in order for a married woman to create a charge upon her separate estate the intention to charge the same must be clearly expressed, or the contract must be one going to the direct benefit of the estate. *Curtan v. David, et al.*, 18 Nev. 310; *Savings Bank v. Scott*, 10 Neb. 83.

<sup>59</sup> *Athol Machine Co. v. Fuller*, 107 Mass. 437. In *West v. Laraway*, 28 Mich. 464, where a married woman had signed a note with her husband as his surety, it was contended that although she was not personally bound, the note operated as a charge on her separate estate. But the court held otherwise, and said that if such were the case she would be in a worse position than a man or a feme sole, because a note by either

of them would not be a lien on their property. In *De Vries v. Conklin*, 22 Mich. 255, the court in speaking of the married woman's statute said: "The disabilities are removed only so far as they operated unjustly and oppressively; beyond that they are suffered to remain. Having been removed with the beneficent design to protect the wife in the enjoyment and disposal of her property for the benefit of herself and her family, the statute cannot be extended by construction to cases not embraced by its language nor within its design." In South Carolina, after the amendment of the law limiting the right of a married woman to contract as to her separate estate, it is held that she cannot enter into or be bound by any contract of suretyship. *Harris v. McCaslan*, 31 S. C. 420; *Gwynn v. Gwynn*, 31 S. C. 482.

<sup>60</sup> *Low v. Anderson*, 41 Iowa, 476; and to similar effect see *Hart. v. Grigsby*, 14 Bush (Ky.), 542.

become a surety, the contract of suretyship being a lawful contract, and in that case, for a lawful purpose.<sup>61</sup> But where a statute empowered a married woman "to contract, sell, transfer, mortgage, convey, devise and bequeath her own property and in the same manner and with the like effect as if she were unmarried," it was held that she could not enter into a contract of suretyship.<sup>62</sup> In Illinois the statute provides that "contracts may be made and liabilities incurred by a wife and the same enforced against her to the same extent and in the same manner as if she were unmarried,"—no specific mention of contracts of suretyship. Held that her contracts of suretyship are valid and binding upon her.<sup>63</sup> An Indiana statute provides that "a married woman shall not enter into any contract of suretyship, whether as endorser, guarantor or in any other manner, and such contract, as to her, shall be void." In that state it has been held that her obligation of suretyship is void, even in the hands of an innocent holder thereof for value.<sup>64</sup> And the burden there is upon the party seeking to

<sup>61</sup> Mayo v. Hutchinson, 57 Me. 546.

<sup>62</sup> Russell v. People's Savings Bank, 39 Mich. 671.

<sup>63</sup> In Stone v. Billings, 167 Ill. 170, at 180, where the wife's defense to a foreclosure suit was that she signed her husband's note as surety, the court said: "No distinction can now be made between the suretyship of a married woman for her husband's debt and that of the debt of a stranger. Such a transaction is not contrary to our laws, and even her separate property, if any, contained in the deed of trust, would be bound by the terms of the instrument." See also Field v. Brokaw, 148 Ill. 654, 37 N. E. Rep. 80, affirming, 40 Ill. App. 371. The wife, by joining in her husband's mortgage of his real estate, does not become a surety for the payment of the mortgage debt: Virgin v. Virgin, 91 Ill. App. 188, at 206. In Nebraska a married woman may bind

her separate estate by her contract of suretyship or guaranty. McKell v. Merchants Nat'l Bank, 62 Neb. 608, 87 N. W. Rep. 317.

<sup>64</sup> In Voreis v. Nussbaum, 131 Ind. 267, 31 N. E. Rep. 70, it was held that the note of a married woman, payable at a bank, to the order of a stranger, was void, even in the hands of an innocent holder for value. The husband, in this case, did not join in the note, but it was secured by the woman's mortgage of her separate property, in which he did join, and the evidence showed that he got all but \$10 of the proceeds. The court grounded its decision not on these circumstances but upon the wording of the statute. McBride, J., dissenting, said that by putting her note in circulation with nothing on its face to indicate that she was a surety, the woman was estopped from defending on the ground of her disability. Compare Plant v. Storey, 131 Ind. 46, 30 N.

hold her, to show that her contract is not one of suretyship.<sup>65</sup> The wife's property pledged for her husband's debt occupies the position of a surety and, in Indiana, is not bound.<sup>66</sup>

E. Rep. 886. In *Southern Mutual Building and Loan Assn. v. Perry*, 103 Ga. 800, 30 S. E. Rep. 658, foreclosure, it was held that "while [under the Georgia statute] a married woman cannot legally become a surety for another's debt, yet where she executes a negotiable note with another as a joint principal, and it has been transferred to a bona fide purchaser for value, before maturity and without notice, it is binding upon her, notwithstanding her purpose in signing the note was to enter into a contract of suretyship only." Citing *Venable v. Lippold*, 102 Ga. 208, 29 S. E. Rep. 181, in which case the fact that one of the signers was a married woman appeared on the face of the note, and she was held liable to a bona fide purchaser for value, without notice that she was a mere surety.

<sup>65</sup> *Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. Rep. 811. See also *Lackey v. Boruff*, 152 Ind. App. 371, 53 N. E. Rep. 412; *Wertz v. Jones*, 134 Ind. 475, 34 N. E. Rep. 1; *Pool v. Davis*, 135 Ind. 323, 34 N. E. Rep. 1130. In *Postell v. Crumbaugh*, Ky., Feb., 1902, no official report, 66 S. W. Rep. 830, 23 Ky. Law Rep. 2193, it was held that a woman who signed her husband's note as surety, in fact, but added the word "principal" after her name, was liable only as surety, and therefore, by statute, not liable at all, the payee having knowledge of the facts. In *Gafford v. Speaker*, 125 Ala. 498, it was held that the testimony of husband and wife alone contradicted by circum-

stances and other witnesses, was not sufficient to prove that a certain mortgage of the wife's land was made as security for the husband's debt contrary to the statute, which forbids suretyship by the wife. Evidence was held insufficient to prove suretyship of wife in *Dial v. Gambrel*, 119 Ala. 330, 24 So. Rep. 564.

<sup>66</sup> *Goff v. Hawkins*, 11 Ind. App. 456, 39 N. E. Rep. 294. In Indiana whether the wife is a surety or not is determined by ascertaining whether she or her husband gets the benefit of the money. In *Beidenkoff v. Brazee*, 28 Ind. App. 646, 61 N. E. Rep. 954, and 63 N. E. Rep. 577, on rehearing, a mortgage by a married woman stated that the proceeds thereof was for her sole and separate property and for her own use. The court held that she was not thereby estopped from showing that the loan was in fact made for her husband and that she was a mere surety and the mortgage therefore void by statute as against her separate property. The court said that whether she was principal or surety was to be determined from the answer to the question whether or not she received the benefit of the consideration on which the mortgage rested, and not from the form of the contract. In *Till v. Collier*, 27 Ind. App. 333, 61 N. E. Rep. 203, the woman was held bound where it appeared that she had used the money to pay an invalid former mortgage on her separate property against which she might have defended on the ground of coverture. Where the considera-

**§ 10. Married woman as surety, continued.**—In many states a married woman is positively forbidden to enter into or bind her estate by any contract of suretyship.<sup>67</sup> Under such a

tion is enjoyed by her she is held liable in equity even though her engagement is apparently that of a surety, as in *Morgan v. Street*, 28 Ind. App. 131, 62 N. E. Rep. 99, in which case a married woman's mortgage of her land to secure her husband's notes given for the purchase money thereof was held valid. In Indiana where a married woman represents that the money is to be used in improving her property and thereby procures the loan, she is estopped from setting up that she was a mere surety for her husband. *Lavene v. Jarnecke*, 28 Ind. App. 221, 62 N. E. Rep. 510.

<sup>67</sup> Such is the case in Georgia: *Saulsbury v. Weaver*, 59 Ga. 254; *Beatie v. Calhoun*, 73 Ga. 269. Iowa: *Sweazy v. Kammer*, 51 Iowa, 642. Indiana: *Dodge v. Kinzy et al.*, 101 Ind. 102; *Nixon v. Whitely et al.*, 102 Ind. 360. In *Smith v. Hardman*, 99 Ga. 381, 27 S. E. Rep. 731, a woman and her husband signed a note, on the strength of which the husband obtained goods from plaintiff for conducting the husband's business. Held, that the wife was a surety and that the statute made the note void as to her, even though it recited that part of its purpose was to obtain goods for the family. In Georgia a married woman cannot bind herself by an accommodation acceptance, even though she is a free-trader under the code. *Madden v. Blain*, 86 Ga. 780, 13 S. E. Rep. 128. But she may raise money to extinguish, though not to secure, the debts of her son-in-law. *Villa Roca Lumber Co. v. Paratain*, 92 Ga. 370, 17 S. E. Rep. 340. In

*McCrary v. Grandy*, 92 Ga. 319, 18 S. E. Rep. 65, it is held that she is liable, though the lender knows that the money loaned to her is for the use of a third person, but is not liable if the relation of debtor and creditor exists between the lender and such third person. In *Waldrop v. Veal*, 89 Ga. 306, 15 S. E. Rep. 310, it was held that the wife is not a surety when she borrowed money to pay for land conveyed to her and her husband jointly. *Freeman v. Coleman*, 86 Ga. 590, 12 S. E. Rep. 1064, was an equitable petition filed by a married woman mortgagor to cancel a mortgage she had executed to secure payment for goods furnished to her sister. It was held that the issue was properly submitted to a jury, whether she made the mortgage as a surety, in which event she was not bound, or as an original undertaking, and judgment on a verdict against her was affirmed. In *Nat'l Bank of Athens v. Carlton*, 96 Ga. 469, 23 S. E. Rep. 388, it was held, on interlocutory appeal, that whatever form a suretyship on the part of a married woman takes, it is void under the statute. For instance, where she conveys land to her son by absolute deed with the intention that he may raise money by hypothecating it, the scheme being arranged in advance by the creditor, the mortgage by the son is void. If she gives her own note to the bank and secures it by mortgaging her own property, the bank knowing that she is in fact a mere accommodation maker for the benefit of her son, both note and mortgage

statute she cannot execute a mortgage upon her separate estate to secure her husband's debt,<sup>68</sup> though a conveyance by her of property held in trust for her husband to secure his debt is not invalidated by such statute.<sup>69</sup> Where a married woman, having a separate estate, executes a note as surety, it is presumed that she intends to bind her estate.<sup>70</sup> But where she is sued upon her individual note, which is secured by a mortgage on her separate estate, her husband joining, there is no presumption that she occupies the relation of surety or guarantor, and the burden is on her to show her suretyship.<sup>71</sup> A married woman may become surety for a partnership of which her son is a member,<sup>72</sup> and may mortgage her separate estate for the liabilities of a partnership of which her husband is a member.<sup>73</sup> Under a statute providing that a married woman may, when she is a party to an action, enter into any bond or

are void. To same effect, *Hall v. Worley*, 99 Ga. 310, 25 S. E. Rep. 698, holding it error, where the evidence was in conflict, to direct a verdict in favor of a married woman sued on a note who claimed to be only a surety. In *Munroe v. Hass*, 105 Ga. 468, 30 S. E. Rep. 654, it was held that where the evidence was uncontradicted that the wife signed her husband's note as surety and that fact was known at the time by payee, a judgment against both husband and wife could not stand. In *Strickland v. Vance*, 99 Ga. 531, 27 S. E. Rep. 152, it was held that a married woman who had paid, out of her separate property, a note on which she was surety, may recover back from the payee the amount paid, and the knowledge of the payee's agent who procured the execution of the note that she was a mere surety was held sufficient notice thereof to the payee.

<sup>68</sup> *Brown v. Will*, 103 Ind. 71; *Cupp et al. v. Campbell*, 103 Ind. 213. *Dial v. Gambrel*, 119 Ala. 330, 24 So. Rep. 564, was a bill to foreclose a mortgage on the

wife's land; defense: that the mortgage was made by way of security for the husband's debt, which would make it void under the Alabama code. Held, that the positive testimony of the lender that the wife borrowed the money, with other testimony that she spoke of it as her loan, overcame the testimony of defendants that the money was borrowed by the husband. The fact that the husband's signature came first was held to be not of controlling importance.

<sup>69</sup> *Stringer v. Montgomery, et al.*, 111 Ind. 489.

<sup>70</sup> *Williams v. Urmston*, 35 Ohio St. 296, overruling in so far as they conflict, *Levi v. Earl*, 39 Ohio St. 147, and *Rice v. Railroad*, 32 Ohio St. 380.

<sup>71</sup> *Miller v. Shields*, 124 Ind. 166.

<sup>72</sup> *Pelzer v. Campbell*, 15 S. C. 581. The court said: "None of the considerations of bad policy as to the wife's being allowed to sign as surety for her husband apply here."

<sup>73</sup> *Penn. Coal Co. v. Blake*, 85 N. Y. 226.

undertaking, she is not disqualified from executing as surety an undertaking upon appeal.<sup>74</sup> It seems that the married women statutes of one state are not effectual to protect her, even in the courts of her own state, against a judgment entered up against her in disregard thereof, after her appearance, in the courts of another state. A married woman in Connecticut entered into a contract of guaranty and, as collateral thereto, signed notes, and a trust deed securing them, conveying land in Cook County, Illinois, which guaranty, notes and trust deed were delivered to a bank in Chicago. Afterwards, on foreclosure, a deficiency decree was obtained in Illinois against the woman after her appearance in the foreclosure suit, and that deficiency decree was presented as a claim against her estate in insolvency proceedings in Connecticut. It was held that, although the woman's guaranty and notes were void under the laws of Connecticut, yet after they had been declared valid by an Illinois court, in which she appeared and made defense, and had been merged in a money judgment against her, her trustee in the insolvency proceeding was estopped from asserting their invalidity. The court said that the trustee was in precisely the same position as if the woman had appeared in a Connecticut court which had thereafter entered judgment against her, and that judgment had been presented for allowance in the insolvency proceedings.<sup>75</sup> A married woman's right to rescind her contract as surety for her husband, which was obtained under pressure and by concealment of facts was upheld in a recent English case.<sup>76</sup>

**§ 11. When statute says party shall not be received as surety, he is nevertheless bound if he is received as such—**A statute providing that attorneys shall not be received as bail in a criminal case is constitutional,<sup>77</sup> but such a statute is only directory; and if an attorney signs a bail bond, and is received as bail, he is bound, notwithstanding the prohibition, of the statute.<sup>78</sup> An attorney as surety is not bound by a judgment

<sup>74</sup> Woolsey v. Brown, 74 N. Y. 82, affirming 11 Hun, 52.

<sup>75</sup> Freeman's Appeal, 71 Conn. 708, 43 Atl. Rep. 185.

<sup>76</sup> Turnbull & Co. v. Duval, L. R. 1902, App. Cases, 429, affirming Sup. Ct., Jamaica, Lindley, J.

<sup>77</sup> Johnson v. Commonwealth, 2 Duvall (Ky.), 410.

<sup>78</sup> Sherman v. The State, 4 Kan. 570; Jack v. The People, 19 Ill.

57; Holandsworth v. Commonwealth, 11 Bush, 617. In the case last cited the court said: "If



against his principal from the mere fact that he conducted his principal's defence.<sup>79</sup> Where a statute prohibited an attorney from becoming a surety upon an attachment bond, he is bound thereon if he becomes surety and the bond is approved.<sup>80</sup> Rules of court prohibiting attorneys from becoming sureties on appeal bonds,<sup>81</sup> or other causes pending therein, except under special leave, are directory merely, and attorneys who become sureties in violation thereof are liable on their obligations, and, at most, are guilty of contempt.<sup>82</sup> Where, however,

those of the exempted or privileged classes persist in tendering themselves as bail, and by becoming such procure the discharge of persons accused of crime, they will not be heard to say that they are not bound because they violated the law." See, also, *Wright v. Schmidt et al.*, 47 Iowa, 233, and *Evans v. Harris*, 15 J. & S. (N. Y. Superior Ct.) 366; *Cook v. Caraway et al.*, 29 Kan. 41. Statutes forbidding county courts from accepting an official bond with the name of a judge of the court as a surety thereon, held directory merely, and the bond is not void if the statute has been disregarded. *State v. Findly*, 101 Mo. 368.

<sup>79</sup> In *Park v. Ensign* (Kans., Jan., 1903), 71 Pac. Rep. 230, a surety on a note, as attorney at law for the principals, defended a suit upon the note against the principals alone. Held, that a judgment which was therein obtained against his principals did not make out more than a prima facie case in a subsequent suit against the sureties. The court, Burch, J., said that the fact that one of the sureties as attorney had conducted the defense of his principals "contributed nothing to the effect of the judgment as an estoppel against either himself or his co-sureties. So far as he was concerned, he might have been lim-

ited in making such defense by instructions, or he might have been discharged at any stage of the trial; and in any event he was not subject in the practice of his profession to the hazard of being personally bound by a judgment against his clients \* \* much less could it be said that by accepting professional employment he staked the fate of his co-sureties upon a proceeding to which they were not parties and which they could not defend."

<sup>80</sup> *Tessier v. Crowley*, 17 Neb. 207.

<sup>81</sup> *The Ohio & Mississippi R'y Co. v. Hardy*, 64 Ind. 454. *De Jarnett v. Marquez*, 127 Calif. 558, 60 Pac. Rep. 45, holds it is not a ground for dismissal of appeal that one of the attorneys for appellant became surety on the appeal bond contrary to a rule of the court from which the appeal was taken. In *McLaughlin v. Sentman*, 2 Pennewell (Del.), 565, the court would not quash a writ of certiorari because the attorney had been taken as sole surety, contrary to rule of court.

<sup>82</sup> *Kohn Bros. v. Washer*, 69 Tex. 67. In *Ullery v. Kokott*, 15 Colo. App. 138, an attorney by leave of court became surety on a certiorari bond on the strength of which the case was removed and collection of the judgment delayed. Held, that, aside from estoppel, the consent

a city charter prohibits an alderman from becoming surety on a bond to the city, a different rule seems to prevail, and it is held that if he executes such a bond he cannot be held liable thereon.<sup>83</sup> Where a statute provided that bail should be a resident of the state, a non-resident who was accepted as bail was held bound.<sup>84</sup> A statute provided that administrators should take notes with two sureties for certain debts due estates. A note in such case was taken with only one surety, and he was held liable, it not appearing that any fraud or imposition had been practiced upon him.<sup>85</sup>

**§ 12. Industrial and commercial corporation as surety or guarantor.**—Within the scope of its corporate purposes and in direct furtherance thereof, an industrial or commercial corporation may make valid contracts of suretyship and guaranty. But such contracts are closely scrutinized and are not enforced unless they appear to be reasonable and such as the stockholders themselves might have authorized under like circumstances. The courts differ as to what specific contracts of suretyship and guaranty fall within the corporate purpose. In a case arising in Ohio, a mining company had agreed to pay a milling company \$50,000 for a crushing, pulverizing and concentrating plant to be used in its mines in Colorado. And the Variety Iron Works, an Ohio corporation, “organized for the purpose, among other things, of manufacturing and selling iron work for such plants,” in order to obtain from the milling company the sub-contract for the iron work in connection with the plant, guaranteed the performance by the milling company of its contract with the mining company, which included a guaranty that the plant when manufactured would do the required work. The plant was duly installed, but failed to give satisfaction. In a suit against the sub-contractor upon its guaranty, it was held that the guaranty was void and that the guarantor was not estopped from setting up its de-

of the court was “enough to render him liable,” so that “he cannot afterwards suggest his incapacity as a defense to the suit.”

<sup>83</sup> *City of Fond du Lac v. Moore*, 58 Wis. 170, at 182, Lyon J. Citing only Wis. cases to the effect that appeal will be dismissed where attorney is surety unless new appeal bond is furnished.

<sup>84</sup> *Commonwealth v. Ramsey*, 2 Duvall (Ky.), 386.

<sup>85</sup> *Reynolds v. Dechaums*, 24 Tex. 174.

<sup>86</sup> *Hurd v. Hannibal & St. Joseph R. R. Co.*, 33 Hun, 109; *Cramer v. Tittle*, 72 Cal. 12.

<sup>87</sup> *Bick v. Reese*, 52 Hun, 125.



fence of ultra vires by the fact that it had enjoyed the profit of the contract for the iron work, which it had secured by means of the guaranty.<sup>88</sup> On the other hand, a lumber company, in order to obtain the contract for the lumber going into a certain construction, became surety on the bond of the contractor, conditioned for the payment of mechanics lien claims, and it was held that having furnished the lumber and reaped the benefits, it was estopped from asserting that its contract was ultra vires and void.<sup>89</sup> In Illinois a brewing company, whose charter purpose was to "manufacture and sell beer, ale and porter, and carry on a general brewing business in all its branches," became surety on the appeal bond of one of its customers in a forcible detainer suit and thereby enabled him to hold his saloon and dispose of its beer pending an appeal. Held, that its act was ultra vires and void; it made no difference that the brewery had enjoyed the fruits of the transaction.<sup>90</sup> In Wisconsin a brewing company's direct guaranty

<sup>88</sup> *Humboldt Mining Co. v. American Manufacturing, Mining & Milling Co.* (Ohio), 62 Fed. Rep. 356, 10 C. C. A. 415. Same case, under the title *Marbury v. Tod*, 22 U. S. App. 267. In this case Taft, J., distinguished the case of *Marbury v. Kentucky Union Land Co.*, 62 Fed. Rep. 335, 10 C. C. A. 393, in which the same court held that a land company's guaranty that a railroad company's preferred stock would earn certain dividends was valid. In that case the guaranteeing corporation was incorporated under a special act of the Kentucky Legislature and had power to do a general mining and manufacturing business, to export the product of its mines, to condemn land for right of way necessary for such exportation and to consolidate with any railroad company, and the railway whose stock was guaranteed by it was capable of being used for carrying the land company's products to market.

<sup>89</sup> *Wittmer Lumber Co. v. Rice*,

23 Ind. App. 586, 55 N. E. Rep. 868, citing and following *Wheeler, Osgood & Co. v. Everett Land Co.*, 14 Wash. 630, 45 Pac. Rep. 316, in which case a like ruling was made on substantially the same facts. In *Interior Woodwork Co. v. Prosser*, 108 Wis. 557, 84 N. W. Rep. 833, a lumber manufacturing corporation guaranteed performance of a building contract and thereby obtained the sub-contract for the interior woodwork. Held, that it could not escape liability on the ground that its contract was ultra vires. Bardeen, J., said: "As noted in many of the cases, courts in recent times have been more liberal in construing the powers of corporations to accomplish the general scope and object of their creation, and the question of ultra vires has not been, of late years construed with that strictness that existed in former years."

<sup>90</sup> *Best Brewing Co. v. Klassen*, 185 Ill. 37, 57 N. E. Rep. 20, reversing 85 Ill. App. 464, and dis-

of the saloon lease of one of its patrons was held to be "germane to the purpose of the corporation and not foreign to it," and was enforced.<sup>91</sup> A railway company bought land for its right of way, taking title in the name of a person whose note for the purchase price it guaranteed. Held, that it could not plead that its contract was ultra vires and void.<sup>92</sup> It goes without saying<sup>93</sup> that a corporation is not liable as surety for

tinguishing *Heims Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. Rep. 286. In *Kelley, Maus & Co. v. O'Brien Varnish Co.*, 90 Ill. App. 287, 294, a corporation chartered to deal in hardware signed an appeal bond as surety, so that it might collect its own claim ahead of another creditor of appellant. Held, the act was ultra vires and void.

<sup>91</sup> *Winterfield v. Cream City Brewing Co.*, 96 Wis. 239, 71 N. W. Rep. 101. Compare *Heims Brewing Co. v. Flannery*, 137 Ill. 309, 27 N. E. Rep. 286, at 289, per Bailey, J., where a brewing company was held liable for rent accruing under a lease to it of saloon property.

<sup>92</sup> *Lake Street Elevated Railroad Co. v. Carmichael*, 82 Ill. App. 344. See also *In re Pyle Works*, L. R. 1891, 1 Ch. Div. 173, where it was held that the directors of an incorporated company could mortgage the uncalled capital to secure two of their number who had become sureties for the repayment of money borrowed by the company.

<sup>93</sup> *Ward v. Joslin* (N. H.), 105 Fed. Rep. 224, 44 C. C. A. 456, affirming 100 Fed. Rep. 676, in which case a corporation whose corporate purpose was "to buy and sell personal property \* \* and to transact the business of a loan and trust company," for a valuable consideration guaranteed the note of a third party, which was not negotiated by it. Held, that the guar-

anty was ultra vires and void, and that a stockholder who was sued on his stock liability could assert the invalidity of the contract as a defense. Citing *Schrader v. Manufacturers National Bank*, 133 U. S. 67, 10 Sup. Ct. Rep. 238, 33 L. Ed. 564. Compare *Commercial Bank v. Cheshire Provident Institution*, 59 Kas. 361, 53 Pac. Rep. 131. In *Rogers v. Jewell Belting Co.* 184 Ill. 574, 56 N. E. Rep. 1017, reversing 84 Ill. App. 249, it was held that where one corporation, as a matter of accommodation, became surety on the note of another corporation having the same stockholders, its contract was ultra vires and void. Compare *Gadsden v. Winchester*, 119 Ala. 168, 24 So. Rep. 351. In *Wheeler v. Home Savings Bank*, 188 Ill. 34, 58 N. E. Rep. 598, reversing 85 Ill. App. 28, it was held that a corporation organized to do a wholesale drug business could not pledge its property to secure the personal debt of its manager, and that its receiver could recover back its property that had been so pledged. That a manufacturing corporation cannot assume liability for the individual debts of its stockholders, see *Gilbert v. Seateco Mfg. Co.* (C. C. Wash.), 98 Fed. Rep. 208, unless perhaps with the consent of all its stockholders. *Id.* and *Gadsden v. Winchester*, 119 Ala. 168, 24 So. Rep. 351. Compare *Rogers v. Jewell Belting Co.*, 184 Ill. 574, 56 N. E.

the debts or obligations of third parties, which are wholly disconnected with the carrying out of its corporate purpose.

Rep. 1017, reversing 84 Ill. App. 249. In *Sturdevant v. Farmers & Merchants Bank*, 62 Neb. 472, 87 N. W. Rep. 156, a bank cashier, for accommodation, signed the bank's name as surety to a replevin bond. Held, that the bank was not bound and could not become bound by ratification. Citing to the latter point *Thompson v. West*, 49 L. R. A. 337, 59 Neb. 677, 82 N. W. Rep. 13. In *Lucas v. White Line Transfer Co.*, 70 Iowa 541, 30 N. W. Rep. 771, 59 Am. Rep. 449, it was held that a guaranty of credit of a third person by a corporation incorporated for general freight and transfer business was not binding on the corporation, though duly executed by its president and cashier. In *Farmers & Merchants Nat'l Bank v. Smith* (Neb.), 23 C. C. A. 80, 77 Fed. Rep. 1129, a bank cashier signed the bank's name as guarantor of an \$8,000 mortgage that was executed by a third party for the cashier's personal accommodation. Held, the bank was not liable. Opinion by Thayer, J. In *Commercial Nat'l Bank v. Pirie* (Kans.), 27 C. C. A. 171, 82 Fed. Rep. 799, the cashier of a national bank signed its name to a guaranty of payment of the debt of its president, a merchant, who, on the strength thereof bought a bill of dry goods in Chicago on credit. Held, that the bank was not bound. Contra, in *First National Bank of Gadsden v. Winchester*, 119 Ala. 168, 24 So. Rep. 351, two of the four stockholders of the Gadsden Foundry and Machine Works, a corporation, sold their stock to the other two, who,

as president and secretary of the corporation, executed a mortgage in the name of the corporation of all the real and personal property of the corporation, to secure payment of the purchase price of the stock. Held, that while the contract of suretyship for the debt of two of its stockholders thus assumed was ultra vires so as not to divest the corporation of its legal title to the property which the mortgage purported to convey, yet, being made by the holders of all the stock, it was valid and effectual in a court of equity as against a subsequent mortgage which was made to secure a loan of \$5,000, made by one who was charged with notice of the facts. In *Murphy v. Arkansas & Louisiana Land & Improvement Co.* (Ark.), 97 Fed. Rep. 723, the court, Rogers, J., asserted the same rule, but limited its application to corporations other than railroad or quasi public corporations (p. 727). In *Steiner v. Steiner Land & Lumber Co.*, 120 Ala. 128, 26 So. Rep. 494, a corporation's indorsement of commercial paper, with the assent of the one holder of all the stock, purely for accommodation and not subserving any purpose of the corporation, was held void. The court said (p. 140): "There are cases in which the indorsement of the paper of others has been upheld, but in each instance the transaction was but the means adopted to carry out the legitimate objects of the corporation and conduct its authorized business, made necessary or expedient by peculiar circumstances." Citing *National Park Bank v. German-American*

A guaranty entered into by a corporation for the mere accommodation of a third party is void.<sup>94</sup> It has been held that the general manager of a corporation has no power to bind it to a contract of guaranty.<sup>95</sup> But the president may.<sup>96</sup>

**§ 13. Suretyship by surety companies.**—It goes without saying that a corporation organized for the express purpose of entering into contracts of suretyship may make valid contracts of suretyship and guaranty anywhere.<sup>1</sup> A foreign surety company is treated as a foreign insurance company within the meaning of statutes specifying the terms upon which foreign insurance companies may do business within the state.<sup>2</sup> By statute in most of the states a surety company organized under the laws of another state or of a foreign country is required to provide a fund within the state out of which damages for breach of its contracts may be paid and an agent within the state upon whom process may be served and may then be accepted as sole surety on all bonds required in judicial proceedings. This is of course subject to the court's right to

Mutual Warehousing Co., 116 N. Y. 281; *National Bank v. Young*, 41 N. J. Eq. 531; *Tod v. Kentucky Union Land Co.*, 57 Fed. Rep. 47; *Hutchinson v. Sutton Mfg. Co.*, 57 Fed. Rep. 998.

<sup>94</sup>In *Dobson v. More*, 164 Ill. 110, 45 N. E. Rep. 243, two stockholders in a corporation gave their individual notes to pay a debt of the partnership, out of which the corporation was formed, and one of them, as general manager, in the name of the corporation, guaranteed the notes. Held, that the corporation was not bound. The by-laws gave the general manager "authority to sign notes, drafts and acceptances in the name of the company, and to make checks upon the company funds in bank for the payment of any proper indebtedness of the company," but this did not authorize him to bind the corporation as guarantor for the debts of individuals. See also preceding note.

<sup>95</sup>*Dobson v. More*, 164 Ill. 110, 45 N. E. Rep. 243, *supra*.

<sup>96</sup>*Star Brewery v. Farnsworth*, 172 Ill. 247, affirming 70 Ill. App. 150.

<sup>1</sup>In *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. Rep. 531, it was held that a statute enabling corporations to become sureties on bonds required in the administration of justice is remedial and should be liberally construed. It was there held that a statute which required a "substantial inhabitant of this state" as surety on the bond for costs required of a non-resident plaintiff was satisfied by his furnishing the obligation of a corporation of New York, which had qualified under the statute to do business in Connecticut, in which he did not join as principal.

<sup>2</sup>*People v. Fidelity & Casualty Co.*, 153 Ill. 25, at 38. 38 N. E. Rep. 752; *People v. Rose*, 174 Ill. 310, 51 N. E. Rep. 246.

inquire into its financial condition and to reject it if it does not appear to be strong enough.<sup>3</sup>

§ 14. **Surety companies continued.**—Statutes authorizing the organization of corporations for the purpose of guarantying bonds and undertakings, as well as the fidelity of persons holding positions of public or private trust, are held valid, and such companies may lawfully become liable as sureties or guarantors.<sup>4</sup> The amount paid to such surety companies for becoming surety in an undertaking is not a taxable disbursement,<sup>5</sup> unless it is so provided by statute.<sup>6</sup> A statute requiring two sureties to all undertakings may be dispensed with where an appeal bond is signed by a guaranty company regularly organized for the purpose of guarantying bonds and undertakings.<sup>7</sup> It is not essential that surety and guaranty companies possess the qualifications required of sureties by statute, though the manner of justifying is the same; but the officer whose duty it is to approve the bond or undertaking may exercise his discretion as to whether the statement of the company's business justifies an approval.<sup>8</sup> The surety company must show assets equal to its undertaking in any given case before it can be accepted, notwithstanding a statutory provision that, upon complying with certain other requisites, it "shall" be accepted.<sup>9</sup> Statutes providing for the release of a surety from an official or court bond must be strictly complied with by the surety company seeking release; otherwise it remains bound,

<sup>3</sup> *Fox v. Hale & Norcross Silver Mining Co.*, 97 Calif. 353, 32 Pac. Rep. 446, note 9, *infra*.

<sup>4</sup> *Hurd v. Hannibal & St. Joseph R. R. Co.*, 33 Hun, 109; *Cramer v. Tittle*, 72 Calif. 12.

<sup>5</sup> *Bick v. Reese*, 52 Hun, 125; *Lee Injector Mfg. Co. v. Penberthy Injector Co.*, 109 Fed. Rep. 964, 48 C. C. A. 760.

<sup>6</sup> As, *Hurds Ill. Stat.* '03, ch. 32, § 102 B.

<sup>7</sup> *Hurd v. Hannibal & St. Joseph R. R. Co.*, 33 Hun, 109; *Travis v. Travis*, 48 Hun, 343. In *Leiter v. Lyons*, R. I., March 1902, 52 Atl. Rep. 78, it was held that a surety company alone was sufficient, although the statute required more

than one surety. *Commonwealth v. Miller*, 195 Pa. St. 230, 45 Atl. Rep. 921; *Lovejoy v. Isbell*, 70 Conn. 557, 40 Atl. Rep. 531.

<sup>8</sup> *Earle v. Earle*, 17 J. & S. (N. Y. Superior Ct.) 57.

<sup>9</sup> In *Fox v. Hale & Norcross Silver Mining Co.*, 97 Calif. 353, 32 Pac. Rep. 446, defendant appealing from a judgment against it for more than \$1,000,000, filed its appeal bond in the penal sum of \$2,030,000 in the Superior Court of San Francisco, with the Western Surety and Guaranty Company, a corporation, as sole surety. Upon a showing that the paid-up capital of the surety company was \$100,000 and that its liabilities did not

notwithstanding the entry of a formal order of release.<sup>10</sup> It has been held that mandamus will lie to compel a clerk of court to accept a duly authorized surety company as surety on a bond.<sup>11</sup>

exceed its assets, the bond was duly accepted by the clerk, under a statute which provided that "any corporation with a paid-up capital of not less than \$100,000, incorporated \* \* for the purpose of becoming a surety on bonds or undertakings required or authorized by law \* \* may become and shall be accepted as security, or as sole and sufficient surety, upon such undertaking or bond \* \* " unless its liabilities exceed its assets in the manner prescribed by the statute. It was held that the incorporated surety must justify the same as an individual by a showing of financial strength commensurate with its liability on the bond. "The apparent object of the law," said the court (p. 357), "was not only to enable corporations of the class designated to become co-sureties upon undertakings required in legal proceedings, but to make the sole undertaking of such a corporation equivalent to the joint undertaking of two or more natural persons. To accomplish that object, the use of the language quoted, or something equivalent, was necessary, and the words chosen are as apt for the purpose as any that could be suggested, their only fault being that, taken literally, they seem to mean something more, viz., that such a corporation is not only sufficient as a surety—the same as a natural person—and sufficient by itself without a co-surety, but also sufficient as surety for any amount, no matter how much greater such amount may be than the value of

its assets. But to allow this clause of the act such unlimited operation would defeat its general policy, which is, undoubtedly, to provide ample security for money judgments in order to stay proceedings for their enforcement pending appeals. \* \* All that it necessarily implies is, that the corporation may go on doing business, i. e., executing bonds in such amount as other provisions of the statute authorize. What, then, is the amount for which such corporations are authorized to become surety?

\* \* In the absence of such [statutory] provision, petitioners claim that the amount is unlimited. We think, on the contrary, that the question may be safely decided upon analagous provisions with reference to natural persons. When a corporation executes an undertaking \* \* exception to the sufficiency of the surety may be taken \* \* with exactly the same effect as if the undertaking had been executed by natural persons. In response to such exception the corporation must justify upon notice, and in addition to the facts which qualify it to do business, it must, like natural persons, show surplus assets equal to the amount of its undertaking." The court therefore refused to grant a writ of prohibition restraining the trial court from proceeding to issue execution on the judgment, notwithstanding the appeal bond.

<sup>10</sup> Clark v. American Surety Co., 171 Ill. 235, 49 N. E. Rep. 481.

<sup>11</sup> Santee River Co. v. Webster, R. I., Feb., 1902, 51 Atl. Rep. 218.



**§ 15. Contracts of surety companies—How construed.—**

When a surety company acts as surety on a bond, the form of which is prescribed by statute, it seems to be treated in all respects precisely the same as a non-corporate surety; the same rules of construction seem to apply as apply to the contracts of other sureties.<sup>12</sup> The same rules appear to apply also where, upon the face of the instrument by which the contract of suretyship is evidenced, or otherwise, it appears that the obligee has had as much to do with getting it up as the obligor.<sup>13</sup> But where the contract appears to have been drawn by the surety company with an elaborate list of questions to be answered by the obligee, the answers to which are by the terms of the contract to be treated as warranties of the truthfulness of the statements therein made, and where the company's contract amounts to an agreement between it and the obligee to indemnify the obligee against loss arising from a certain specified source, for instance, defalcation by an employee, it is treated as an insurance policy and construed according to the rules of construction applicable to insurance policies.<sup>14</sup> Where such an

<sup>12</sup> *United States v. National Surety Co.*, 92 Fed. Rep. 549, 34 C. C. A. 526; *N. K. Fairbank Co. v. American Bonding & Trust Co.*, Mo. App., Dec., 1902, 70 S. W. Rep. 1096. This appears incidentally in a great number of cases. *Fidelity & Deposit Co. v. Courtney*, 103 Fed. Rep. 599, 43 C. C. A. 331; *United States Fidelity & Guaranty Co. v. Merkley*, Ky., Dec., 1901, no off'l report; 65 S. W. Rep. 614, 23 Ky. Law Rep'r 1570; *United States v. Nat'l Surety Co.*, 112 Fed. Rep. 336; *National Bank of Asheville v. Fidelity & Casualty Co.*, 89 Fed. Rep. 819, 32 C. C. A. 355, 61 U. S. App. 506; *Guaranty Co. of North America v. Mechanics Savings Bank & Trust Co.*, 183 U. S. 402, 46 L. Ed. 253; *Pacific Fire Ins. Co. of N. Y. v. Pacific Surety Co.*, 93 Calif. 7, 28 Pac. Rep. 842; *American Life Ins. Co. v. American Surety Co.*, 34 Fed. Rep. 298; *Supreme Council Catholic Knights of*

*Am. v. Fidelity & Casualty Co. of N. Y.*, 22 U. S. App. 439, 63 Fed. Rep. 48, 11 C. C. A. 96; *Fidelity & Casualty Co. v. Gate City Nat'l Bank*, 97 Ga., 634, 25 S. E. Rep. 392; *Perpetual B. & L. Assn v. United States Fidelity Co.*, Iowa, Dec., 1902, 92 N. W. Rep. 686; *Mayor of Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. Rep. 754; *California Savings Bank v. American Surety Co. (Calif.)*, 82 Fed. Rep. 866, 87 Fed. Rep. 118.

<sup>13</sup> *N. K. Fairbanks Co. v. American Bonding & Trust Co.*, Mo. App., Dec., 1902, 70 S. W. Rep. 1096.

<sup>14</sup> Thus in *Tebbets v. Mercantile Credit Guaranty Co.*, 19 C. C. A. 281, 73 Fed. Rep. 95, an action on a guaranty against loss by sales on credit, Peckham, J., said (p. 282) that in the construction of such a contract cases "holding that a surety is a 'favorite of the law' and that a claim against them is *strictissimi juris* have no applica-

instrument will fairly and reasonably bear either of two constructions, the one that is more favorable to the obligee should

tion. Corporations entering into contracts like the one at bar may call themselves 'guarantee' or 'surety' companies, but their business is, in all essential particulars, that of insurers who, upon careful calculation of the risks of such business, and with such restrictions of their liability as may seem to them sufficient to make it safe, undertake to assure persons against loss, in return for premiums sufficiently high to make such business commercially profitable. Their contracts are, in fact, policies of insurance and should be treated as such." Citing to this point, *Mercantile Credit Guarantee Co. v. Wood* (N. Y.), 15 C. C. A. 563, 68 Fed. Rep. 529, action on a policy of credit insurance; *Wallace v. German-American Insurance Co.* (Iowa), 41 Fed. Rep. 742, *McCrary, J.*, fire insurance; and *Wadsworth v. Tradesmens Co.*, 132 N. Y. 540, 29 N. E. Rep. 1104, life insurance. See also, to the same effect, *American Credit Guarantee Co. v. Wood* (N. Y.), 19 C. C. A., 264-270, and note at 271, 73 Fed. Rep. 81, credit insurance. In *Supreme Council Catholic Knights v. Fidelity & Casualty Co. of N. Y.* (Tenn.) 11 C. C. A. 96, at 106, 63 Fed. Rep. 48, the court, in holding defendant's employee's fidelity bond to be in effect from July 1, according to its terms, and refusing to allow defendant to show that the bond was in fact not accepted until July 20, said: "With reference to bonds of this kind, executed upon a consideration, and by a corporation organized to make such bonds for profit, the rule of construction applied to ordinary sureties is not

applicable. The bond is in the terms prescribed by the surety, and any doubtful language should be construed most strongly against the surety and in favor of the indemnity which the assured had reasonable ground to expect. The rule applicable to contracts of fire and life insurance is the rule, by analogy, most applicable to a contract like that in this case." Language of the same effect was used by the court in *Minnesota Title Insurance & Trust Co. v. Drexel* (Minn.), 17 C. C. A. 56, 70 Fed. Rep. 194, action on a mortgagee's title insurance policy, where it was held that the purchase of the property at the foreclosure sale was not a payment and satisfaction of the mortgage in such sense as to relieve the guarantee company from responsibility for mechanic's lien claims, which the mortgagee, purchaser at such sale, was afterwards obliged to pay. In *First Nat'l Bank of Nashville v. United States Fidelity & Guaranty Co.*, Sup. Ct. Tenn., July, 1903, 75 S. W. Rep. 1076, plaintiff's cashier applying for a fidelity bond for its individual bookkeeper stated that the "risk" had "kept his accounts faithfully and without default;" that "when last examined or audited by committee on the 22d day of April, 1898, all the accounts of his office were found in every respect correct up to April 22, 1898." A \$7,000 bond was thereupon executed by defendant. As a matter of fact, the committee referred to had reported on April 22, 1898, that the bookkeeper in question was out of balance \$421, but that the books were "correctly kept



be adopted.<sup>15</sup> It has been held that where a city takes the usual form of fidelity bond from a surety company in place of the form of official bond prescribed by statute, the statute cannot be read into it and the city must abide by its terms and

and the affairs of the bank are in satisfactory condition." The bookkeeper subsequently satisfied the committee that his discrepancy was only \$21, though as a matter of fact he was then in default \$7,217.50. Held, on the authority of *Missouri, K. & T. Trust Co. v. German Nat'l Bank*, 77 Fed. Rep. 117, 23 C. C. A. 65, that the cashier's statement in the application was not a warranty, that it need only be substantially correct, that it was a substantially correct statement of the committee's report, and that the surety was liable. There was, in this case, a statutory provision that no warranty or representation shall defeat a policy unless it is made with an actual intent to deceive or unless it increases the risk of loss, and the court found as a fact that the statement by the cashier was made in good faith and expressed the opinion that the surety would have executed the bond, even if the facts on which the cashier's statement was based had been given to it, but the decision was not rested upon the statute. Construing a like statute, see *Pennsylvania Mutual Life Insurance Co. v. Mechanics Savings Bank & Trust Co.*, 72 Fed. Rep. 413, per Taft, J. See also § 269, post; *Champion Ice Mfg. Co. v. American Bonding & Co.*, Ky., June, 1903, no official report; 25 Ky. Law. Rep. 239, 75 Pac. Rep. 197.

<sup>15</sup> *Guaranty Co. of North America v. Mechanics Savings Bank & Trust Co.*, 80 Fed. Rep. 766, citing cases. *American Surety Co. v. Pauly* (No. 1), 170 U. S. 133, 42

L. Ed. 977 (and note), 18 Sup. Ct. Rep. 552 (affirming 38 U. S. App. 254, 72 Fed. Rep. 470, 18 C. C. A. 644), was an action by the receiver of the California National Bank on the fidelity bond of its defaulting cashier. With reference to the rule of construction of the bond, the court, by Mr. Justice Harlan, said: "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted, and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well established rule in the law of insurance." Accordingly it was held that a provision in the bond—"that the company shall be notified in writing, at its office in the city of New York, of any act on the part of the employee, which may involve a loss for which the company is responsible hereunder, as soon as practicable after the occurrence of such act, shall have come to the knowledge of the employer," did not oblige the receiver to communicate any suspicions of irregularity he may have had, and it was held to have been properly left to the jury to determine when he acquired knowledge of the defaults and whether or not he had transmitted notice thereof with reasonable diligence thereafter.

limitations.<sup>16</sup> Where an action on an employee's fidelity bond involves the examination of complicated accounts, it may be brought by bill in equity.<sup>17</sup>

**§ 16. Construction of employees' fidelity bonds.**—It has been held that the conditions of an employee's fidelity bond must be strictly complied with by the obligee before the obligor can be charged.<sup>18</sup> And that a declaration that does not aver compliance with conditions precedent to recovery is bad on

<sup>16</sup> In *Mayor of Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. Rep. 754, a city treasurer, instead of giving bond conditioned "for the faithful performance of his duties," as prescribed by statute, gave the usual form of fidelity bond issued by surety companies. Held, that though the statute might be read into a statutory bond, it could not be read into a voluntary bond, and that the city was bound by the conditions and limitations thereof. It was insisted in the argument that the bond, though defective, was still a statutory bond, and that the court should "read into it" all the conditions prescribed for statutory bonds, but the court declined to do so. "The charter of Brunswick," it said, "requires that the treasurer of the city give bond and security for the faithful performance of his duties. In order to comply with this requirement, the officer himself should be one of the obligors in the bond. Instead of giving the bond required by the charter, Harvey gave the one signed by the fidelity and guaranty company, which was in the nature of a policy of fidelity insurance insuring the city against his fraud and dishonesty. While his name was signed to this bond, he, as before recited, made no promise or covenant to the city, but merely undertook to save the company harmless.

A careful examination of the bond will show that it is not in the nature of a statutory bond at all, but is in its nature a policy of fidelity insurance. \* \* Not being a statutory bond, this obligation must be dealt with as a common law bond. Being a bond of this nature, it makes the company liable under its provisions only \* \* "

<sup>17</sup> *Guaranty Co. of North America v. Mechanics Savings Bank & Trust Co.*, 80 Fed. Rep. 766.

<sup>18</sup> Thus, in *California Savings Bank v. American Surety Co.* (C. C. S. D. Cal.), 82 Fed. Rep. 866, defendant company, insuring the fidelity of plaintiffs, vice-president and cashier, agreed to make good any pecuniary loss &c. "within three months next after notice, accompanied by satisfactory proof of loss, as hereinafter mentioned." Held, on demurrer, that plaintiff must aver not only the giving of notice, but also that it made such proof of loss three months before bringing suit. It was not enough to aver that "plaintiff had duly kept and performed all the conditions of said bond on its part." The same bond provided that the defendant should be liable only for defalcations discovered not later than six months from the death, dismissal or retirement of the employee, and it was held that the complaint must aver that the loss for which recovery is sought was

demurrer.<sup>19</sup> That a false representation by an applicant releases the obligor where such representation has been by the terms of the instrument made a warranty.<sup>20</sup> A provision for "immediate" notice of default, in a fidelity bond has been held to mean notice within a reasonable time, and the question whether the notice was given within reasonable time or not

discovered within that time. In the same case, *Calif. Sav. Bank v. American Surety Co.*, in the same court, 87 Fed. Rep. 118, a demurrer to an amended complaint was sustained by the same judge, because it did not aver that the employer had, within six months after the death of the employee, given notice in writing to defendant in accordance with the literal requirements of the bond. The court, Wellborn, J., said that it was not enough that the complaint averred that the defendant, within one month after the death of the employee, "became and was fully advised and informed \* \* of and concerning all the aforesaid breaches of said bond by said Collins and the loss thereby occasioned to the plaintiff, and acted upon such knowledge and in pursuance thereof did every act and thing that it might, would or could have done to protect its interests in the premises if formal notice of such loss had been given it by the plaintiff \* \* "

The citations to this point are of actions on fire insurance policies. Compare *Globe Savings & Loan Co. v. Employers' Liability Assurance Corporation*, 13 Manitoba Law Rep. 531, note 21, below.

<sup>19</sup> *California Savings Bank v. American Surety Co.* (C. C. S. D. Cal.), 82 Fed. Rep. 866, supra.

<sup>20</sup> In *Imperial Building and Loan Co. v. United States Fidelity & Guaranty Co.*, 23 Ohio Cir. Ct. Rep.

243, false representations by an applicant for an employee's fidelity bond that he had not been rejected by another company were held to invalidate the bond; the obligee had knowledge of the misrepresentation. Compare *Fuller Bros. Toll Lumber & Box Co. v. Fidelity & Casualty Co.*, 94 Mo. App. 490, 68 S. W. Rep. 222. And see *Carstairs v. American Bonding & Trust Co.* (Pa.), 54 C. C. A. 85, 116 Fed. Rep. 449, affirming 112 Fed. Rep. 620, in which case a false statement by the employer that the employee's books had been examined and found correct, on the strength of which the bond was continued, was held to release the surety, Acheson, J., dissenting. The books in that case had in fact not been examined at all (p. 453). Where a bank president falsely certified that the bank's cashier is of good habits and thereby procured a surety company to become surety on the cashier's fidelity bond, it was held that the act of the president was not the act of the bank and did not bar a recovery by the bank upon the bond. "The procuring of a bond for O'Brien, in order that he might become qualified to act as cashier," said the court, "was no part of the business of the bank nor within the scope of any duty imposed upon Collins as president of the bank." *Pauly v. American Surety Co.*, 170 U. S. 133, at 155, 42 L. Ed. 977, 18 Sup. Ct. Rep. 552. Compare *Warren De-*

is ordinarily for the jury.<sup>21</sup> Notice "as soon as practicable" means with reasonable diligence.<sup>22</sup> Knowledge of an employee's default, as the term is used in fidelity policies, has been held to mean actual and not merely constructive knowledge.<sup>23</sup> Limitations as to the time within which suit on the

posit Bank v. Fidelity &c. Co., Ky., June, 1903, 25 Ky. Law Rep'r 289, 74 Pac. Rep. 1111.

<sup>21</sup> Fidelity & Deposit Co. of Md. v. Courtney, 103 Fed. Rep. 599, 43 C. C. A. 331; affirmed in 185 U. S. 342, 46 L. Ed. 1193, was an action on an employee's indemnity bond conditioned to make good any pecuniary loss to the employer bank through "the fraudulent act or acts" of its president in which it was provided "that the employer shall immediately give the company notice in writing of the discovery of any default or loss hereunder." Held that a delay in giving notice from Feb. 2 to Feb. 18 should not prevent the submission of the case to the jury. Citing Ben Franklin Insurance Co. v. Flynn, 98 Pa. St. 628, where 30 days' delay was held a sufficient compliance with a like requirement. McFarland v. United States Mutual Accident Association, 124 Mo. 204, 27 S. W. Rep. 436, where immediate was held to mean "within a reasonable time." Hornden v. Milwaukee Mechanics Ins. Co., 164 Mass. 382, 41 N. E. Rep. 658, where the jury were held justified in finding that proof of loss made two months after a fire was rendered "forthwith" and Niagara Ins. Co. v. Scammon, 100 Ill. 644, where notice on August 5th of loss occurring on July 14 was held "immediate." And notice of any kind may be waived. In Globe Savings & Loan Co. v. Employers' Liability Assurance Corp'n, 13 Manitoba Law Rep. 531,

an employer's liability contract provided that "on the discovery of such fraud or dishonesty, the employer shall immediately give notice thereof in writing to the corporation at its chief office in Montreal, stating the number of policy, cause, nature and extent of loss." The employer's first discovery of dishonesty occurred Feb. 9, 1898. It was communicated verbally to the insurer's local agent on Feb. 10 and by him on the following day to the insurer's general agent for Canada. No formal notice was given to the chief office at Montreal, but agents and solicitors of the insurer investigated the books of the employee and asked and obtained various proofs. Held "that the chief officer of the corporation in Canada, in charge of the office where the notice was to be given, had power to waive, and that he did waive, any further performance of the condition."

<sup>22</sup> Harlan, J., in Pauly v. American Surety Co., 170 U. S. 133, 42 L. Ed. 977, 18 Sup. Ct. Rep. 552, affirming 38 U. S. App. 254, 72 Fed. Rep. 470, 18 C. C. A. 644.

<sup>23</sup> In Fidelity & Casualty Co. v. Gate City Nat'l Bank, 97 Ga. 634, 25 S. E. Rep. 392, defendant company insured plaintiff bank against loss by the fraud or dishonesty of Redwine as receiving teller or in the discharge of "the duties to which, in the employer's service, he may be subsequently appointed or assigned by the employer." The contract required the bank

bond shall be brought are enforced when they are reasonable.<sup>24</sup> Failure on the part of the employer, a corporation, to exact weekly settlements with his employee, as stipulated in the bond, has been held to release the surety.<sup>25</sup> It has been held that the obligee on a fidelity bond does not release a surety company as obligor by neglecting to exercise diligence, which might have led to the discovery of an existing defalcation.<sup>26</sup> It has been held that failure on the part of the employer to report delinquencies that do not amount to dishonesty does not release the surety.<sup>27</sup> But in a notable case in

upon the discovery of any fraud or dishonesty on the part of the employee to give notice thereof to the company. Redwine was made assistant cashier without notice to the company and as such became short in his accounts more than the penalty of the bond. It was held that the cashier's knowledge of his shortage was not to be imputed to the bank. "The 'knowledge' referred to meant actual knowledge," said the court. "Constructively, when Redwine—he being an employe of the bank, handling its money, misapplied the same, the bank itself would have immediate notice of the fact; for his knowledge, as a servant of the bank, would, if the doctrine of notice were applicable, be its knowledge. Surely the contract cannot be construed as contemplating any such result as this. Again, suppose another employee was colluding with Redwine in concealing his shortage; the knowledge of such other employee would be, constructively, the knowledge of the bank? Or, suppose Redwine and another employee, also under bond, were both misappropriating the bank's funds, and each found the other out. Could it be said in defence to a suit on Redwine's bond that the other employee's knowledge was the knowledge of the bank? or,

when suit on the other employee's bond was entered, that Redwine's knowledge was constructive notice to the bank, and the legal equivalent of the knowledge referred to in the company's bond? \* \* The bond would, indeed, be of no practical protection if, in order to realize its benefits, the bank had to insure, not only the honesty and fidelity, but also the faithful and conscientious attention to duty, of a dozen others of its employees." Citing and following: *Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Shaeffer*, 59 Pa. St. 350.

<sup>24</sup> *Pauly v. American Surety Co.*, 170 U. S. 133, 42 L. Ed. 977, 18 Sup. Ct. Rep. 552, affirming 38 U. S. App. 254, 72 Fed. Rep. 470, 18 C. C. A. 644. Note 16 to § 15, *supra*.

<sup>25</sup> *Fidelity Mutual Life Assn. v. Dewey*, 83 Minn. 389, 86 N. W. Rep. 423.

<sup>26</sup> *National Bank of Asheville v. Fidelity & Casualty Co.*, 89 Fed. Rep. 819, 32 C. C. A. 355, 61 U. S. App. 506, citing 26 C. C. A. 146.

<sup>27</sup> In *Pacific Fire Insurance Co. of New York v. Pacific Surety Co.*, 93 Calif. 7, 28 Pac. Rep. 842, plaintiff's agents in California who, by the terms of their employment were required to remit receipts on the 20th of the 2d month after receiving them, did not make such

the United States supreme court it was held that failure by the employer to notify the obligor on a fidelity bond of improper conduct on his part that came to the employer's notice released the obligor, who had expressly stipulated for such notification.<sup>28</sup>

**§ 17. Sufficiency of sureties—Pecuniary responsibility.—**

Where a statute requires the pecuniary responsibility of sureties to be inquired into and determined by the officer approving the obligation of any surety, the surety's personal prop-

remittances for from 90 to 120 days after receiving them, notwithstanding which plaintiff represented to defendant that they were not and had not been in arrears, and failed to notify defendant at any time of such delinquency. Held that defendant was not thereby released from liability as surety on a bond guaranteeing the honesty of plaintiff's agents. Citing and following: *Etna Life Insurance Co. v. American Surety Co.*, 34 Fed. Rep. 298.

<sup>28</sup>In *Guaranty Co. of North America v. Mechanics Savings Bank and Trust Co.*, 183 U. S. 402, 46 L. Ed. 253, 22 Sup. Ct. Rep. 124, the fidelity policy issued by appellant insuring appellee against pecuniary loss from the fraudulent acts of Schardt, appellee's cashier, contained a provision "that the employer shall at once notify the company, on his becoming aware of the said employee being engaged in speculation or gambling or indulging in any disreputable or unlawful habits or pursuits." While the bond was in force the president, cashier and certain directors of the bank were informed directly and by anonymous letter that the cashier was a partner in a bucket shop in New York, and the cashier admitted that he had been such partner but had sold out. None of this information was

imparted to the guaranty company. It was held reversing the Circuit Court 68 Fed. Rep. 459, and the Circuit Court of Appeals, 26 C. C. A. 161, 47 U. S. App. 115, 80 Fed. Rep. 781, that there could be no recovery on the bond as to defalcations occurring subsequent to the time when the information in question reached the bank and that since the renewal of the bond had been procured by failure to disclose the information there could be no recovery at all. Fuller, J., speaking of the clause above quoted said (p. 420), "Our understanding of the provision is that what the company stipulated for was prompt notification of information by the bank in regard to speculation or gambling on the part of the employee. It was entitled to exercise its own judgment on that information, and had not agreed to rely on the bank's belief in that regard. It had the right to investigate for itself, whether the bank did so or not. Notification of the existence of reason for inquiry was exactly what the clause was intended to secure. The bank neither investigated nor gave the company notice of the information it had, and substituted its own judgment as to the value of that information for that of the company. In our view this conduct on its part amounted to a breach



erty as well as realty must be considered.<sup>29</sup> But where by statute a surety must not only be good and solvent and reside within the jurisdiction of the court, but must also have property susceptible of being legally reached by the sheriff and subjected by him to the payment of the pressing creditors' claims it is held that a surety who carries all his property in his pocket, as, for example, negotiable securities, is not such a surety as the law requires.<sup>30</sup> The sufficiency of sureties to a contract is not shown by the mere production of the contract. The court must have some evidence upon which it can say that they were sufficient sureties.<sup>31</sup> "In estimating the sufficiency of sureties to bonds, it is the daily practice of the courts to take into account the obligations entered into already by the party whose sufficiency is disputed, and we know of no good reason why it should not be so. If a score of attachments were taken out successively, and the same surety were given to each bond, who was proved to be worth the amount of the first and largest, and no more, it would be small safety to the bonds subsequently given to pronounce the same party sufficient as the sole surety to them."<sup>32</sup> Where sureties in

of the stipulation. \* \* The company's defense did not rest on the duty of diligence growing out of the relation of the parties, but on the breach of the stipulations entered into between them." Cf. *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, at 362; 46 L. Ed. 1193 at 202, 22 Sup. Ct. Rep. 833, where the notification clause was in very different language and the court reached a different result.

<sup>29</sup> *Post v. Township Board of Sparta*, 63 Mich. 323.

<sup>30</sup> *State ex rel. Menge v. Righton, Judge*, 36 La. Ann. 711, overruling so far as is inconsistent, *State ex rel. Fabre v. Judge Fifth Dist. Ct.*, 28 La. Ann. 884. A surety who by the Illinois dram shop act is required to be a "freeholder of the county" in which the license is granted must hold real estate in that county, but need not be a resident thereof. *Matthews v. Peo-*

*ple*, 159 Ill. 399, 42 N. E. Rep. 864. An Ohio statute requires that a guardian before selling the ward's real estate shall execute a bond "with freehold sureties." In *Arrowsmith v. Gleason*, 129 U. S. 86, 32 L. Ed. 630, 9 Sup. Ct. Rep. 237, it was held that a sale under the statute was not invalid because the court had accepted a bond with only one freehold surety.

<sup>31</sup> *Regina v. Richardson*, 17 Ont. (Can.) 729.

<sup>32</sup> *Durham & Co. v. Lisso & Scheen*, 32 La. Ann. 415, per Manning, J. In *Zuckerman v. Hawes*, 146 Ill. 59, 34 N. E. Rep. 479, an appellant having been required, at Chicago, to file an appeal bond in the penal sum of \$5,000, tendered a surety who testified that he owned one piece of real estate in Chicago worth \$75,000, encumbered for \$13,000, and other real estate in Chicago worth \$12,000, encumbered

justifying as to their pecuniary responsibility make statements which they know to be false, they are guilty of perjury,<sup>33</sup> and may be committed for contempt of court.<sup>34</sup> A surety may, in order to avoid justification, deposit in court the amount for which he is bound, and in such case the deposit becomes the principal's and the surety the principal's creditor.<sup>35</sup> The substitution of a sufficient for an insufficient surety will not be made by the supreme court when the case is there on appeal;<sup>36</sup> neither will a federal court enter upon the sufficiency of the sureties on a bond, conditioned as required by the removal

for \$3,000, and was worth over \$100,000. The Appellate Court refused to accept him and dismissed appellant's appeal forthwith. Held, that this was error. "The appellant in cases of this character," said Bailey, J., "should not be held to furnish security which in any and every event and under all possible circumstances, will certainly produce the amount of the bond, without requiring any further outlay on the part of the appellee. To require security of that character in all cases would be highly oppressive, and would often be tantamount to the denial of the right to an appeal. A reasonable discretion should be exercised in passing upon the sufficiency of the surety, and one should be required of such pecuniary ability as will, in all reasonable probability, enable the appellee to collect his bond, if the appeal is decided in his favor." In *Cleveland R. R. v. Monaghan*, 140 Ill. 474, 30 N. E. Rep. 869, a surety was held insufficient whose affidavit set forth only that he was "worth the sum of \$2,000 over and above all his exemptions of every kind and over and above all his liabilities." The court said that it failed to show that the surety had any property subject to execution in the district or that he was a resident of

the state. An affidavit of the qualification of a surety on an appeal bond, which leaves the name of the surety blank at the beginning of the affidavit, thus: "—, being first duly sworn," etc., but contains no other defect, was held sufficient in *Brown v. Jessup*, 19 Oreg. 288. Query: What weight should be given to the surety's contingent liabilities in determining his sufficiency? See *Ayers v. Harrell*, 111 Ga. 864, 36 S. E. Rep. 946, where it is held that a guarantor's or surety's contingent liability should not usually be considered a debt in determining whether a conveyance to his wife was fraudulent or not. The solvency of a surety may be proved by his brother who knows his affairs or by his banker. *Watterson v. Fuellhart*, 169 Pa. St. 612, 32 Atl. Rep. 597.

<sup>33</sup> *Ralph v. United States* (Cir. Ct. N. D. Ill.), 9 Fed. Rep. 693.

<sup>34</sup> *Egan v. Lynch*, 17 J. & S. (N. Y. Superior Ct.) 454. A surety in justifying need not give, however, a description of his property, but only its amount and value. *Hodgkin v. Holland*, 34 Ark. 200.

<sup>35</sup> *Lyon v. Wilder*, 24 J. & S. (N. Y. Superior Ct.) 67.

<sup>36</sup> *Durham & Co. v. Lisso & Scheen*, 32 La. Ann. 415.



act and approved by the state court.<sup>37</sup> Legatees under a will, having no other property except that to be derived through the will, are insufficient sureties on the bond of the executor of the will.<sup>38</sup> It has been held that a bond may be sufficient where the sureties bind themselves in different amounts, provided the aggregate is equal to the sum required.<sup>39</sup> There are authorities holding that the sufficiency of the sureties may be left to be determined by the clerk and that the sureties need not personally appear.<sup>40</sup> The affidavit attached to an appeal bond, if it sets up the necessary facts, is *prima facie* sufficient.<sup>41</sup>

<sup>37</sup> *Van Allen v. Atch., Col. & Pac. R. R. Co.*, 3 Fed. Rep. 545 (Cir. Ct. D. Kan.).

<sup>38</sup> *Ellis v. Witty et al., Ex'rs*, 63 Miss. 117. Where a statute provided that all undertakings upon appeal should be accompanied by an affidavit of one of the sureties thereto that he is worth double the amount specified therein, held that the affidavit of another, as to the pecuniary reputation of a surety, was insufficient. *Morphew v. Tattem*, 89 N. C. 183.

<sup>39</sup> In *Bradley Fertilizer Co. v. Pace*, 80 Fed. Rep. 862, 26 C. C. A. 198, 52 U. S. App. 194, a Florida statute required that an assignee for the benefit of creditors should give "bond \* \* in double the value of the property assigned." Held that the statute was complied with by the filing of a bond in which the principal was bound for \$50,000, ten sureties for \$5,000 each, one for \$1,500 and one for \$1,000.

<sup>40</sup> In *Hunt v. United States (Mo.)* 63 Fed. Rep. 568, 11 C. C. A. 340, the judge of a United States district court decided that the offense was bailable, fixed the amount of bail and ordered the clerk to approve the bond when it should be signed by two sureties. Held, that this merely amounted to an "ap-

proval in advance of a bond signed by two sureties whom the clerk might accept as sufficient." It was done at the request and for the convenience of the accused, and if it was an irregularity "it was competent for the accused and his sureties to waive the irregularity, and they should be adjudged to have done so." It was also held in this case that it is not necessary for the sureties on a bail bond to appear before the judge or even the clerk. "In accepting a bail bond a court or judge may undoubtedly act upon knowledge of its own, or upon knowledge derived from third parties, as to the solvency of the sureties and as to the genuineness of their signatures," said the court. "In point of fact they do frequently so act in the interest of personal liberty; and it would sometimes lead to great hardship if they should act otherwise by requiring sureties to be brought from a great distance, at great inconvenience and expense, to merely sign a bail bond in the presence of the judge." See also cases cited under sections on "Bail."

<sup>41</sup> *Bank of Escondido v. Superior Court*, 106 Calif. 43, 39 Pac. Rep. 211.

**§ 18. Same continued—Residence of sureties.**—A surety on an official bond cannot be heard to say that he is not liable thereon because the statute requires such sureties to be residents of the state,<sup>42</sup> or of the county,<sup>43</sup> and he is not. But where, however, a surety is so habitually absent from the state as to leave his domicile in doubt, he may properly be declared an insufficient surety.<sup>44</sup> In the federal court it is held that the sureties on a receiver's bond need not be citizens of the same state in which the action is pending.<sup>45</sup>

**§ 19. Contract of suretyship must actually be entered into.**—Presupposing necessary and competent parties to a contract of suretyship, it is essential for the existence of the relation that they either actually enter into the contract of suretyship,<sup>46</sup> or so conduct themselves that the law assumes that they

<sup>42</sup> *Board School Directors v. Brown et al.*, 33 La. Ann. 383. In Arkansas the constitution prohibits non-residents from becoming sureties on the official bonds of county officers. *Hyner v. Dickinson*, 32 Ark. 776. An Iowa statute required that sureties on statutory bond should be residents of Iowa. Held, that a non-resident surety who had been accepted was estopped from setting up that he was not a resident of Iowa. *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. Rep. 209, 16 C. C. A. 498. See also *Leidigh v. Pribble*, Neb., June, 1902, 90 N. W. Rep. 950.

<sup>43</sup> *State v. Thim*, 77 Ala. 100. And even in the absence of a statutory provision requiring it, such a defense would be of no avail. The sureties on an attachment bond need not necessarily be residents of the county wherein the attachment was levied. *Mobile Mut. Ins. Co. v. Cleveland*, 76 Ala. 321.

<sup>44</sup> *Ex parte Buckley*, 53 Ala. 42.

<sup>45</sup> *Taylor v. The Life Ass'n of America* (Cir. Ct. W. D. Tenn.), 3 Fed. Rep. 465; *Hunt v. United States* (Mo.) 63, Fed. Rep. 568, 11

C. C. A. 340, cited in note 40 to preceding section.

<sup>46</sup> The principal may be an infant. *Fiala v. Ainsworth*, Neb., Nov., 1901, 88 N. W. Rep. 135. In the *Alliance*, 73 Fed. Rep. 503, 19 C. C. A. 541, 38 U. S. App. 531, affirming 63 Fed. Rep. 726, a vessel owner secured repayment of a loan to him by pledging freights earned and to be earned and agreed to give the lenders "any additional security they require whenever they may see proper to demand it." Held, that this being a mere unexecuted promise, did not amount to a pledge of the vessel itself, and that therefore, the lenders had no maritime lien for the amount of their advances. The endorsement of a bond by the principal is not equivalent to its execution by him. *North St. Louis B. & L. Assn. v. Obert*, Mo. Sup., Oct., 1902, 69 S. W. Rep. 1044. In *Randolph v. Allen* (Tex.), 73 Fed. Rep. 23, 19 C. C. A. 353, verbal representations by a bank to a non-resident as to the financial standing of a customer of the bank were held not equivalent to a guaranty

have entered into it.<sup>47</sup> It is essential to a contract of suretyship that there be a contract or obligation on the part of the principal to which the contract of suretyship is collateral.<sup>48</sup> If there is no principal contract, or if the principal contract is void, as against public policy, or for want of a consideration, or for want of proper parties, or for any other reason, there can be no contract of suretyship.<sup>49</sup> One may execute a contract of suretyship by an agent. If the contract of the surety is under seal, the authority of the agent to affix the surety's name and seal thereto must be under seal. Where the common law prevails it is held that a contract of suretyship under seal executed by the surety through an agent who did not have authority under seal cannot be enforced.<sup>50</sup> The writ-

and the bank was held not liable for a defalcation by the man as to whom the representation was made.

<sup>47</sup> Note 9, § 1, *supra*, § 37, *post*.

<sup>48</sup> *Moffett v. City of Goldsborough*, 52 Fed. Rep. 560, cited in next note.

<sup>49</sup> In *Keith County v. Ogalalla Power and Irrigation Co.*, Neb., Feb., 1902, 89 N. W. Rep. 375, a village by vote authorized the building of a power and irrigation canal and the issue of bonds. The County Commissioners entered into a contract therefor that varied in its terms from that authorized by the vote. The building corporation failed to perform its part of the contract. Held, that the contract was not binding on the village and that therefore there was no consideration for the contract of the sureties. In *Moffett v. City of Goldsborough*, 52 Fed. Rep. 560, 3 C. C. A. 202, 8 U. S. App. 160, the city of Goldsborough, N. C., passed an ordinance authorizing Moffett and others to construct water works and operate them for twenty years unless the city bought them within that time at an agreed valuation. Thereafter Moffett gave a bond conditioned

that Moffett et al. should "faithfully perform the terms of their contract during the construction of said works." Held, reversing the circuit court, 49 Fed. Rep. 213, that the ordinance did not constitute a contract and that the bond was without consideration and void.

<sup>50</sup> In *Overman v. Atkinson*, 102 Ga. 750, 29 S. E. Rep. 758, *sci. fa.* on a forfeited recognizance, against three sureties, one of them showed that his name had been signed to the bond without authority under seal, and the other two testified that they signed upon the representation that their co-surety's signature was made with due authority. Judgment against all three was set aside. The court quoted from *Rowe v. Ware*, 30 Ga. 278, the following language: "But it was said that the bond need not have been under seal, though in point of fact it was so, and therefore the seal might be disregarded. Not so. The question was whether Taylor had authority to sign the names of Hooks and Herndon to this bond as it is—sealed as it is. Whether a bond without a seal (to use, for convenience, a short but

ing by which the contract of suretyship is evidenced need not be under seal.<sup>51</sup> Where there are several signatures and only one seal, it seems that the presumption is that it has been adopted as the seal of each signer.<sup>52</sup> A contract of suretyship that has been entered into under a mistake of fact may be avoided by the surety.<sup>53</sup> The writing must show the essential elements of the contract. If one is missing it cannot be supplied by parol where the effect of parol evidence would be to vary the terms of the written agreement.

**§ 20. Contract of suretyship may be void as against public policy.**—A contract of suretyship may be void as against public policy, as, for instance, where it is conditioned for the performance of an act which a statute makes a misdemeanor,<sup>54</sup>

inaccurate phrase) would be valid, has nothing to do with the case, for there was no such paper in the case.” In *Dale Bros. v. Cosmopolitan Preserving Co.*, 167 Mass. 481, 46 N. E. Rep. 105, the name of the principal was signed to a bond to dissolve an attachment by an unauthorized agent. Held that none of the sureties was bound. Compare note 9 to § 1.

<sup>51</sup> Bank cashier’s official obligation in form of bond but lacking seals, held valid if founded upon a sufficient consideration. *First Nat’l. Bank v. Briggs’ assignees*, 69 Vt. 12, 37 Atl. Rep. 231.

<sup>52</sup> Husband and wife signing bond with only one seal. Held, that the wife is presumed to have adopted the husband’s seal. *Warder Bushnell & Glessner Co. v. Stewart*, 2 Marv. (Del.) 275, 36 Atl. Rep. 88.

<sup>53</sup> *Blaney v. Rodgers*, 174 Mass. 277, 54 N. E. Rep. 561, in which case the court held a building contractor’s bond a nullity because it had been entered into under a mistake of fact. “People of the State of Illinois by Robert W. Wright, as relator” as principal and Moses as surety. The

judgment appealed from was affirmed and costs put on the relator. Held, that there could be no recovery on the bond. *Weigley v. Moses*, 78 Ill. App. 471.

<sup>54</sup> In *McCanna & Frazer Co. v. Citizens’ Trust & Surety Co.* 76 Fed. Rep. 420, 24 C. C. A. 11, 39 U. S. App. 332, defendant became surety on the fidelity bond of one who had been appointed manager at Philadelphia of the business of plaintiff, a Wisconsin corporation. Plaintiff had not complied with a Pennsylvania statute requiring any foreign corporation before doing business in that state to file in the office of the secretary of state a statement showing its name, corporate purpose, location of offices, etc., and declaring it a misdemeanor for any foreign corporation to transact business in Pennsylvania without compliance with its requirements. Held, that without such compliance plaintiff’s business was unlawful and the bond being conditioned for the performance of an unlawful act, was void. The court said it made no difference that the surety did not know the statute in question had not been complied with. “In any view that can be

or for the violation of a city ordinance by a building contractor.<sup>55</sup> An arrangement made by directors of a mercantile corporation by which its property was hypothecated, by way of security to certain directors who were liable as sureties for it was, in one case, held to be void because, among other reasons, it was against public policy to permit the directors to prefer themselves to other creditors.<sup>56</sup> A note signed by a surety in consideration that the maker thereof shall not be prosecuted for embezzlement is void as opposed to public policy.<sup>57</sup> So a surety to a note made to a public officer for

taken of the subject," said Butler, J., "the fact remains that the plaintiff is seeking to enforce a contract entered into for the purpose of securing it in conducting a business forbidden by law; and such a contract is necessarily void." See also *Carey v. Griffin* (Mass.), 63 N. E. Rep. 420, cited in note 37 to § 5, *supra*, and § 30 *post*.

<sup>55</sup> In *Burger v. Roelsch*, 77 Hun. (N. Y.), 44, 28 N. Y. Supp. 460, it was held that a building contract providing for walls of less thickness than the ordinance required was not enforceable, but in *Higgins v. Quigley*, 23 Ind. App. 348, 54 N. E. Rep. 136, citing the foregoing case, it was held that the surety on a building contract that likewise provided for violation of a city ordinance was not released; the bond contained a provision for changes in the contract and under that provision the contract had been altered so as to comply with the ordinance. Compare *Ray v. McDevitt*, 126 Mich. 417, 85 N. W. Rep. 1086, holding, by a divided court, that an indemnity bond given to induce a sheriff to refuse to levy under a valid execution, was not void as against public policy.

<sup>56</sup> In *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624, 17

S. E. Rep. 968, defendant company being \$500,000 in debt mortgaged its entire assets to indemnify its directors and others who were at the time of the execution of such mortgages bound as sureties, indorsers or accommodation makers, for its debts to the amount of \$140,000. It was held that the mortgages were void because there was no new consideration for them other than what the corporation had already received and because their effect was to prefer the claims of directors either as sureties or co-sureties with others, and that being void the creditors could not obtain any benefit from them by being subrogated to the rights of the mortgagees. A contrary decision on similar facts was reached in *Gould v. Little Rock Railroad* (Ark.), 52 Fed. Rep. 680, where a mortgage of land to secure repayment of moneys which had been loaned to a failing corporation by its directors was held valid as against a subsequent judgment creditor.

<sup>57</sup> *Rouse v. Glissman*, 29 Ill. App. 321. In *Portier v. Kirchner*, 169 Pa. St. 472, 32 Atl. Rep. 442, a lodge treasurer being short in his accounts, gave a bond with sureties conditioned for the payment of his shortage. Held, that an affidavit

the private and illegal use or loan of public funds cannot be held liable thereon, for the reason that it is in contravention of public policy.<sup>58</sup> Nor can such sureties, after they have made good the loss, enforce contribution as between themselves, or be subrogated to the rights of the creditors whose claims they have paid.<sup>59</sup> A statute forbidding the loaning of public money

of defense stating that the bond was given for the purpose of "settling a charge of embezzlement" and that "the said obligees in consideration thereof, released the said Kirschner from all liability to prosecution for said crime of embezzlement," did not state a sufficient defense. No criminal prosecution was pending or threatened when the bond was given. The court distinguished *Riddle v. Hall*, 99 Pa. St. 116, in which case a mortgage given for the sole purpose of preventing a criminal prosecution actually begun against the mortgagor's son and threatened against her husband for alleged improper use of a bank's funds was held invalid.

<sup>58</sup> *Board of Education v. Thompson*, 33 Ohio St. 321. See, also, an illustrative case involving the same principle, *Deobold v. Oppermann*, 111 N. Y. 531. And see, also, *Ring v. Devlin*, 68 Wis. 384.

<sup>59</sup> This is well illustrated in *Estate of Ramsay v. Whitbeck*, 183 Ill. 550. Ramsay died in 1894 short in his accounts as State Treasurer of Illinois, \$478,539.52. The Chicago National Bank, in behalf of ten sureties on his official bond, promptly made good the loss, and the ten sureties jointly presented their claim for allowance in the County Court against Ramsay's estate, claiming precedence over general creditors under a statute which gives such precedence to claims arising from failure of the

deceased to account for money received "in trust for any purpose." (Rev. Stat. Ill., Chap. 3, Sec. 70.) The general creditors objected, claiming that the sureties had signed Ramsay's bond under a criminal and corrupt agreement and understanding by which Ramsay was to deposit \$1,500,000 state funds in five Chicago banks with which the sureties were identified, which were to pay him, for his own use, 2 1-2 per cent per year on such deposits, and that therefore they could not be subrogated to the claim of the state against Ramsay's estate. The County Court allowed the claims as for trust money, and was reversed on appeal by the Circuit Court which directed that they be disallowed, which decision was reversed and the County Court sustained by the Appellate Court in *Whitbeck v. Ramsay*, 74 Ill. App. 524, and *Ramsay v. Whitbeck*, 81 Ill. App. 210. The reasoning of the Appellate Court was that the arrangement by which Ramsay got 2 1-2 per cent interest was between the five banks and Ramsay whereas the implied contract of Ramsay, as principal, to indemnify the sureties on his official bond to the people was between Ramsay and his sureties as individuals and that even if the two transactions were between the same parties the illegal stipulation as to 2 1-2 per cent interest was separable from the legal contract of suretyship so as



by a public official does not prohibit him from depositing it in a bank; such deposit is not a loan within the meaning of the statute; therefore a bond of indemnity taken upon making such a deposit is not void as against public policy.<sup>60</sup>

to form no obstacle to its enforcement. The Supreme Court,—*Estate of Ramsay v. Whitbeck*, 183 Ill. 550, 56 N. E. Rep. 322—reversing the Appellate Court, held that the claim of the sureties must be dismissed. The subrogation which they invoked, it said, is a creature of equity whose operation is controlled exclusively by the principles of equity (p. 559). “The agreement which was made and executed (p. 564) was in direct and palpable violation of Sec. 81, of the criminal code, which prohibits any state officer from using by way of investment or loan, for his own use, \* \* with or without interest, any portion of the money entrusted to him for safe-keeping. \* \* It was also against the public policy of the state. \* \* Nothing is better settled in the law of contracts than that if any part of the consideration upon which a promise rests is illegal the entire promise fails. \* \* But while the rule of law is not questioned by appellees, they insist that there was no illegal contract by the sureties, but that the agreement is divisible, as to parties, between them and the banks. The supposed division is that the illegal transaction was between Ramsay and the banks and not between him and the sureties; that he never agreed at any time with the sureties that if they signed the bond he would deposit state money with them; that whatever Ramsay agreed to do in the way of loaning state funds was with the banks, which were entities in law, and not with the individuals

who signed the bond. \* \* This is a refinement in separating the parties to the transaction that we are not able to appreciate or approve. The sureties signed the bond as representative of the banks, and they all understood it that way. \* \* The officers signed the bond for the benefit of the banks, as their officers and representatives, and at least three of the banks have reimbursed them. This suit is being prosecuted for the benefit of the banks and what the officers did in signing the bond and are doing now, is by virtue of their official relations as agents of the banks. We cannot say that the banks are guilty, and that their officers, who made the bargain and did the business, are innocent. \* \* The consideration upon which the implied promise now sought to be enforced was made was the signing of the bond, and the payment of interest to the treasurer. The consideration moving from the sureties was not a single one, free from unlawful taint, but included pecuniary gain and advantage to the treasurer. \* \* The promises are connected and so mingled and bound together that they are not separable. \* \* The parties were all engaged in the illegal enterprise and all are equally involved.” See also note 26 to § 4, *supra*.

<sup>60</sup> *Davis v. Dunlevy*, 11 Colo. App. 344, 53 Pac. Rep. 250, affirmed in *Davis v. Dunlevy*, 27 Colo. 244. Citing *Moulton v. McLean*, 5 Colo., App. 455, 39 Pac. Rep. 78.

**§ 21. When duress a defense to surety or guarantor.**—If the surety or guarantor acts under duress in entering into the contract, he will not be bound.<sup>61</sup> And this for the same reason that a person sought to be charged on a contract of any other kind would not be bound, viz., because he never consented to it. But when the duress is exercised on the principal alone, a different question arises. It has been held that the duress of the principal, who is a stranger to the surety, will be no defense to the surety.<sup>62</sup> It has also been held, and it seems

<sup>61</sup> *Small v. Currie*, 2 Drewry, 102. The usual difficulty is to determine whether or not the conduct of those dealing with the surety amounts to duress. In *Graham v. Marks*, 98 Ga. 67, 25 S. E. Rep. 931, Davis, having been arrested for alleged misappropriation of lumber, was taken by the arresting officer to defendant, a woman, whom the officer persuaded to sign notes covering the alleged shortage by representing that unless she did so Davis would be taken to Alabama for criminal prosecution, and by promising to have him appointed policeman. Held, that the imprisonment did not amount to duress unless, without the surety's knowledge, it was illegal, or, being legal, the process of law was being prostituted to the accomplishment of an illegal purpose, and that the promise of appointment being against public policy could not amount to fraud that would vitiate defendant's contract. In *Mills v. Toronto Lumber Co.*, 63 Conn. 103, 26 Atl. Rep. 689, it was held that where a contract of suretyship "is obtained from one who is under pressure to such an extent as to be deprived of free agency, equity will not only refuse to aid the party in whose favor such a contract is made, but will actively give as-

sistance in favor of the oppressed party by declaring the contract void." In that case the defendant's agent, with the sheriff, went to plaintiff's house and threatened to arrest her husband for obtaining lumber by false representations unless she executed a second mortgage on her real estate for the sum of \$1,000, which she did after much argument, being "so moved by the threats that, against her intention and will, she executed the mortgage without fully understanding its nature and effect, and believing it was designed and intended to enable her husband to proceed with certain work on which he was then engaged and for which the defendant would continue to furnish him building material." Held, that she was entitled to a decree setting aside the mortgage. *Howgate*, having been appointed disbursing officer of the signal service, was requested by the Treasury Department to furnish an official bond that was not required by law. Failure to furnish it would have meant his transfer to another post in the service. Held, that the sureties could not successfully urge duress as a defense. *Howgate v. United States*, 3 App. Cas. (D. C.) 277.

<sup>62</sup> *Wayne v. Sands*, *Freeman*, 351;



with the better reason, that the duress of the principal alone is a complete defense to the surety.<sup>63</sup> Where a statutory bond for the liberties of a prison was executed by the principal under duress, if the principal with the knowledge and consent of the surety claims and exercises the right of being on the liberties by virtue of such bond, they are both estopped to allege its invalidity.<sup>64</sup> Where a creditor caused the arrest of a debtor, and under a threat of sending him to state's prison forced him to sign a note, and his wife, who was then in a delicate condition, was induced by the same threats to indorse the note, it was held she might avail herself of the duress.<sup>65</sup> A state treasurer gave bond with sureties as required by law, and afterwards held over under a constitutional provision, no successor being appointed. While holding over, he was "required and demanded" by the legislature to give a new bond in a much larger amount, and gave such bond with sureties. The sureties on the last bond claimed to be discharged on account of duress of their principal, but it was held there was no duress and that they were bound.<sup>66</sup> So

*Simmons v. Barefoots' Ex'rs*, 2 Haywood (N. C.), 606; *Thompson v. Buckhannon*, 2 J. J. Marsh, 416; *Tucker et al. v. State*, 72 Ind. 242. Duress of the principal will not avail the surety, as a defense, unless the surety, at the time of executing the obligation, was ignorant of the circumstances which made it voidable by the principal. *Hazard v. Griswold* (Cir. Ct. D. R. I.), 21 Fed. Rep. 178.

<sup>63</sup> *Hawes v. Marchant*, 1 Curtis, 136; *Owens v. Mynatt*, 1 Heisk. (Tenn.) 675. The reason given in the last case is that if it were otherwise, the surety, being compelled to pay, could recover from his principal and thus the principal be deprived of his defense. See, also, *Putnam v. Schuyler*, 4 Hun, 166; *Coffelt et al. v. Wise et al.*, 62 Ind. 451. And see, also, *Paterson v. Gibson*, 81 Ga. 802.

<sup>64</sup> *Hawes v. Marchant*, 1 Curtis, 136.

<sup>65</sup> *Ingersoll v. Rowe*, 65 Barb. (N. Y.) 346. But where a wife was induced to sign a note for her husband under threats that unless she did so he would poison himself, it was held no duress, and therefore such defense was not available to her in an action upon such note. *Wright et al. v. Remington*, 41 N. J. Law. 48. In *Thompson v. Buckhannon*, 2 J. J. Marsh, 416, *Robertson, J.*, said: "If an officer *colore officii* exacts a bond to himself which he has no authority to require, the security may avoid it as well as the principal, because being not only unauthorized but positively prohibited, it is totally void." Compare *Howgate v. United States*, 3 App. Cas. (D. C.) 277.

<sup>66</sup> *Sooy ada. State*, 38 N. J. Law. 324, adhered to in *Sooy, Jr. et al. v. State*, 41 N. J. Law. 394.

when a board of supervisors threaten to declare an office vacant unless the incumbent executes the required bond, and the bond is accordingly executed, the sureties thereon cannot evade their liability on the ground of duress.<sup>67</sup> Where an officer executes a several, and not a joint and several, bond as required, a direction to execute a new bond which is done in compliance therewith cannot be considered as executed under duress.<sup>68</sup> Where an officer having seized property under a writ exacts from a claimant thereof a bond more onerous in its condition than the statute prescribes, the bond is not good, either as a statutory or as a common law obligation.<sup>69</sup> In one case the court said that under the statute the obligors were neither legally nor morally bound to give the bond that was exacted as a prerequisite to the possession of the property in controversy; and as they were required to give the bond in order to have the possession of the property, the giving of it cannot well be said to have been voluntary. While an officer so holding property may not have taken bond under such a state of facts as would make the same void upon the ground of duress, if between parties contracting in their own right, yet the simple fact that an officer received a bond more onerous than the law prescribes ought to be taken, in the absence of an averment to the contrary, as evidence of the fact that he refused to deliver the property unless the bond given was executed. The taking of such a bond under such circumstances would be as to the maker, coercion and oppression. Parties contracting in their own right may make such terms as they please, so they are not contrary to law; but an officer in the discharge of his official duties, who denies a legal right, even though the same be but a right given by statute, unless the party seeking the same will do more than the law requires, is a coercer and oppressor, through whose contracts no one ought to be permitted to claim rights.<sup>70</sup>

**§ 22. There must be a consideration to support the contract.**  
**Instances.**—As already stated, the contract of suretyship or guaranty, when not under seal,<sup>71</sup> must, in order to render

<sup>67</sup> State v. Harney et al., 57 Miss. 863.

302; Wooters v. Smith, 56 Tex. 198; Johnson v. Erskine, 9 Tex. 10.

<sup>68</sup> Soule v. United States, 100 U. S. 8.

<sup>70</sup> Wooters v. Smith, 56 Tex. Rep. 198, at 210, per Stayton, J.

<sup>69</sup> Leverett v. Meeks, Tex. Civ. App., May, 1902, 68 S. W. Rep.

<sup>71</sup> Want of consideration is not a defense to a bond [under seal]

it valid, be supported by a sufficient consideration.<sup>72</sup> A consideration of one dollar is sufficient to support a contract of

executed and delivered but failure of consideration is. *Anderson v. Best*, 176 Pa. St. 498, 35 Atl. Rep. 194. That want of consideration is no defense to an indemnity contract under seal, see, also, *Cosgrove v. Cummings*, 195 Pa. St. 497, 46 Atl. Rep. 69. In *Bullen v. Morrison*, 98 Ill. App. 669, 673, it was held that a guaranty, under seal, of a lease, that was executed after delivery of the lease but not as part of the same transaction could not be enforced because of want of consideration; *Windes, J.*, citing and following *Rogers v. School Trustees*, 46 Ill. 431, at 434. That failure or want of consideration may be shown notwithstanding seal, see *Yearance v. Blake*, N. J. Eq., no official report, 44 Atl. Rep. 858. Compare *Gary, J.*, in *Hallberg v. Brosseau*, 64 Ill. App. 520, 522, holding that a defense of "no consideration" cannot be made to guaranty under seal of a lease. In *Chicago Sash, Door & Blind Co. v. Haven*, 195 Ill. 474, 63 N. E. Rep. 158, it was held that a statute which provided that want of consideration should be a sufficient defense to a suit on "any note, bond, bill or other instrument in writing for the payment of money or property, or the performance of covenants and conditions," applied only to negotiable instruments, and did not abolish all distinctions between specialties and simple contracts. Therefore where a woman, as surety, had signed a bond conditioned for the prompt payment of a material man, it was held no defense that she had received no consideration therefor. Reversing 96 Ill. App.

92. The general words in the statute were held to include only negotiable instruments. Where a seal was wanting on an indemnity bond it was held that the point could not be raised for the first time on appeal and judgment against the sureties affirmed: *Davis v. Dunlevy*, 27 Colo. 244, affirming 11 Colo. App. 344, 53 Pac. Rep. 250. Upon proof of the signature of a surety the seal opposite his name is presumed to be genuine and contemporaneous with his signature. *Howgate v. U. S.*, 3 App. Cas. (D. C.) 277. *Warder v. Stewart*, 2 Marvel (Del.) 275, 36 Atl. Rep. 88. Printed form of seal held sufficient: *Carlile v. People*, 27 Colo. 116. Where the guaranty of a sealed note is not under seal, the statute of limitations applicable to unsealed instruments applies in a suit upon the guaranty. *Ridley v. Hightower*, 112 Ga. 476, 37 S. E. Rep. 733; *Keith County v. Ogalalla Power & Irrigation Co.*, Neb., Feb., 1902, 89 N. W. Rep. 375; *Tucker v. Gentry*, Mo. App. Apl. 1902, 67 S. W. Rep. 723; *Howard v. Jones*, 13 Mo. App. 595-596; *Osborne v. Lawson*, 26 Mo. App. 549; *Serrell v. Belts*, 58 N. J. Eq. 199, 42 Atl. Rep. 573; *Alves v. Humphrey*, Ky., Oct., 1902, no official report, 69 S. W. Rep. 1080, 24 Ky. Law. Repr.; *Peale v. Addicks*, 174 Pa. St. 543, 34 Atl. Rep. 201; *Moffett v. City of Goldsborough*, 52 Fed. Rep. 560, 3 C. C. A. 202, 8 U. S. App. 160, reversing 49 Fed. Rep. 213; *Lane v. Richards*, Iowa, Oct., 1902, 91 N. W. Rep. 786.

<sup>72</sup> *Pfeiffer v. Kingsland*, 25 Mo. 66; *Barrell v. Trussell*, 4 Taunt.

suretyship or guaranty for any amount, for the law cannot take account of the prudence or imprudence of the bargain the

117-20; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Bailey v. Freeman*, 4 Johns. 280; *Leonard v. Vredenburg*, 8 Johns. 29; *Cobb v. Page*, 17 Pa. St. 469; *French v. French*, 2 Man. & Gr. 644; *Aldridge v. Turner*, 1 Gill & Johns. (M. D.) 427; *Tenney v. Prince*, 4 Pick. 385; *Clark v. Small*, 6 Yerg. (Tenn.) 418; *Cowles, Exr, v. Peck*, 55 Conn. 251; *Briggs v. Latham*, 36 Kan. 205; *Barney v. Forbes*, 118 N. Y. 580, affirming 44 Hun, 446. In *Allen v. Wicker-son*, 99 Ga. 139, 25 S. E. Rep. 26, it was held that one who signed a note as surety was none the less a surety because the creditor, in consideration of his signing the note, released a mortgage which he held against the principal. In *The Berkeley* (D. C., S. C.) 58 Fed. Rep. 920, it was held that, where a vessel was arrested under a warrant issued without authority and therefore void, that the obligors on the release bond were not bound. An appeal bond was given on appeal from the judgment of a Federal Court allowing a writ of mandamus, from which judgment no appeal lies. Held, that the appeal being ineffective there was no consideration and the surety on the bond was not liable. *Jabine v. Oates*, 115 Fed. Rep. 861. In *Johnson v. Ford*, 92 Ga. 751, 19 S. E. Rep. 712, an appeal from a justice of the peace was dismissed by the Superior Court for want of jurisdiction, the amount at stake not being large enough. Held, that the surety on the appeal bond was not liable for the judgment of the justice. In *McCallion v. Hibernia Savings & Loan Society*, 98 Calif. 442, 33 Pac. Rep. 329, a stay bond was filed where the law did not require such bond and where it therefore did not operate as a stay. Held, there was no consideration and the sureties were not bound. Like rulings were made on similar facts in *Kennedy's Estate*, 129 Calif. 384, 62 Pac. Rep. 790; *Reay v. Butler*, 118 Calif. 113, 50 Pac. Rep. 375. In *Deposit Bank v. Peak*, Ky. Apl. 1901, 23 Ky. Law. Rep'r 19, 62 S. W. Rep. 268, a surety without any new consideration signed a note after its delivery, held he was not bound. But in *Pauly v. Murray*, 110 Calif. 13, 42 Pac. Rep. 313, *Burner*, being introduced to the bank by defendant, applied for a loan of \$500, saying defendant would sign his note as surety. The bank thereupon gave him \$500, took his note, but did not enter it for account, and, on the same day, within banking hours, defendant, not knowing that the money had been advanced, signed the note as surety, wherefor the note was duly entered for discount. Held, that the facts did not sustain defendant's defense of want of consideration. In *Benson v. Dublin Warehouse Co.*, 99 Ga. 303, a note was given for money advanced by the payee to buy futures in cotton. Held, no consideration and surety on note not liable. Indemnifying mortgage given to secure sureties who were already bound as such, and no new consideration, held void: *Lowry Banking Co. v. Empire Lumber Co.*, 91 Ga. 624, 17 S. E. Rep. 968. In *McNaught v. Fisher*, 96 Fed. Rep. 168, 37 C. C. A. 438, at 442 plain-

surety or guarantor has made.<sup>73</sup> But there must be some consideration, usually either of benefit to the principal or surety, or detriment to the creditor, to support the contract. Leaving a claim in the hands of an attorney to control and collect is a

tiff, having subscribed for the stock of a corporation on certain conditions which were accepted by the corporation, and having received and paid for his stock, defendant, who had procured his subscription, wrote him: "I promise you that everything shall be done which is necessary to carry out the terms provided in your subscription." Held, the guaranty was without consideration and defendant incurred no liability thereunder. In *Schradsky v. Dunkell*, 9 Colo. App. 394, the money due a contractor having been garnisheed in the hands of his employer the contractor procured its release by giving a bond, not provided for in any statute, conditioned that the money would be forthcoming to answer any judgment that might be obtained against the contractor, and paid the money to his laborers, who might have obtained it anyhow by filing claims for mechanics' liens. Judgment having been obtained against the contractor, it was held that the sureties were liable, for the laborers might never have filed their claims for liens. "The release of money to which the plaintiff might be able to show himself entitled, if permitted to litigate the question, was ample consideration for the undertaking," said the court. A town board passed an ordinance giving a water company an exclusive franchise for 20 years and took from the company a bond with sureties conditioned for the observance by the water company of the ordinance. The town's charter gave

it power only, in general terms, "to provide the supply of water." Held, that these words gave it no right to grant an exclusive franchise, that the exclusive feature of the ordinance made it void and that therefore the contract of the sureties was without consideration and void: *Town of Kirkwood v. Meramec Highlands Co.*, 94 Mo. App. 637, May, 1902, 68 S. W. Rep. 761. Citing *Davis v. Town of Harrison*, 46 N. J. Law 79, to the effect that the ordinance under such circumstances was void. In *Savage v. Robinson*, 93 Me. 262, 44 Atl. Rep. 926, a deputy sheriff delivered up property that he had attached, and took therefor a receipt in which the receiptors agreed to hold themselves responsible for the amount of debt and damage "contained in the writ." Held that, though the deputy made such release at his peril, the consideration was sufficient and the surety was liable to the attachment plaintiff for the judgment that was recovered.

<sup>73</sup> *Lawrence v. McCalmont*, 2 Howard (U. S.) 426; *Jackson's Adm'r v. Jackson*, 7 Ala. 791; *Davis v. Wells*, 104 U. S. 159. But where the consideration is one dollar, it may be shown by parol evidence what the real consideration was in fact—as that it was an extension of time. *Taylor v. Wightman et al.*, 51 Iowa 411. The entire transaction will be looked into in ascertaining the consideration. *Wills v. Ross et al.*, 77 Ind. 1.

sufficient consideration for a contemporaneous guaranty claim by him.<sup>74</sup> The liability of a surety on a note is a sufficient consideration for his subsequent written guaranty its payment, whether at the date of the guaranty the right of action on the note is or is not barred by the statute of limitations.<sup>75</sup> A mere moral consideration is not sufficient to support the contract of suretyship.<sup>76</sup> A married woman without consideration became surety on the note of her husband. After the death of the husband she gave a new note for the amount of the former note and another note signed by her husband alone. Afterwards she gave another note and a mortgage to secure it, the only consideration for the last note being the note signed by her after her husband's death. It was held that all the papers executed by her were void for want of consideration.<sup>77</sup> B, the assignee of a lease, assigned the lease to W, taking from W and from R, his surety, an agreement to pay the rent. Held, this agreement was void for want of consideration. B was liable for rent only so long as he held as assignee of the lease, and W by accepting the assignment of the lease became liable for rent to the owner of the premises and not to B.<sup>78</sup> Where property occupies the position of surety, and there is no consideration for the contract of suretyship, it is released.<sup>79</sup> It is held that want of consideration to be availed

<sup>74</sup> Gregory v. Gleed, 33 Vt. 405.

<sup>75</sup> Miles v. Linnell, 97 Mass. 298. See on same subject, Buckner v. Clark's Ex'r, 6 Bush 168.

<sup>76</sup> In Fidelity Co. v. Thompson, 128 Calif. 506, 61 Pac. Rep. 94, a widow promised her second husband, before his death, to pay his debt to his aunt, who was then in feeble health, and after his death, guaranteed her husband's note by which that debt was secured and assigned to the aunt a policy of insurance on her husband's life. She was then insolvent. The fund having been paid into court, it was held that the moral consideration was insufficient to support the guaranty or the assignment as against the widow's other creditors. Citing Peek v. Peek, 77 Calif.

106, 11 Am. State Rep. 244, 19 Pac. Rep. 227. In Pennsylvania a moral obligation is held sufficient consideration to support an express promise to pay. Anderson v. Best, 176 Pa. St. 498, 35 Atl. Rep. 194, citing Bailey v. City of Phila., 167 Pa. St. 569, 31 Atl. Rep. 925.

<sup>77</sup> Hetherington v. Hixon, 46 Ala. 297.

<sup>78</sup> Stoppani v. Richard, 1 Hilton (N. Y.) 509.

<sup>79</sup> In Dillon v. Dillon, Ky., Oct., 1902, no official report; 69 S. W. Rep. 1099, 24 Ky. Law Rep. 781. A advanced money to B with which liens against B's real estate were discharged and afterwards (prior to the Ky. Act of 1894) married her, thereby extinguishing the debt. Thereafter she conveyed the



as a defense must be specially pleaded.<sup>80</sup> Where the instrument is not under seal the burden of proving a consideration on the plaintiff.<sup>81</sup> Commissions allowed to an agent for sale of property are a sufficient consideration for his guaranty of notes taken by him in payment.<sup>82</sup> The surrender of an old note<sup>83</sup> or bond<sup>84</sup> is a sufficient consideration to support a guaranty of a new one. Employment of the principal is sufficient consideration for the execution of a fidelity bond contemporaneously therewith.<sup>85</sup> Acceptance of a note in lieu of cash is sufficient consideration for guaranteeing its payment.<sup>86</sup>

**§ 23. Executory consideration to principal alone sufficient.—**

It is not necessary to the validity of the consideration that any portion of it should move from the creditor to the surety or guarantor, provided the circumstances are such that a previous request on the part of the surety or guarantor is held to exist. A consideration moving to the principal alone contemporaneous with or subsequent to the promise of the surety or guarantor is sufficient.<sup>87</sup> If, after the original consideration has

property to him through a third party by way of security for the advances. Held, that the conveyance was without consideration and void.

<sup>80</sup> *Hollenbeck v. Breakey*, 127 Mich. 555, 86 N. W. Rep. 1055.

<sup>81</sup> *Richner v. Kreuter*, 100 Ill. App. 548. In *Blakely Printing Co. v. Barnard*, 63 Ill. App. 238, defendant signed, without sealing, on the back of an account, "February 1, 1895. Guaranteed to extent of \$125, payable February 15, 1895. Jas. H. Barnard." There was no proof of any communication whatever between plaintiff and defendant. Held, that no consideration could be implied and that a verdict for defendant was the only one the evidence would warrant.

<sup>82</sup> *Newton Wagon Co. v. Diers*, 10 Neb. 284. See further, cases on the sufficiency of the consideration, *Lamb v. Briggs*, 22 Neb. 138; *Munson v. Adams*, 89 Ill. 450; *Worden*

*v. Salter*, 90 Ill. 160; *Grigsby v. Shwarz*, 82 Calif. 278; *Barney v. Forbes*, 118 N. Y. 550, affirming 44 Hun 446.

<sup>83</sup> *Churchill v. Bradley*, 58 Vt. 403; *Brewster v. Baker*, 97 Ind. 260.

<sup>84</sup> *Erie Co. Savings Bank v. Coit*, 104 N. Y. 532.

<sup>85</sup> *Bryant v. Stout*, 16 Ind. App. 380, 44 N. E. Rep. 68.

<sup>86</sup> *Wilson v. St. John's Hospital*, 92 Ill. App. 413. In *LaRose v. Logansport Nat'l Bank*, 102 Ind. 332, at 341, 1 N. E. Rep. 805, a bank cashier's bond was executed 14 days after his appointment. Held, that his retention in office was sufficient consideration for it. Citing *Bank of U. S. v. Brent*, 2 Cranch. (C. S.) 696.

<sup>87</sup> *Wren v. Pearce*, 4 Smedes & Marsh. (Miss.) 91; *Freeman v. Freeman*, 2 Bulst. 269; *Bailey v. Croft*, 4 Taunt. 611; *Henderson v. Rice*, 1 Cold. (Tenn.) 223; *Robert-*

moved between the creditor and principal, the surety or guarantor signs upon a new consideration, moving from the creditor to the principal, this is sufficient.<sup>88</sup> When a guaranty on a note is without date, a jury may infer without further proof that it was made at the same time and on the same consideration as the note.<sup>89</sup> Where a promise that a surety or guarantor will become liable is part of the inducement on which the creditor acts in creating the original debt, this is a sufficient consideration to support the contract of the surety or guarantor who subsequently signs. A told B that if C would lend B money, he, A, would be surety for it. B communicated this to C, and on the strength of it C loaned B money and took his note for it, due in one year. Three days after the note became due A signed it, and he was held bound.<sup>90</sup> A principal executed and delivered a note to a creditor which specified no time of payment, and at the time same time agreed that he would procure B to sign as surety if at any time the creditor should deem himself insecure. Afterwards the creditor re-

son v. Findley, 31 Mo. 384; Leonard v. Vredenburg, 8 Johns. 29; Morley v. Boothly, 10 Moore 395; Bicksford v. Gibbs, 8 Cush. 154; McNaught v. McClaughry, 42 N. Y. 22; Savage v. Fox, 60 N. H. 17; Hollingshead v. American Nat'l Bank, 104 Ga. 250, 30 S. E. Rep. 728. That a saloonkeeper agreed to buy beer from the brewing company of which defendant was president was sufficient consideration to support a guaranty of the saloonkeeper's lease by defendant. Gunderson v. Hasterlik, 100 Ill. App. 429. In McDougald v. Argonaut Land & Development Co., 117 Calif. 87, 48 Pac. Rep. 1021, the lessee's agreement to exchange lands was held sufficient consideration for the guaranty of a lease.

<sup>88</sup> Gay v. Mott, 43 Ga. 252. In Kennedy v. Wofford, 84 Ga. 157, 10 S. E. Rep. 722, indulgence shown the principal at the surety's request was held sufficient consideration for the agreement by prin-

cipal and surety to pay 12 per cent interest. In Bullen v. Morrison, 98 Ill. App. 669, 673, where the guaranty of a lease was executed after delivery of the lease and not as part of the same transaction, the fact that the guarantor received no new consideration constituted a sufficient defence.

<sup>89</sup> Bicksford v. Gibbs, 8 Cush. 154; Underwood v. Hossack, 38 Ill. 208. On the same subject, see Snevily v. Johnston, 1 Watts & Serg. 307. In Hippach v. Makeever, 166 Ill. 136, a plea of want of consideration by defendant who was sued as guarantor of a note, was held bad because if the guaranty was contemporaneous with the making of the note no consideration moving to the guarantor was necessary.

<sup>90</sup> Paul v. Stackhouse, 38 Pa. St. 302. The same principle was held in the case of a sale of goods by C to B under similar circumstances. Standley v. Miles, 36 Miss. 434.



turned the note to the principal, with the request that he would get B to sign it, which he did, and B was held liable.<sup>91</sup>

**§ 24. Executory consideration to principal alone continued.—** The same principle was applied in a case where A sold B goods on the promise by B that C would guaranty the payment, and C guarantied the payment of the note given by B for the price of the goods about three hours after the note was given.<sup>92</sup> So a guaranty is binding when goods are contracted for one day by the principal, and the guaranty is executed the next day and delivered to the seller before the goods are delivered by him, because the sale was not complete till the goods were delivered.<sup>93</sup> A principal signed an undertaking, and at that time it was agreed between the principal and creditor that certain other parties should sign it as sureties. The writing was delivered by the principal to the creditor when it was signed, and the creditor afterwards and at another time presented it

<sup>91</sup> *McNaught v. McClaughry*, 42 N. Y. 22. In *Kennedy & Shaw Co. v. S. S. Construction Co.*, 123 Calif. 584, 56 Pac. Rep. 457, defendant executed a guaranty of a note before its delivery but after its date. Held, that the consideration of the note was sufficient to support the guaranty.

<sup>92</sup> *Wheelwright v. Moore*, 2 Hall (N. Y.) 162. With reference to what is sufficient consideration for guaranty of promissory note by payee, who also indorses it, see *Gillighan v. Boardman*, 29 Me. 79. In *Smith v. Molleson*, 148 N. Y. 241, 42 N. E. Rep. 669, a building contract by its terms bound the contractors to give the owner a bond conditioned for its performance. The bond was not given until after the contract was made, and, apparently, after work had begun. There was no additional consideration for the bond. The sureties defended on the ground of want of consideration. Held, that the execution of the building contract was sufficient consideration

for the bond. The court said that the contractor's right to insist upon performance, as against the owner, and to receive the benefit of the contract, was not perfected until the bond was given. "Whatever the contractors may have assumed to do before, it was only upon the delivery of the bond that the contract became complete and binding upon the plaintiff, and hence the mutual obligations imposed upon the contractors at one time, and upon the plaintiff at another, furnished a consideration for the bond." Citing *Erie County Savings Bank v. Coit*, 104 N. Y. 532, 11 N. E. Rep. 54.

<sup>93</sup> *Simmons v. Keating*, 2 Starkie, 375. In *Dunlap v. Hopkins* (Ill.), 95 Fed. Rep. 231, 37 C. C. A. 52, at 54, the verbal guaranty of a loan before the making thereof, subsequently acknowledged in writing, was held sufficient though the consideration was not expressed in the writing. *Pauly v. Murray*, 110 Calif. 13, 42 Pac. Rep. 313.

to the sureties, who signed it, and it was held they were bound.<sup>94</sup> A guaranty to "pay or cause to be paid the amount" awarded against one of the parties to an arbitration proceeding, executed concurrently with the agreement to submit to arbitration, is binding and valid.<sup>95</sup> Compliance by the guarantor with a request made by the guarantor that the guarantor proceed with the performance of a contract already entered into with the principal, has been held sufficient consideration for the guaranty.<sup>96</sup>

<sup>94</sup>In *Williams v. Perkins*, 21 Ark. 18, Compton, J., said: "If the debt or obligation of the principal debtor is already incurred previous to the undertaking of the surety, then there must be a new and distinct consideration to sustain the promise of the surety. But if the obligation of the principal debtor be founded upon a good consideration, and at the time it is incurred or before that time the promise of the surety is made and enters into the inducement for giving the credit, then the consideration for which the principal debt is created is considered as a valid consideration also for the undertaking of the surety. \* \* Although the signatures of the principal obligors were procured at one time and those of the sureties afterwards, nevertheless in contemplation of law their promises were contemporaneous and formed a part of one and the same general transaction, and the same consideration which supports the promise of the one also supports that of the other." *Wheeler v. Barr*, 7 Ind. App. 381, 34 N. E. Rep. 591.

<sup>95</sup>*Wood v. Tunnicliff*, 74 N. Y. 38.

<sup>96</sup>In *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234, appellee had contracted to sell certain carpeting to the Tivoli Amusement Co. and had refused to perform its con-

tract unless Hirsch, president, and Morgenroth, secretary of the Tivoli Company, guaranteed the account, which they thereupon did, whereupon the carpeting was furnished. In assumpsit on the guaranty appellant contended that the contract between the carpet company and the Tivoli Company having been closed before appellant signed or agreed to sign the guaranty, there was no consideration. In affirming judgment against the guarantors the court, Horton, J., answered the guarantors' argument thus (p. 237): "The contract between the Tivoli Company and appellee was a valid contract, binding upon both the parties thereto. Appellee positively refused to perform on its part unless payment was secured. It was then optional with the Tivoli company to recover damages, if any there were, for non-performance of contract. Instead of doing this the guaranty sued upon was furnished by the Tivoli Company and the goods were delivered by appellee. There is no contest as to the value of the goods thus delivered. \* \* We are of opinion that there was not such a want of consideration as to defeat the claim of appellee upon said guaranty. *Bishop v. Busse*, 69 Ill. 403; *Cooke v. Murphy*, 70 Ill. 96. \* \* Appellant and Morgenroth were

**§ 25. Agreement by creditor to forbear towards principal sufficient.**—An agreement on the part of the creditor to extend the time of payment to the principal for a definite time is a sufficient consideration for the contract of suretyship or guaranty, the one agreement being a consideration for the other, and the delay usually operating both as a benefit to the principal and a detriment to the creditor.<sup>1</sup> An agreement for forbearance for one year,<sup>2</sup> for a convenient time,<sup>3</sup> on an overdue note, for four years,<sup>4</sup> for a considerable time,<sup>5</sup> or for a reasonable time,<sup>6</sup> are any of them a sufficient consideration.

not outside parties having no interest in the matter. They were the principal officers of the Tivoli Company.”

<sup>1</sup> Fuller v. Scott, 8 Kan. 25; Underwood v. Hossack, 38 Ill. 208; Pulliam v. Withers, 8 Dana (Ky.) 98; Dahlman v. Hammel, 45 Wis. 466; Coffin v. Trustees, 92 Ind. 337; Lee v. Wisner, 38 Mich. 82.

<sup>2</sup> Sage v. Wilcox, 6 Conn. 81. In Hannay v. Moody, Tex. Civ. App., Dec., 1902, 71 S. W. Rep. 325, it was held that giving time to the principal by accepting his 90-day notes constituted a sufficient consideration to bind one who became surety on the notes. Citing, as bearing directly upon this point, Gook v. Pearson, 63 Me. 587; Thompson v. Gray, 63 Me. 228, at 230, and Bank v. Bridgers, 98 N. C. 67, 3 S. E. Rep. 826, 2 Am. St. Rep. 317, and distinguishing Simniang v. Farnsworth, Tex. Civ. App., no off'l report, 24 S. W. Rep. 541, where the surety signed a note after its delivery without other consideration than that which had already passed to the principal, and Baker v. Wahrmond, 5 Tex. Civ. App. 268, 23 S. W. Rep. 1023. Giving time to a guardian who is already in default is sufficient consideration to bind the sureties on a bond given by him to secure payment of the amount of

his defalcation. Union Trust Co. v. Zynda, Mich., Dec., 1901, 88 N. W. Rep. 407. Note 11 post.

<sup>3</sup> Sadler v. Hawkes, 1 Roll. Abr. 27, pl. 49; Tricket v. Mandlee, Sid. 45.

<sup>4</sup> Breed v. Hillhouse, 7 Conn. 523.

<sup>5</sup> Maples v. Sidney, Cro. Jac. 683.

<sup>6</sup> Johnson v. Whitchcott, 1 Roll. Abr. 24, pl. 33; Lonsdale v. Brown, 4 Wash. 148; Walker v. Sherman, 11 Metc. (Mass.) 170, 172; McCorney v. Stanley, 8 Cush. (Mass.) 85, 88; Hakes v. Hotchkiss, 23 Vt. 231; Calkins v. Chandler, 36 Mich. 320; Lonsdale v. Brown, 4 Wash. (C. C.) 148; Downing v. Funk, 5 Rawle (Pa.) 69; Watson v. Randall, 20 Wendel (N. Y.) 201; Sidwell v. Evans, Rawle's Pen. & W. 383; Insurance Co. v. Smith, 23 Hun (N. Y.) 535. In Citizens Savings Bank & Trust Co. v. Babbitt's Estate, 71 Vt. 182, 44 Atl. Rep. 71, a stranger to an overdue note endorsed upon it over his signature: "For value received I hereby guaranty payment of the within note and waive demand notice and protest on the same when due." The court held that the words "for value received" imported a consideration, but that evidence was admissible that the consideration was an agreement to extend the time of payment for a reasonable time.

An agreement on the part of the creditor for general indulgence toward the principal, without any definite time being specified, with proof of actual forbearance for a reasonable time, is sufficient.<sup>7</sup> An agreement for delay in consideration of further forbearance means forbearance for a convenient or reasonable time.<sup>8</sup> But in order that forbearance by the creditor towards the principal may be a sufficient consideration, there must be an agreement on the part of the creditor that he will forbear. Mere forbearance or omission on the part of the creditor to exercise his legal right without any agreement to that effect is not sufficient, because he may at any moment, and at his own pleasure, proceed. There must be promise for promise.<sup>9</sup> An agreement to withdraw, and the withdrawal of, a suit or other proceeding against a principal is also a sufficient consideration.<sup>10</sup> The court's forbearance to remove an executor who was in default has been held sufficient consideration for the execution of a bond, by order of court, indemnifying the sureties on his official bond against loss and damage by reason of their suretyship.<sup>11</sup>

<sup>7</sup> *Thomas v. Croft*, 2 Richardson Law (S. C.) 113; *Elting v. Vanderlyn*, 4 Johns. 237; *Oldershaw v. King*, 2 Hurl. & Nor. 520; *Rowlett v. Ewbank*, 1 Bush (Ky.) 477; *Wills v. Ross*, 77 Ind. 1; *Crears v. Hunter*, Law Rep. (19 Q. B. Div.) 341; *Davies v. Funston*, 45 Up. Can. (Q. B.) 369.

<sup>8</sup> *Caldwell v. Heitshur*, 9 Watts & Serg. 51; *Oldershaw v. King*, 2 Hurl. & Nor. 520.

<sup>9</sup> *Shupe v. Galbraith*, 32 Pa. St. 10; *Walker v. Sherman*, 11 Met. (Mass.) 170; *Mecorney v. Stanley*, 8 Cush. (Mass.) 85; *Breed v. Hillhouse*, 7 Conn. 523; *Crofts v. Beale*, 11 Com. B. 172; *Sage v. Wilcox*, 6 Conn. 81. It was held in some old cases which have not been generally followed in later times, that an agreement to forbear for an indefinite period (*Phillips v. Shackford*, Cro. Eliz. 455), or for a short (*Tolhurst v. Brickinden*, Cro. Jac. 250), or some (*Tricket v. Mandlee*,

*Sid.* 45), or a little time (1 Roll. Abr. 23), would not be a sufficient consideration. In *Greenway v. Wm. D. Orthwein Grain Co.*, 85 Fed. Rep. 536, 29 C. C. A. 330, it was held that the pledgee of a four-months' accommodation note held by him as collateral to a note running three months longer than the accommodation note, could sue on the collateral note at its maturity; the fact that the principal note did not mature at the same time was not evidence of an extension of the time of payment of the collateral note, and, if it were, such extension, without an agreement on sufficient consideration, constituted no defense.

<sup>10</sup> *Worcester Savings Bank v. Hill*, 113 Mass. 25; *Harris v. Venables*, Law Rep. 7 Exch. 235.

<sup>11</sup> *Buffington v. Bronson*, 61 Ohio St. 231, 56 N. E. Rep. 762. Note 2, *supra*.

**§ 26. Executed consideration to principal not sufficient—Damage to creditor sufficient.**—Where the consideration between the principal and creditor has passed and become executed before the contract of the surety or guarantor is made, and such contract was no part of the inducement to the creation of the original debt, such consideration is not sufficient to sustain such contract.<sup>12</sup> One person entered into a contract with another by which he was to receive such other's promissory note without surety and the note was made and received. Afterwards the payee requested the maker to get a surety, and the maker took the note and had it subscribed by a third person, and returned it to the payee. There was no new consideration, and it was held the surety was not bound.<sup>13</sup>

<sup>12</sup> Tomlinson v. Gell, 6 Ad. & Ell. 564; Yale v. Edgerton, 14 Minn. 194; Williams v. Marshall, 42 Barb. 524; Thomas v. Williams, 10 Barn. & Cres. 664; Pratt v. Hedden, 121 Mass. 116; Farnsworth v. Clark, 44 Barb. 601; Eastwood v. Kenyon, 11 Ad. & Ell. 438; Ludwick v. Watson, 3 Oreg. 256; Parker v. Bradley, 2 Hill 584; Hunt v. Bate, 3 Dyer 272(a); Stewart v. Hinkle, 1 Bond 506; Leonard v. Vredenburg, 8 Johns. 29; French v. French, 2 Man. & Gr. 644; McCreary v. Van Hook, 35 Tex. 631; Wood v. Benson, 2 Cr. & Jer. 94, 1 Roll. Abr. 27, pl. 49; Ashton v. Bayard, 71 Pa. St. 139; Payne v. Wilson, 7 Barn. & Cres. 423; Ellenwood v. Fults, 63 Barb. 321; Besshears v. Rowe, 46 Mo. 501; Lossee v. Williams, 6 Lans. 228; Harris v. Young, 40 Ga. 65; Sawyer v. Fernald, 59 Me. 500; Uhler v. Farmers' National Bank, 64 Pa. St. 406; Davis v. Banks, 45 Ga. 138; Badger v. Barnabee, 17 N. H. 120; Brown v. Brown, 47 Mo. 130; Ware v. Adams, 24 Me. 177; Clompton's Ex'rs v. Hall, 51 Miss. 482; Lewis v. Barry, 2 Colo. Dec. 325, 15 Colo. App. 461, 63 Pac. Rep. 121.

<sup>13</sup> Jackson v. Jackson, 7 Ala. 791,

Collier, C. J., said: "Any act in the nature of a benefit to the person who promises, or to any other person upon his request, or any act which is a trouble or detriment to him to whom the promise is made, is sufficient, and the amount of benefit or of trouble or detriment or its comparative value in relation to the promise is indifferent." See also Thorner v. Field, 1 Bulstr. 120; Hunt v. Bate, 3 Dyer 272(a); Deposit Bank v. Peak, Ky., Apr., 1901, 23 Ky. Law Rep'r 19, 62 S. W. Rep. 268. Compare Yearance v. Blake, N. J. Eq., no off'l report, 44 Atl. Rep. 858, in which case a woman selling land agreed to take second mortgage for part of the price and the mortgage having been executed but not delivered, she insisted on a bond conditioned for its payment. The bond was executed the day after the mortgage, and the papers were delivered together. Held, that the consideration was ample to hold the surety on the bond. In Crofut v. Aldrich, 54 Ill. App. 541 (motion to vacate judgment by confession), after the maker and payee of an overdue note had agreed that the maker would give a new note to

But where a bond was executed by the obligors and the obligee refused to receive it unless it was guarantied, and A thereupon guarantied it without any request from the obligors, and the obligee thereupon accepted the bond, it was held that the acceptance of the bond was a sufficient consideration for the guaranty.<sup>14</sup> A party sold a horse to another, being misled by false statements and representations of the purchaser, and took a note for the price. Discovering the fraud, the seller was about to rescind the contract and reclaim the horse. Upon being informed of these facts two days after the note was made, a surety put his name to the note and in consequence the property was not reclaimed. It was held that not reclaiming the horse was a good consideration for the agreement of the surety.<sup>15</sup> A guaranty of past and future advances made and to be made to a third person is good for the whole and the consideration sufficient.<sup>16</sup> But there must be an agreement on the part of the creditor to make the future advances, or he must actually make them, or there will be no consideration for the agreement to pay for the past advances, and it

take the old one's place, the attorney of payee persuaded appellant to endorse the new note as guarantor, representing that her signature was necessary to bar her dower in land by which the note was secured; held that, though such representation as to legal effect could not be relied on as a fraud avoiding her obligation, her guaranty was void for want of consideration. *Wipperman v. Hardy*, 17 Ind. App. 142, 46 N. E. Rep. 537; *Brant v. Barnett*, 10 Ind. App. 653, 38 N. E. Rep. 421; *Owens v. Tague*, 3 Ind. App. 245, 29 N. E. Rep. 784; *Bridges v. Blake*, 106 Ind. 332, 6 N. E. Rep. 833.

<sup>14</sup> *Gardner v. King*, 2 Ired. Law (N. C.) 297.

<sup>15</sup> *Harwood v. Kiersted*, 20 Ill. 367. So also where a creditor claimed that he had been defrauded in the sale of goods to the debtor, and that unless further security was given he would re-

claim them, and the debtor gives note with surety, and the creditor relinquishes his remedy, held the consideration was sufficient to bind the surety. *Jaffray v. Brown*, 74 N. Y. 393.

<sup>16</sup> *Hargroves v. Cook*, 15 Ga. 321; *White v. Woodward*, 5 Com. B. 810; *Chapman v. Sutton*, 2 Com. B. 634; *Russell v. Moseley*, 3 Bro. & Bing. 211. To the same effect with reference to attorneys' fees, see *Roberts v. Griswold*, 35 Vt. 496; also with reference to rent, see *Vinal v. Richardson*, 13 Allen 521. To same effect as above, see *Boyd v. Moyle*, 2 Man. Gr. & S. 644. Contra, *Wood v. Benson*, 2 Crompt. & Jer. 94. That a guaranty of the payment of the hotel expenses of third persons to the extent of a stated sum is supported by a sufficient consideration as to the whole amount named, even though part of the expenses are already incurred, see *Clune v. Ford & Eagan*, 55 Hun 479.



will be void.<sup>17</sup> It is not necessary that the consideration should consist of a benefit to the principal or surety. Any trouble, detriment or inconvenience to the creditor is sufficient.<sup>18</sup> When the consideration moves directly between the surety or guarantor and the creditor, the same rules apply which prevail with reference to the consideration for any other contract.<sup>19</sup> An injunction already issued before the injunction bond was executed has been held not sufficient consideration to hold the obligors on the bond.<sup>20</sup>

**§ 27. How far partner can bind firm as surety or guarantor.—** One partner cannot usually bind the firm as sureties or guarantors for another.<sup>21</sup> The reason is that the business of a partnership is not commonly that of making contracts as sure-

<sup>17</sup> *Westhead v. Sproson*, 6 Hurl. & Nor. 728; *Boyd v. Moyle*, 2 Com. B. 644. But see *Morrell v. Cowan*, Law Rep. (7 Ch. Div.) 151, reversing same case, Law Rep., 6 Eq. Div. 166.

<sup>18</sup> *Wells v. Mann*, 45 N. Y. 327; *Colgin v. Henley*, 6 Leigh (Va.), 35; *Morley v. Boothly*, 10 Moore, 395; *Pillans v. Van Mierop*, 3 Burr. 1663; *Hirsch v. Chicago Carpet Co.*, 82 Ill. App. 234, cited in note to § 24, supra.

<sup>19</sup> *Leonard v. Vredenburg*, 8 Johns. 29; *Smith v. Finch*, 2 Seam. (Ill.) 321.

<sup>20</sup> *Alaska Improvement Co. v. Hirsch*, 119 Calif. 249, 47 Pac. Rep. 124, 51 Pac. Rep. 340, following *Carter v. Mulrein*, 82 Calif. 167, 16 Am. St. Rep. 98; 22 Pac. Rep. 1086.

<sup>21</sup> *McQuewans v. Hamlin*, 35 Pa. St. 517; *Sutton v. Irwine*, 12 Serg. & Rawle, 13; *Rolston v. Chick*, 1 Stew. (Ala.) 526; *Sweetser v. French*, 2 Cush. 309; *Mayberry v. Bainton*, 2 Harrington (Del.), 24; *Duncan v. Lowndes*, 3 Camp. 478; *Crawford v. Stirling*, 4 Esp. 207; *Osborne v. Stone*, 30 Minn. 25; *Osborne v. Thompson*, 35 Minn. 229. Where a partnership name is used by a member of the firm as

surety, the presumption is that such use of the firm name is outside the firm business. *Fore et al. v. Hitson et al.*, 70 Tex. 517. An officer of a corporation cannot bind it as surety or guarantor. *Culver v. Reno Real Estate Co.*, 91 Pa. St. 367. Where a partnership name appears on a note as indorser and is known by the payee to have been signed by one partner, and as a mere surety, the burden of proving ratification by the other members of the firm is on the payee. *Sibley v. American Exchange Bank*, 97 Ga. 126, 25 S. E. Rep. 470. Compare *Fuller v. Scott*, 8 Kans. 25. In *Lewin v. Barry*, 2 Colo. Dec. 325; 15 Colo. App. 461, 63 Pac. Rep. 121, a landlord suing her tenant and a partnership whose name was signed to a guaranty of a saloon license, testified that the lease was brought to her with the guaranty signed with the firm name and that she went to Lewin, one of the firm who signed it, and was assured by him that the guaranty was all right, but did not consult Levy, his partner. There was no evidence as to when the guaranty was signed and no evidence as to the nature of the

ties or guarantors; and the partner who makes such a contract acts outside the scope of his implied authority as agent of the firm. One member of a firm of attorneys has no right, in consideration of the discharge of their client from custody, to bind the firm to pay the debt of such client and the costs of suit.<sup>22</sup> So where certain partners were railroad contractors, and sublet a portion of their work to A, and it was necessary for A to have brick to carry on the work, and he could not get them without coal, and one of the partners, without the knowledge of the others, gave a guaranty in the firm name for coal bought by A for that purpose, it was held the guaranty did not bind the partnership.<sup>23</sup> Where, however, the partner who attempts to bind the firm has special authority for that purpose from the other members, he may bind the firm the same as any other agent having authority. So where the making of such a contract is within the usual scope of the business of the firm, it may be bound by the act of one partner in that regard. When the contract is made by a partner without authority, if the other members of the firm afterwards adopt it and act on it, the firm will be bound.<sup>24</sup> A firm sold a steamboat to A, and he gave a note for the purchase money to B, who was a creditor of the firm, in payment of the firm debt, and one of the firm signed the name of the firm to the note as sureties. It was held that the firm was bound, because it was in fact their own debt, and not the debt of another, that the

partnership business. Held, that a judgment against both partners could not stand. In *Milwaukee Harvester Co. v. Newell*, 65 Ill. App. 612, it was held that a partner had no right to guarantee the payment of certain notes, after the dissolution of the firm, in the firm's name.

<sup>22</sup> *Hasleham v. Young*, 5 Ad. & Ell. (N. S.) 833; *Id.*, Dav. & Mer. 700. In *Mauldin v. Branch Bank at Mobile*, 2 Ala. 502, the court said, if an unauthorized indorsement by one member of a firm was on commercial paper, an innocent indorsee might recover against the firm. In *Fuller v.*

*Scott*, 8 Kan. 25, when it was proved that a firm indorsed a note in blank in the firm name, the court said: "It would then be presumed that such indorsement was made in the firm business." Compare *Sibley v. American Exchange Bank*, 97 Ga. 126, 25 S. E. Rep. 470.

<sup>23</sup> *Brettel v. Williams*, 4 Wels., Hurl. & G. 623.

<sup>24</sup> *Crawford v. Stirling*, 5 Esp. 207; *Ex parte Gardom*, 15 Vesey, 286. See, also, on same subject, *Sandilands v. Marsh*, 2 Barn. & Ald. 673; *Hope v. Cust*, cited in *Shirreff v. Wilks*, 1 East, 53.



note paid; and the substance, and not the form of the transaction, should be looked to.<sup>25</sup> One firm may become the surety of another firm, the same as one individual may become the surety of another.<sup>26</sup> Where there is a guaranty of a note by a firm, the firm may be considered as a single person, and the members alone sued without joining another guarantor.<sup>27</sup>

**§ 28. Same continued.**—A partner cannot, by virtue of his partnership relation, sign the firm name as surety or guarantor of commercial paper not given in the course of the firm business.<sup>28</sup> And a note executed as the individual note of one partner, with a guaranty of the firm indorsed thereon, is *prima facie* an individual debt, and the burden of proof is upon the holder to show that it is in fact a firm transaction.<sup>29</sup> A partnership cannot become surety on a writ of error bond unless it appear therefrom the names of the members composing the firm as well as the authority for their becoming such security.<sup>30</sup> Where a bond containing the names of the members of a partnership as sureties thereto is signed by one partner, with the expectation, but not condition, that the other partners will likewise sign the same, the partner so signing will be individually liable thereon, but not the firm.<sup>31</sup> Where a partner signed the firm name to a guaranty that an employee of the firm would pay rent for his home so “long as said ‘H’ remains in our employ,” it was held that the partner alone and not the firm was bound.<sup>32</sup> Where, after the failure of a firm, one partner guaranties the payment of a firm obligation, it is held that such guaranty is without any legal effect, and does not even entitle the holder to prove the same against the separate estate of the guarantor upon a subsequent adjudication in bankruptcy.<sup>33</sup> A guaranty signed in a firm

<sup>25</sup> *Langan v. Hewett*, 3 Smedes & Marsh. 122.

<sup>26</sup> *Allen v. Morgan*, 5 Humph. (Tenn.) 624. And it was held that one corporation may guaranty the bonds of another corporation. *Phila. & R. R. Co. v. Knight et al.*, 124 Pa. St. 58; *Harrison v. Union Pacific R’y Co.* (Cir. Ct. E. D. Mo.), 13 Fed. Rep. 522.

<sup>27</sup> *Keastner v. First Nat’l Bank*, 170 Ill. 322, 326.

<sup>28</sup> *Marsh v. Thompson National Bank*, 2 Bradwell (Ill. App.) 217.

<sup>29</sup> *Davis v. Blackwell*, 5 Bradwell (Ill. App.), 32.

<sup>30</sup> *Buchard v. Cavins*, 77 Tex. 365, following *Donnelly v. Elser*, 69 Tex. 287.

<sup>31</sup> *Avery v. Rowell*, 59 Wis. 82.

<sup>32</sup> *In re Blumer & Co.* (Dist. Ct. E. D. Pa.), 13 Fed. Rep. 622.

<sup>33</sup> *Ex parte Harding*, Law Rep. (12 Ch. Div.) 557.

name and also by each partner is held to be the contract of the firm and of each partner separately. An undertaking in attachment signed by the principal and a partnership as surety has been held *prima facie* good.<sup>34</sup>

**§ 29. How far agent can bind principal as surety or guarantor.**—A party authorized to sign another's name as surety must pursue his authority strictly in order to bind the principal.<sup>35</sup> Thus where a party was authorized to sign the name of A as surety to a note and he signed the name of A to the note as a principal, it was held A was not bound.<sup>36</sup> One who is acting as agent of another, and as such, writing letters in his name, collecting money and giving receipts for the same in his name, indorsing bank checks, etc., has no power, without special authority, to bind his principal by the guaranty of the debt of a third person.<sup>37</sup> So an agent having a general power of attorney to transact business for his principal and sign his name to bonds, notes, etc., in connection with the business of the principal, cannot by virtue of such authority bind his principal as surety on a sequestration bond in a matter not connected with the business of the principal.<sup>38</sup> It has been held that an agent may sign his principal's name to an attachment bond without having authority under seal to do so, and that the principal may, by subsequently ratifying the agent's act, make the bond good *ab initio*.<sup>39</sup>

**§ 30. Where act of principal is prohibited by law, or is fraudulent, surety not bound.**—When the act of the principal for which the surety undertakes to become responsible is pro-

<sup>34</sup> *Tessier v. Crowley*, 17 Neb. 207.

<sup>35</sup> In *Brown v. Hess & Co.*, 187 Ill. 283, to plaintiff's claim for tobacco sold, defendants, by way of set-off, introduced in evidence a written guaranty signed "J. E. Avery, Gen'l Agt. S. F. Hess & Co., Rochester, N. Y.," guaranteeing defendants against the loss of a rebate of 30 cents per thousand which they were receiving from the American Tobacco Co. in consideration of handling its goods only. It was held that this guaranty by plaintiff's agent did not

bind plaintiff in the absence of evidence showing that he had authority to make such an agreement and that the agent alone was bound by it.

<sup>36</sup> *Bryan v. Berry*, 6 Cal. 394. And the doctrine of estoppel does not prohibit such want of authority being shown. *Farmington Savings Bank v. Buzzell*, 61 N. H. 612.

<sup>37</sup> *Stevenson v. Hoy*, 43 Pa. St. 191.

<sup>38</sup> *Gates v. Bell*, 3 La. Ann. 62.

<sup>39</sup> *Pollock v. Murray*, 38 Fla. 105, 20 So. Rep. 815. Note 9 to § 1.

hibited by law, the surety will not be bound. Thus a statute provided that express companies should not do business in the state without recording in every county in which they did business a statement, showing the stockholders' names, residences, etc. An express company, without complying with the law, appointed an agent who gave bond with surety for the faithful performance of his duties. The agent collected money for packages sent and failed to pay it over, and it was held the surety was not bound. The bond being given for the performance of an illegal act, viz., sending packages by express, was void.<sup>40</sup> The same thing was held in a case where a statute prescribed the terms on which a foreign insurance company could do business in a state, appoint agents, etc. The court said: "It has often been held that an action founded on a transaction prohibited by statute cannot be maintained, although a penalty be imposed for violating the law, and it be not expressly declared that the contract be void."<sup>41</sup> So where a statute prohibited the making of a lease to a slave, the surety on a lease made to a slave was held not bound.<sup>42</sup> The court said: "The defense set up, that the contract under consideration is null and void because it contravenes public policy, is not a personal exception. If slaves were merely incapacitated from making a contract of lease, the case might be different; but there is no affinity between a prohibitory law, laying down rules of public policy, and one merely incapacitating a party for his own protection or interest." The distinction is here drawn between a prohibition to the principal on the grounds of public policy, and a mere personal exemption to the principal. As will be hereafter seen, a mere personal exemption to the principal, as infancy or coverture, will furnish no defense to the surety. On the same principal the surety

<sup>40</sup> *Daniels v. Barney*, 22 Ind. 207. And where the legislature failed to direct the manner in which a constable might be chosen, and as a result there could not be a regularly commissioned constable in the state, it was held that the sureties on the bond of a constable appointed by a trial justice were not liable. *Tinsley v. Kirby*, 17 S. C. 1. See, also, § 20, *supra*, and

notes. *McCanna & Fraser Co. v. Citizens' Trust & Surety Co.*, 76 Fed. Rep. 420, 24 C. C. A. 11, 39 U. S. App. 332; *Higgins v. Quigley*, 23 Ind. App. 348, 54 N. E. Rep. 136. See also § 4, § 20, and notes,

<sup>41</sup> *Thorne v. Travelers' Ins. Co.*, 80 Pa. St. 15.

<sup>42</sup> *Levy v. Wise*, 15 La. Ann. 38.

a note may show as a defense that it was given by the principal to pay a gambling debt.<sup>43</sup> So where the transaction which induces the giving of a note by the principal is fraudulent, the surety is not bound. Thus, A, being a trader in distressed circumstances, was indebted to B for money lent on goods, and B promised to induce A's creditors to agree to a composition on condition that A would give him a note for the money lent, signed by A and a surety; and it was agreed between A and B that the matter should be kept secret. The note was given, signed by a surety as agreed; B endeavored to effect a composition and failed. Held, the surety was not bound, the fraud was that B, by undertaking to procure the composition, obtained a secret preference, and the note being the creation of B, could not be rendered valid by the subsequent fact that B failed to effect a composition.<sup>44</sup>

§ 51. **Voluntary bond not required by law, or different from bond required, valid.**—The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily, for a valid consideration, and if it is not repugnant to the letter or policy of the law; and the surety on such bond is bound thereby.<sup>45</sup> The voluntary bond of a state

*State v. S-*, 10 La. (3

*State v. Girling*, 1 Brod. & B. 4 Moore, 78.

*State v. Buckhannon*, 2 J.

*State v. 416; Hoboken v.*

*Vroom (N. J.)*, 73;

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*State v. 14*, the prin-

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them stipulated wages for their services in a "Wild West Show" and, without being required by law, executed and delivered his bond with sureties conditioned to pay such wages and traveling expenses and return the Indians to their reservation. It was held that inasmuch as such an arrangement was not forbidden by any statute and was for the benefit of the Indians and inasmuch as the United States exercised a guardianship over them it had the right to enforce the bond as a common law obligation and recover in its own name the amount of wages due and the cost of transporting the Indians from a distant state where they were left back to their reservation and that it was no concern of the defendants

treasurer which is not demandable by law,<sup>46</sup> of a county treasurer where there is no law requiring a bond to be given,<sup>47</sup> of a deputy collector of customs where there is no law prescribing a bond to be given,<sup>48</sup> of a plaintiff in an attachment suit when no bond is required by law,<sup>49</sup> are all valid and bind the sureties who sign them. But where a district judge, having no authority to do so, requires a father or natural tutor of a child to give bond for the faithful performance of his trust, and such a bond is given, the surety thereon is not liable. The maxim, that as a man consents to bind himself so shall he be bound, is not applicable to such a case, for the bond is not purely voluntary, but is required by the judge from the parties as the condition for the exercise of a function.<sup>50</sup> Where a

how the money recovered was divided. A town took a bond of indemnity against any expense it might be put to by the support of one who was likely to become a pauper. Held, that it was good as a voluntary bond though no statute provided for or required any such bond. *Inhabitants of Palmyra v. Nichols*, 91 Me. 17, 39 Atl. Rep. 338. An indemnity bond given to the sheriff by an attaching creditor, when the sheriff had no right to exact it without first summoning a jury to try a claim to the property attached, was held valid in *Matheson v. F. W. Johnson Co.*, S. D., Dec., 1902, 92 N. W. Rep. 1083. In *People v. Eckman*, 63 Hun (N. Y.), 209, 18 N. Y. Supp. 654, it was held that the commissioners of excise, having discretionary power to issue licenses to sell liquor, may, without express statutory authority require of the licensee a bond conditioned for his observance of the law, and that when such a bond is given it is a valid common law obligation. An appeal bond not following statutory form is frequently good as a common law obligation. *Coughron v. Sundback*,

13 S. D. 115, 82 N. W. Rep. 507, 49 Am. St. Rep. 886; *Coughran v. Hollis*, S. D., Feb., 1902, 89 N. W. Rep. 647; *Miller v. Vaughn*, 78 Ala. 323; *National Furniture Co. v. Edwards*, 105 Ga. 240, 31 S. E. Rep. 161.

<sup>46</sup> *Sooy ada. The State*, 38 N. J. Law, 324.

<sup>47</sup> *Supervisors of St. Joseph v. Coffenbury*, 1 Manning (Mich.), 355. To the same effect see *Missoula County v. Edwards*, 3 Mont. 60; *Comm'rs Jefferson County v. Lineberger et al.*, 3 Mont. 231.

<sup>48</sup> *Dignan v. Shields*, 51 Tex. 322.

<sup>49</sup> *Lartigue v. Baldwin*, 5 Martin, O. S. (La.) 103.

<sup>50</sup> *Ancion v. Guillot*, 10 La. Ann. 124. So, a bond, unauthorized by law, taken by a sheriff from a person in his custody, is void, and the surety therein is not liable. *Shuttleworth v. Levi*, 13 Bush (Ky.), 195. This question arises when as frequently happens, an executor is given duties to perform which make him in effect a trustee under the will. The Probate Court, in many states, has no jurisdiction over him as trustee, but nevertheless sometimes requires him to furnish a bond conditioned

on a note may show as a defense that it was given by the principal to pay a gambling debt.<sup>43</sup> So where the transaction which induces the giving of a note by the principal is fraudulent, the surety is not bound. Thus, A, being a trader in embarrassed circumstances, was indebted to B for money lent and goods, and B promised to induce A's creditors to agree to a composition on condition that A would give him a note for the money lent, signed by A and a surety; and it was agreed between A and B that the matter should be kept secret. The note was given, signed by a surety as agreed; B endeavored to effect a composition and failed. Held, the surety was not liable. The fraud was that B, by undertaking to procure the composition, obtained a secret preference, and the note being void in its creation, could not be rendered valid by the subsequent fact that B failed to effect a composition.<sup>44</sup>

**§ 31. Voluntary bond not required by law, or different from bond required, valid.**—The general rule is that a bond, whether required by statute or not, is good at common law if entered into voluntarily, for a valid consideration, and if it is not repugnant to the letter or policy of the law; and the surety on such bond is bound thereby.<sup>45</sup> The voluntary bond of a state

<sup>43</sup> *Leckie v. S—*, 10 La. (5 Curry), 412.

<sup>44</sup> *Wells v. Girling*, 1 Brod. & Bing. 447; *Id.* 4 Moore, 78.

<sup>45</sup> *Thompson v. Buckhannon*, 2 J. Marsh. (Ky.) 416; *Hoboken v. Harrison*, 1 Vroom (N. J.), 73; *Cotton's Guardian v. Wolf*, 14 Bush (Ky.), 238. But it is held that in case of official bonds this principle is applicable only where the office "was authorized by law, and no obstacle existed in the way of its being filled." *Tinsley v. Kirby*, 17 S. C. 1. See contra to the rule as stated in the text, *Williams v. Skipwith*, 34 Ark. 529. In *United States v. Pumphrey*, 11 App. Cas. (D. C.) 44, the principal defendant having obtained permission of the authorities took a number of Indians from their reservation upon promising to pay

them stipulated wages for their services in a "Wild West Show" and, without being required by law, executed and delivered his bond with sureties conditioned to pay such wages and traveling expenses and return the Indians to their reservation. It was held that inasmuch as such an arrangement was not forbidden by any statute and was for the benefit of the Indians and inasmuch as the United States exercised a guardianship over them it had the right to enforce the bond as a common law obligation and recover in its own name the amount of wages due and the cost of transporting the Indians from a distant state where they were left back to their reservation and that it was no concern of the defendants

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<sup>50</sup> *Ancion v. Guillot*, 10 La. Ann. 124. So, a bond, unauthorized by law, taken by a sheriff from a person in his custody, is void, and the surety therein is not liable. *Shuttleworth v. Levi*, 13 Bush (Ky.), 195. This question arises when as frequently happens, an executor is given duties to perform which make him in effect a trustee under the will. The Probate Court, in many states, has no jurisdiction over him as trustee, but nevertheless sometimes requires him to furnish a bond conditioned



bond is required by law to be given, the voluntary bond of an executor or administrator to the ordinary, which varies from

for the faithful performance of his duties as trustee. Is such a bond good as a common law obligation? In *Conant v. Newton*, 126 Mass. 105 (1879), a probate judge made a verbal order appointing one Sanderson trustee of an estate and requiring him to file a bond, whereupon defendants executed and filed their bond reciting that Sanderson had been "duly appointed trustee of the estate \* \* " and conditioned for the faithful performance of his trust. The order was absolutely void. The Probate Court had no jurisdiction to appoint a trustee under the circumstances. It was held that the bond was a nullity. Morton, J., said that the rule that a defective statutory bond when entered into for a good consideration may be valid as a common law obligation, "cannot be extended to cases in which, to hold the parties liable as upon a bond at common law would be to charge them with liabilities and obligations greater than or different from those which they announced in the instrument executed by them. In the case at bar," said the court, "the bond was given with the belief and understanding that the Probate Court had duly appointed Sanderson trustee of the estate of Mary Ward, that it had jurisdiction over him, that it had the right to require him to account at any time, and to exercise over him the supervision and control which the law gives to the Probate Courts in case of the trustees duly appointed. The condition is, that Sanderson shall make a true inventory \* \* and shall at the expiration of his trust account for

and pay over the estate to the persons entitled thereto. It is manifest that all these provisions look to a due administration of the estate under the direction of the Probate Court according to law. But as the Probate Court had no jurisdiction whatever in the matter, the judge had no authority to require Sanderson to enter an account or to remove him for unfaithfulness, \* \* or generally to exercise over him any control or direction, and it was legally impossible to perform the condition of the bond according to its true spirit and meaning. In order to hold the defendants liable as on a bond at common law, we must treat this bond as if its condition was solely that Sanderson should faithfully manage and pay over the estate in his hands to the person entitled to it. But this was not the obligation which the defendants intended or consented to assume. They intended to become liable as sureties for one who was under the jurisdiction of the Probate Court and who, in administering the estate, must conform to the rules and practice of that court. To hold them bound as upon a voluntary contract to be responsible for a trustee not subject to the jurisdiction of the Probate Court would be to change the character of their contract and to increase their liability." In this case, the point does not seem to have been made or considered that the sureties had notice of the Probate Court's lack of jurisdiction and of the fact that the verbal order of the judge was a nullity. Mr. Lemuel M. Ackley, editor of this edition, suggests that the bond



the form prescribed by the statute,<sup>51</sup> of a cashier containing nothing contrary to law but varying from the statutory form,<sup>52</sup> of a plaintiff in replevin, in which the condition does not conform to the statute,<sup>53</sup> are all valid and binding on the sureties. Where a statute provided that the bond of a prisoner given for the liberty of the jail yard should be approved by two justices of the peace, and a bond was given but not approved by the justices, the sureties were held liable. The statutory requirement that the bond should be approved by two justices was intended to prevent oppression by the creditor in refusing sufficient sureties, and the creditor having accepted the bond, the intention of the statute was complied with.<sup>54</sup> A statute required that a bank cashier should give a bond conditioned for the faithful performance of his duties. The cashier

in question would have been valid if it had contained a recital implying doubt of the court's jurisdiction over the trustee and of the court's power to require a bond covering his acts as trustee. The presumption that the sureties relied upon the court's authority and jurisdiction would then be repelled. The reasoning that makes a bail bond taken without statutory or common law authority void—it is well stated by Bunn, J., in *U. S. v. Keiver*, 56 Fed. Rep. 422—would seem not to apply to a bond given to a Probate Court by a trustee under a will expressly as a voluntary obligation. See *Wanless v. West Chicago St. R. R. Co.*, 77 Ill. App. 120, note 57 post, note 78 to § 34, note 66 to § 32. That an executor's sureties are not liable for his defaults as trustee, see *People v. Huffman*, 182 Ill. 390, 55 N. E. Rep. 981; *People v. Petrie*, 191 Ill. 497, 61 N. E. Rep. 499.

<sup>51</sup> *Ordinary v. Cooley*, 1 Vroom, N. J. 179. In *Huston v. People*, 12 Colo. App. 271, 55 Pac. Rep. 262, it was held that when a justice of the peace has made an order of commitment to jail in de-

fault of bail, his jurisdiction then ceases and he has no right thereafter to accept bail or authorize its acceptance, even in place of bail that has already been accepted, and any recognizance so given is void both as a statutory bond and as a common law obligation. Citing *Rupert v. People*, 20 Colo. 424, 38 Pac. Rep. 702. *United States v. Keiver* (C. C. Wis.), 56 Fed. Rep. 422. Compare *Moulding v. Wilhartz*, 169 Ill. 422; *Deposit Bank v. Thomason*, Ky., Feb., 1902, no official report, 66 S. W. Rep. 604, 23 Ky. Law Rep'r 1957.

<sup>52</sup> *Grocers' Bank v. Kingman*, 16 Gray, 473.

<sup>53</sup> *Morse v. Hodson*, 5 Mass. 314. See, also, *Carlon v. Dixon*, 12 Oreg. 144, where it was held the sureties on a replevin bond could not escape liability because the affidavit upon which the writ was founded was signed by plaintiff instead of the justice, as required by statute.

<sup>54</sup> *Bartlett v. Willis*, 3 Mass. 86; *Boone Co. v. Jones et al.*, 54 Iowa, 699. And see, also, *State v. Creusbauer et al.*, 68 Mo. 254; *Irwin v. Crook*, 17 Colo. 16.

gave a bond which provided for past as well as future delinquencies. Held, the bond was not void because it contained more than provided by statute. Being a voluntary bond and for a lawful purpose, it was good at common law.<sup>55</sup> A statute provided that in all cases where an execution should issue illegally, if affidavit of the fact was filed and a bond given, the execution should be suspended until the matter was determined, but the statute did not prescribe what the condition of the bond should be. An execution was issued to which no seal of the court was attached. An affidavit of its illegality was filed, and a bond given, the condition of which was: "Now if it shall appear that the said writ has not been properly issued in this, that there is no seal to said writ, then the above obligation to be void." The sureties were not liable by the terms of the bond, but the court held them for the amount of the execution suspended, on the ground that as the statute did not prescribe the condition of the bond, its condition must be found in the object of the statute; that it was undoubtedly the intention of the sureties to become bound according to the liabilities imposed by the statute; and that as the object intended by them had been accomplished, they were liable.<sup>56</sup> This case is of very questionable character, running counter, as it does, to the current of authority, which is, that a surety is not bound beyond the strict terms of his engagement. If it can be sustained at all, it can only be upon its own peculiar circumstances. It has been held that the terms of the statute requiring an official bond cannot be read into a form of bond differing from the form prescribed by the statute; such a bond must be construed, according to its terms, as a common law obligation.<sup>57</sup> In construing a voluntary common-law bond the intention of the statute becomes wholly immaterial, and the liability of the surety will not be extended by implication beyond the precise terms of his undertaking, which is to be

<sup>55</sup> *Franklin Bank v. Cooper*, 36 Me. 179. In *Baker v. Morrison*, 4 La. Ann. 372, a sequestration bond provided that the defendant should not send the property out of the jurisdiction of the court, etc., and should satisfy such judgment as should be rendered by the court. The last provision as to the payment of the judgment was not re-

quired by law, but was inserted by the sheriff. It was held not binding on the surety. The bond, under the circumstances, could not be said to be a voluntary one.

<sup>56</sup> *Mitchell v. Duncan*, 7 Fla. 13.

<sup>57</sup> *Mayor of Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. Rep. 754. See, also, notes to Sec. 15, *supra*. Sometimes greater liability is im-

strictly construed.<sup>58</sup> A bond voluntarily given by a principal and surety to secure the payment of a judgment in an issue then pending before a trial justice under an agricultural lien is not illegal and void, although there was no statute authorizing such bond.<sup>59</sup> An appeal bond given by an executor, though not required, is binding on the sureties thereon if the judgment appealed from be affirmed.<sup>60</sup>

**§ 32. Bond valid though wrong obligee named therein or no obligee.**—A bond may be good as a common law obligation, though no person be named therein as obligee. The naming of an obligee is the merest formality possible, so that if the instrument failed to name one, the substance of the undertaking would remain.<sup>61</sup> An official bond ran to “E. J. Reed, mayor of the city of Orlando, Ind., and his successors in office.” Held,

posed on the obligors in a common law bond than if they had followed the statutory form. In *Wanless v. West Chicago St. R. R. Co.*, 77 Ill. App. 120, complainant upon obtaining an injunction gave an injunction bond departing from the form prescribed by the statute and providing that if the injunction be dissolved, complainant would pay defendants “all damages, which may be sustained by the said defendants, by reason of the wrongful issuing of such injunction.” Held that, even though the statutory form and the form prescribed by the trial court might have limited the obligees in the bond to recovery of 10 per cent of the amount of the judgment enjoined, they were entitled to recover, under the bond filed, the full amount of damages proven. The court, Windes, J., said: “The bond is a voluntary bond, given on a good consideration—to-wit, the issuing of the injunction—and is binding on defendant in error as such. Had it confined itself to giving the bond required by the statute, and as ordered by the court, a more difficult question would arise.”

<sup>58</sup> *Abrahams v. Jones* 20 Bradwell (Ill. App.), 83.

<sup>59</sup> *Cavender v. Ward*, 28 S. C. 470.

<sup>60</sup> *Schmucker v. Steidemann*, 8 Mo. App. 302.

<sup>61</sup> *Cooley, J.*, in *Bay County v. Brock*, 44 Mich. 45, 6 N. W. Rep. 101, cited and followed in *State v. Wood*, 51 Ark. 205, 10 S. W. Rep. 624, and in *Carnegie, Phipps & Co. v. Hulbert*, 70 Fed. Rep. 209, 16 C. C. A. 498, Caldwell, J. Contra, in *Crocker v. Fales*, 13 Mass. 260, the clerk of court had collected fees belonging to the crier. The bond of the clerk ran to the county treasurer and was conditioned for the faithful execution of his trust. Held, that the crier could not maintain an action on the bond. The court, Parker, C. J., said that the statute made a disposition of the fund recovered that was wholly inconsistent with the supposition that an individual has an interest in the bond, and that a wholly different principle applied to the bond of the sheriff which was made to the commonwealth.

that it was valid as a common law obligation, and that suit might be brought in the name of the present mayor for the use of the city.<sup>62</sup> A probate trustee's bond was held good, though it named only a part of the beneficiaries.<sup>63</sup> An appeal bond ran to the clerk of court instead of to appellee. Held good, nevertheless, as a common law bond.<sup>64</sup> So, also, a constable's bond running to the city treasurer instead of the city, as the statute required.<sup>65</sup> Further analogous cases are cited in a note.<sup>66</sup> In an official bond of a sheriff or county treasurer,

<sup>62</sup> *City of Orlando v. Gooding*, 34 Fla. 244, 15 So. Rep. 770. In *Scott v. Rogers*, 56 Ill. App. 572, held that Milward H. Rogers could recover on a bond made out to him as obligee under the name of Melville H. Rogers.

<sup>63</sup> In *McIntyre v. Linehan*, 178 Mass. 263, 59 N. E. Rep. 767, the Probate Court having ordered a trustee under a will to furnish a new bond of \$50,000, the trustee filed a bond in the penal sum of \$40,000 which was not presented to or approved by the probate judge and omitted to name part of the beneficiaries. No other bond was taken and there was evidence that the one filed was satisfactory to some of the parties in interest. Held, that the bond was valid, and that the sureties were bound for the trustee's default.

<sup>64</sup> *Babcock v. Carter*, 117 Ala. 575, 23 So. Rep. 487.

<sup>65</sup> *Farr v. Rouillard*, 172 Mass. 303, 52 N. E. Rep. 443.

<sup>66</sup> In *Stephenson v. Monmouth Mining & Mfg. Co.*, 84 Fed. Rep. 114, 28 C. C. A. 292, a board of aldermen took a bond from a sewer contractor running to the city of Menominee conditioned for the payment for labor and materials furnished in the work. The Michigan statute required such bond to run to the people of the state of Michigan and provided that any

person might maintain an action thereunder in the name of the people for his use. There was no statute authorizing any such bond to be taken running to the city. In an action on the case against the aldermen brought by a material man to recover damages on account of their failure to take a bond in statutory form, it was held that the bond taken by them was good as a common law obligation though by reason of being made to the wrong obligee it was invalid as a statutory bond, and that the city, by the act of taking such a bond, had given its implied consent to any beneficiary included in its provisions to bring suit on the bond in the name of the city for his use and that no express consent was necessary. The plaintiff having made no attempt to sue on the bond, it was held that it could not recover and a judgment for \$6,676.59 against the aldermen was therefore reversed. Citing and following *Board of Education v. Grant*, 107 Mich. 151, 64 N. W. Rep. 1050, (1895), in which case the board of education of Detroit took a like bond from a contractor, making it payable to the board instead of to the people and it was held that an individual material man might maintain an action thereunder against the sureties in the name of

voluntarily given, the liability of the sureties thereon is in no wise affected by the fact that the bond is erroneously executed to the state instead of the proper county, or to the territory

the board for his use. In *Governor v. Allen*, 8 Humph. (27 Tenn.), 176, a trustee of schools obtained moneys belonging to the school fund upon giving a bond running to "the governor in and over the state of Tennessee" without stating his name. It was held that suit might be brought on it by the county of Montgomery for failure to account for the fund "merely in the name of the governor of the state" though the suit was in fact begun in the name of "Aaron V. Brown, governor and successor of James C. Jones." The court said that if the bond had run to an individual by name, designating him governor, the suit would have to be brought not in the name of his successor but in his name if living and in the name of his personal representative if dead. It was held that the governor was a corporation sole and that, drawn as it was, the bond must be considered as running to the corporation. The fact that it ran to the governor instead of to the "superintendent of public instruction and his successors in office," as the statute required, made it invalid as a statutory bond but it remained good as a common law bond. Citing *United States v. Tingey*, 5 Peters 114, where it was held (Story, J.) that the bond of a purser in the navy, not required by statute, running to the United States was valid, and that the United States might maintain an action for its breach. In *Van Hook v. Barnett*, 4 Dev. (15 N. C.), 268, an administrator's bond which the statute required

should run to the governor and his successors in office, ran to "Robert Van Hook, chairman, and other justices of the county of Person." Held, that the words other justices, etc., should be rejected as senseless and unmeaning and that the bond was good as a common law obligation, though the principal was in fact one of the justices of the county named. In *Justices of Christian v. Smith*, 2 J. J. Marsh (25 Ky.), 472, the statute required a bond for the construction of a bridge to run to the commonwealth. Held, that the justices in their own names might maintain an action on the contractor's bond running to them and their successors. It was good as a common law bond. In *Horn v. Whittier*, 6 N. H. 88, a statute required the tax collector's bond to run to the town; it in fact ran to Horn, Furber and Nason, "selectmen of Somersworth," for the "use of the said town." Held, it was good as a common law obligation and that Horn et al. might maintain an action for its breach. In *Sweetser v. Hay*, 2 Gray (68 Mass), 49, the statute likewise required that the town should be the obligee in the tax collector's bond. The bond taken ran to Sweetser et al., selectmen of the town of Stoneham, for 1848 "or their successors in said office." Only one of the obligees was in office in 1849. Held, that their successors could not maintain an action on the bond (*Stevens v. Hay*, 6 Cush., Mass. 229), but that the obligees in their own names might. Metcalf, J., said that the

instead of to the county commissioners. Such a bond is valid as a common law obligation.<sup>67</sup>

**§ 33. Voluntary bond binds surety.**—The principle that the surety in a voluntary bond, made upon good consideration, and which does not contravene the policy of the law or the prohibition of a statute, is liable at common law on such bond, has been applied to a great variety of circumstances. Such a bond is valid, even though another bond be required by statute. Thus, where a statute required a bank cashier to give a bond with two or more sureties, and he gave a bond with only one surety, such surety was held liable. The statute did not say no other bond but the one required should be taken, and was only directory.<sup>68</sup> On the same principle the sureties on an administrator's bond, entered into before a probate judge

obligors had made the obligees trustees for the town and that the obligees "are entitled to maintain this action for the benefit of the town." In *Howard v. Brown*, 21 Maine 385, a debtor to escape imprisonment gave a bond signed only by his sureties and of a smaller penalty than the statute required. Held, that though not good as a statutory bond it was binding on the sureties. In *Claasen v. Shaw*, 5 Watts, Pa. 468, a forthcoming bond taken by a constable, not conforming to the statute, was held good as a common law bond, and the judgment creditor was held entitled to maintain an action in the name of the constable. In *Supervisors v. Coffinberry*, 1 Mich. 355, 357, there being no provision in the statute as to who should be named as obligee, a county treasurer's bond was made payable to "the board of supervisors of the county of St. Joseph." Held, that the bond was good as a common law obligation and that the board might maintain an action upon it. In *Stone v. Hart*, Ky. Jan'y, 1902, no

official report, 66 S. W. Rep. 191; 23 Ky. Law Rep'r 1777, assignment for benefit of creditors, it was held that though the bond runs to the assignor, anybody may sue upon it. But no right of action accrues to any creditor until he has first obtained an order directing the assignee to pay his claim and the assignee has failed to pay it.

<sup>67</sup> *Huffman v. Kopplekom*, 8 Neb. 344; *Kopplekom v. Huffman*, 12 Neb. 95; *Thomas et al. v. Hinkley*, 19 Neb. 324; *Comm'rs Jefferson Co. v. Lineberger*, 3 Mont. 231. But see, contra, *United States v. Shoup* (Idaho), 21 Pac. Rep. 656, where it was held that the sureties on a recognizance, regular in form, though executed by mistake "to the people of the United States," instead of "to the people of the United States of the territory of Idaho," were not liable thereon on the ground that the bond should have been reformed.

<sup>68</sup> *Bank of Brighton v. Smith*, 5 Allen, 413.



de facto but not de jure, were held liable.<sup>69</sup> The sureties on a guardian's bond having become insolvent, the uncle of the minors demanded of the guardian that he give another bond, which he did, with a new surety. No new bond was required by the court, but, on a proper showing, one would have been required. Held, the surety on the last bond was bound.<sup>70</sup> So, where a testator by will directed that his executor need give no bond, but the executor falsely represented to A that the court required a surety of him, and thereby induced A to become surety on an executor's bond, which was approved by the court, A was held liable. The fraud which the executor practiced on A would not avoid the bond unless the obligee participated in it.<sup>71</sup> A statute required that tobacco inspectors should give a bond with certain conditions, in the sum of \$2,000, and such a bond was given. Two days before the giving of the bond, an amendment to the statute had been passed, requiring a bond of \$5,000, and changing the condition somewhat. The bond already given was held to bind the sureties as a common law obligation.<sup>72</sup> Where a statute provided that injunction bonds should be given in the office of the clerk of the court, the judgment of which was enjoined, an injunction bond not thus given was held valid, although the injunction would have been dissolved for want of a proper bond, if objection had been made.<sup>73</sup> The sureties on the bond of a school fund commissioner, whose bond has not been approved by the proper authorities, but who has entered upon and exercised the duties of the office, and appropriated money, are liable on the bond at common law. The bond not being good as a statutory, but as a common law bond, the common law remedy on it would have to be pursued, and not the statutory remedy on statutory bonds.<sup>74</sup> A stay or appeal bond for which there is no provision in the statute is usually held void and not enforceable as a common law obligation, because there is no consideration for it.<sup>75</sup> But one was held valid in Indiana, where appeals had been allowed by the practice of the court,

<sup>69</sup> Pritchett v. The People, 1 Gilman (Ill.), 525.

<sup>70</sup> Elam v. Heirs of Barr, 14 La. Ann. 682; McWilliams v. Norfleet, 60 Miss. 987.

<sup>71</sup> Sebastian v. Johnson, 2 Duvall (Ky.), 101.

<sup>72</sup> Lane v. Kasey, 1 Met. (Ky.) 410.

<sup>73</sup> Cobb v. Curts, 4 Littell (Ky.), 235.

<sup>74</sup> The State v. Fredericks, 8 Iowa, 553.

<sup>75</sup> Powers v. Chabot, 93 Calif.



though not provided for by statute.<sup>76</sup> In California a bond exacted under the authority of an unconstitutional statute was held by a divided court to be void.<sup>77</sup> Other cases are referred to in a note.<sup>78</sup>

**§ 34. Obligation of surety must be delivered, and takes effect from time of delivery.**—In order to bind a surety or guarantor, his contract must be delivered, and it takes effect from the

266, 28 Pac. Rep. 1070; *Miller v. Vaughn*, 78 Ala. 323. In *Everly v. State*, 10 Ind. App. 15, 37 N. E. Rep. 556, it was held that though no statute authorized the Circuit Court to grant a stay of proceedings upon appeal from conviction on a charge of unlawful liquor selling, yet the Circuit Court by the accepted practice had such power, and "a court which has the power to grant an appeal from its judgment has the inherent power to prescribe the conditions of such appeal, provided these are not in violation of any statute."

<sup>76</sup> It was further held, therefore, that a bond which the court had required as a condition of such stay of proceedings was good as a common law obligation, and the stay a sufficient consideration for it. *Everly v. State*, supra.

<sup>77</sup> In *Coburn v. Townsend*, 103 Calif. 233, 37 Pac. Rep. 202, it was held that a bond given by plaintiff in a condemnation suit under a statute which permitted the plaintiff to take the land sought to be condemned upon giving bond conditioned to pay the amount of damages found, was void, because the statute had been declared unconstitutional and void. Referring to *San Mateo Water Works v. Sharpstein*, 50 Calif. 284; *Sanborn v. Belden*, 51 Calif. 266 and *Vilhac v. Stockton R. R.*, 53 Calif. 209.

<sup>78</sup> In the *Town of Salem v. Mc-*

*Clintock*, 16 Ind. App. 656, 46 N. E. Rep. 39, a town by a writing signed by its president and clerk, hired a superintendent of a water works that it owned and charged him with the duty of collecting water rent. There was no statute or ordinance creating such office of superintendent or prescribing the superintendent's duties. The superintendent, however, gave a bond conditioned for the faithful discharge of his duties "according to law and contract." He failed to account for water rents collected. Held, that the bond was good as a common law obligation, but that the sureties were liable only for the breach of such duties as were ordinarily accepted as the duties of an overseer, and were not liable for his failure to account for money collected. A purser in the navy was required by the secretary of war to give a \$100,000 bond not required by any statute in order to retain his office. Held, that the bond so given was a voluntary bond. *United States v. Tingey*, 5 Peters 114. Story, J., followed in *Howgate v. United States*, 3 App. Cases, D. C. 277. In *Reese v. Worsham*, 110 Ga. 449, 35 S. E. Rep. 680, the statute required the forthcoming bond given by the execution defendant to the levying officer to be "conditioned for the delivery of the property at the time and place of sale." Held, that a bond condi-

time of its delivery.<sup>79</sup> A made a promissory note and delivered it to the payee, and the payee then gave the note to A in order that he might get a surety to it and return it. A got C to sign the note as surety, and then refused to deliver it to the payee. The payee then sued A and C on the note, and it was held that C was not liable.<sup>80</sup> The note had never been delivered after C signed it, as A was in no sense the agent of the payee to receive a delivery of the note. Moreover, if C had been compelled to pay the note he could not have recovered indemnity from A, because A, by refusing to deliver the note, had refused to consent to C being his surety. Where a bond is signed by the principal on Saturday and by the surety on Sunday, but is not delivered till Monday, it takes effect from its delivery, and the surety is bound.<sup>81</sup> A law provided that in no case should a bank cashier's bond be signed by a director of the bank as surety. A bank director signed such bond as surety, but it was not approved till his term as director had expired. Held, the bond took effect from the time of its approval, and the surety was bound.<sup>82</sup> An official bond, in order to bind a surety thereon, must, like any other contract, be delivered or accepted before it becomes operative; and it is held there can be no delivery of such a bond until it is approved

tioned "to have the said described personal property forthcoming to answer the final judgment of the court in said case and pay the final condemnation money as provided by the statute" was not a statutory bond, but was good as a common law obligation between the parties even though there was "no provision of law allowing a claimant of property to retain possession thereof upon the execution of such a bond." In *Waycross Airline R. R. Co. v. Offerman & Western R. R. Co.*, 114 Ga. 727, at 732, an injunction bond was held good as a voluntary obligation even though the judge had no right to require it in the form in which it was given.

<sup>79</sup> *Forst v. Leonard*, 116 Ala. 82, 22 So. Rep. 481; *Irwin v. Crook*, 17 Colo. 16, 28 Pac. Rep. 549, where

the surety signed an appeal bond and gave it to the principal who filed it with the clerk.

<sup>80</sup> *Chamberlin v. Hopps*, 8 Vt. 94.

<sup>81</sup> *Commonwealth v. Kendig*, 2 Pa. St. 448. To similar effect, see *State v. Young*, 23 Minn. 551. Under precisely the same state of facts it was held in Indiana that the obligation of the surety was void because executed on Sunday. *Parker v. Pitts*, 73 Ind. 597. And see *Gilbert v. Vachon et al.*, 69 Ind. 372. The fact, however, that the negotiations which resulted in the contract of surety or guaranty took place on Sunday would not invalidate the contract where it was executed on a secular day. *Tyler v. Waddington*, 58 Conn. 375.

<sup>82</sup> *Franklin Bank v. Cooper*, 36 Me. 179.

by the proper authority.<sup>83</sup> The delivery of an official bond is presumatively at its date, but proof of the actual time of delivery may be shown.<sup>84</sup> Delivery need not be proven by direct evidence. It may be inferred from the acts of the parties. The fact that the obligees had the bond in their possession and that the sureties had knowledge thereof was held sufficient evidence of delivery in one case.<sup>85</sup> It is usually a question of fact for the jury whether or not the bond was delivered. In a North Carolina case it was held that the official file mark on an informal administrator's bond was not such conclusive evidence of delivery that the court could direct the jury to find that the bond was delivered.<sup>86</sup> An averment in pleading that a liquor license bond was "executed" is equivalent to an averment that it was delivered.<sup>87</sup>

**§ 35. Surety bound when his name not mentioned in body of instrument—Not bound when penalty of bond blank.**—Although the name of a surety is not mentioned in any part of the body of a bond, but a blank intended for it is left unfilled, yet if he sign, seal and deliver it as his bond, he is bound.<sup>88</sup> So where the name of a surety is not mentioned in the obligatory part of a bond, but is mentioned in the recital of the condition,

<sup>83</sup> *People v. Van Ness*, 79 Cal. 84; *City of Evansville v. Morris et al.*, 87 Ind. 269. In *Hamilton v. Phoenix Insurance Company*, 107 Ga. 728, 33 S. E. Rep. 705, a writ of certiorari was issued without the certiorari bond having been approved as required by statute. On motion, at trial, to dismiss the writ, the court examined the sureties and then approved the bond. Held, that he had no authority to pursue that course and should have sustained the motion to dismiss the writ, which having been issued without approval of the bond, either express, or implied from the conduct of the court, was a mere nullity. That the sureties on an official bond are liable from the date of delivery though the bond has not been approved as required by law, see

*State v. Paxton*, Neb., June, 1902, 90 N. W. Rep. 983.

<sup>84</sup> *Reilly v. Dodge*, 42 Hun (N. Y.), 646.

<sup>85</sup> *St. Louis Brewing Assn. v. Hayes* (Tex.), 97 Fed. Rep. 859, 38 C. C. A. 449.

<sup>86</sup> *Van Hook v. Barnett*, 4 Dev. (15 N. C.), 268, 271.

<sup>87</sup> *Jacobs v. Hogan*, 73 Conn. 740, 49 Atl. Rep. 202. Citing *Jacobs v. Curtiss*, 67 Conn. 497, 35 Atl. Rep. 501. See, also, *Forst v. Leonard*, 116 Ala. 82, 22 So. Rep. 481.

<sup>88</sup> *Joyner v. Cooper*, 2 Bailey, Law (S. C.), 199; *Valentine v. Christie*, 1 Rob. (La.) 298; *Potter v. The State*, 23 Ind. 550; *Scheid v. Leibschtz*, 51 Ind. 38; *Neil v. Morgan*, 28 Ill. 524; *Danker v. Atwood*, 119 Mass. 146.

if he sign, seal and deliver it he is bound.<sup>89</sup> Where one signs a lease between the signature of the lessor and lessee, in which lease it is said that the lessee "binds himself and his security," but no name of a surety is mentioned in the lease, and the lease is signed in the presence of others who sign it as witnesses, the party who signs between the signature of the lessor and lessee will be held as surety on the lease.<sup>90</sup> So where a lease had been signed by the lessor and lessees, and D., whose name was not mentioned in the lease, signed his name to it after the names of the lessees, adding to his name the word "surety," it was held that it sufficiently appeared that D. was the surety of the lessees, and that he was originally and not collaterally liable.<sup>91</sup> A promissory note commenced as follows: "For value received, the Fishkill Iron Company promise to pay," etc. This note was signed by the president and agent of the company, their destinations following their names. It was also signed by four other persons. Held, the last four signers were liable as sureties on the note, although they were not mentioned nor referred to in it. The court said it was sufficient that the instrument expressed an obligation on the part of the principal. A blank indorsement would have been sufficient to hold the surety, and this was quite as effectual as a blank indorsement.<sup>92</sup> Where, however, the penalty of a bond is blank, it is void as to the sureties, and it cannot be held to be a covenant and thus bind them.<sup>93</sup> A verdict in blank is a nullity.<sup>94</sup>

<sup>89</sup> *Bartley v. Yates*, 2 Hen. & Mun. (Va.) 398.

<sup>90</sup> *Holden v. Tanner*, 6 La. Ann. 74.

<sup>91</sup> *Perkins v. Goodman*, 21 Barb. (N. Y.) 218.

<sup>92</sup> *Parks v. Brinkerhoff*, 2 Hill (N. Y.), 663. But see *Blackener v. Davis*, 128 Mass. 538, wherein it was held that stranger to a contract who signed in such a manner as not to indicate the capacity in which he intended to become bound could not be held, and parol evidence was inadmissible to show him to be a surety.

<sup>93</sup> *Anstin v. Richardson*, 1 Gratt.

(Va.) 310; *Spring Garden Insurance Co. v. Lemmon*, Iowa, May 16, 1901, 86 N. W. Rep. 35; *Copeland v. Cunningham*, 63 Ala. 394, holding that the defect cannot be supplied by parol evidence in an action at law. *Church v. Noble*, 24 Id. 291; *Case v. Pettee*, 5 Gray. (71 Mass.), 27. But, contra, see *Treasurer State Lunatic Asylum v. Douglas*, 77 Mo. 647, in which case a bond reciting the admission of a patient into an asylum was conditioned for the payment of the sum of — dollars per week for the board of said patient so long as she shall continue in the said asy-

**§ 36. Same continued.**—As has already been stated, it is immaterial in order to charge a surety that his name should appear in the body of the instrument, provided the intention that he shall be so charged appears clearly therefrom.<sup>1</sup> This principle is applicable to every variety of bonds. Thus, the sureties to a recognizance, who have signed the same, are liable thereon, whether their names are entered in the body of the bond or not.<sup>2</sup> And this is true of the sureties to an appeal bond,<sup>3</sup> injunction bond,<sup>4</sup> undertaking for attachment,<sup>5</sup> replevin bond,<sup>6</sup> official bond of a sheriff,<sup>7</sup> and clerk of court.<sup>8</sup> While it is unnecessary, then, that the name of the surety be recited in the body of the obligation, yet, if it does so appear, he must sign the same, or he will not be bound.<sup>9</sup> Where there is a greater number of signatures than seals to a bond, two or more of the signers may adopt one seal, and be charged as sureties, although all the signers do not appear in the body of the bond.<sup>10</sup>

**§ 37. When party liable on implied guaranty.**—Although a surety or guarantor generally becomes bound by express contract, yet persons are sometimes held as sureties or guarantors who do not so become bound. The law will, under certain circumstances, imply such contract.<sup>11</sup> Thus, where two married women made a promissory note, and the payee indorsed it to A. before maturity, A. at that time knowing that the

lum.” The court, in sustaining a recovery on the bond, said: “The bond, in the case at bar, shows incompleteness upon its face, in regard to the compensation to be paid for the board of the patient. There would seem to be no reason to question that the obligors bound themselves to pay for the board of the patient, and if they failed to contract respecting the rate, the law would imply a reasonable one.”

<sup>94</sup> Clark v. Blalock, 114 Ga. 309, where the verdict on a sheriff's bond was \$— against principal and \$— against sureties.

<sup>1</sup> Partridge v. Jones, 38 Ohio, St. 375; Hodgkin v. Holland, 34 Ark. 203.

<sup>2</sup> Holmes v. State, 17 Neb. 73.

And see, to same effect, Stewart v. Carter, 4 Neb. 564.

<sup>3</sup> San Roman v. Watson, 54 Tex. 254; Case v. Daniels, 1 Colo. App. 116, following Neal v. Morgan, 28 Ill. 524.

<sup>4</sup> Griffin et al. v. Wallace et al., 66 Ind. 410.

<sup>5</sup> McLain v. Simington, 37 Ohio St. 484.

<sup>6</sup> Affeld et al. v. People, 12 Bradwell (Ill. App.), 502.

<sup>7</sup> Hodgkin v. Holland, 34 Ark. 203.

<sup>8</sup> State ex rel. Howell v. Parsons, 89 N. C. 230.

<sup>9</sup> Pevito v. Rodgers, 52 Tex. 581.

<sup>10</sup> Building Association v. Cummings, 45 Ohio St. 664.

<sup>11</sup> See Sec. 1 supra.

makers were married women, it was held that the indorsement of the note to A. was an implied guaranty that the makers were competent to contract in the character in which, by the terms of the note, they purported to contract; and the fact that A, when he took the note, knew the makers were married women, did not change the rule.<sup>12</sup> So the vendor of a promissory note, who transfers it by indorsement expressed to be without recourse, impliedly guaranties the genuineness of the signatures of the prior parties whose names appear on the note.<sup>13</sup> A person not a party to a promissory note, and who does not indorse it, but who sells it and receives the money, by implication guaranties the genuineness of the signatures; and this whether he receives the money paid for the note for himself or for another. The only way he can avoid such responsibility is by an agreement to the contrary.<sup>14</sup> So the purchaser of goods who transfers, without indorsement, the promissory note of a third party, impliedly guaranties that the sum expressed in the note is due.<sup>15</sup> A person who procures notes to be discounted at a bank impliedly guaranties the genuineness of the signatures of the makers and indorsers; and such implied contract is not a representation concerning the character, credit or ability of another, within the statute of frauds; and such person may be sued as a guarantor of the notes, if the signatures are forged.<sup>16</sup> The reason on which the last preceding cases are grounded is thus well expressed by the court in the case last cited: "It seems to fall under a general rule of law, that in every sale of personal property the vendor impliedly warrants that the article is, in fact, what it is described and purports to be, and that the vendor has a good title or right to transfer it." The agent of another for the sale of property, who has agreed not to sell for credit except to good and responsible parties, and to take no paper but good collectible paper, and such as he is willing to guaranty, and who takes paper he knows to be worthless, and turns it over to his employer, who is ignorant of its character, is liable as

<sup>12</sup> *Erwin v. Downs*, 15 N. Y. 575.  
To similar effect, see *Ogden v. Blydenburgh*, 1 Hilton (N. Y.), 182.

<sup>13</sup> *Dumont v. Williamson*, 18 Ohio St. 515.

<sup>14</sup> *Lyons v. Miller*, 6 Gratt. (Va.) 427.

<sup>15</sup> *Jones v. Yeargain*, 1 Dev. Law (N. C.), 420.

<sup>16</sup> *Cabot Bank v. Morton*, 4 Gray, 156, per Shaw, C. J. See, also, *Jones v. Ryde*, 5 Taunt. 488.

guarantor of such paper. He can be sued and judgment had against him without the paper being returned to him. He is not entitled to the paper till he pays the debt.<sup>17</sup>

**§ 38. Joint maker of note may be shown by parol to be, as to the payee, a surety.**—In view of the fact that a surety is entitled to certain rights and privileges to which the principal is not, it often becomes highly important to determine whether a party to an instrument is principal or surety, and if in fact a surety, when and where that fact may be shown.<sup>18</sup> When several parties execute a joint, or joint and several, promissory note not under seal, and there is nothing in the note to indicate that any of them are sureties,<sup>19</sup> if some of them are in fact sureties and this is known to the creditor, such sureties may both at law and in equity show by parol that they were sureties and that they were known to be such by the creditor, and they will be entitled to all the rights, privileges and immunities of sureties, and will be discharged by any act of the creditor, after he had knowledge of the fact of suretyship,

<sup>17</sup> Clark v. Roberts, 26 Mich. 506.

<sup>18</sup> The supreme court of Indiana, in determining the question of suretyship, say: "It depends upon the relations existing between the makers of the note, and is determined by inquiring who received the consideration of the contract, or who, according to the arrangements actually made and existing among themselves, ought to pay the debt." Sefton v. Hargett et al., 113 Ind. 592. And to secure such a determination it is essential that the parties be before the court on that issue. Knopf v. Morel, 111 Ind. 570. And see further, Gipson et al. v. Ogden, 100 Ind. 20. The rule for determining the suretyship of married women is also laid down by the same court in Vogel v. Leichner, 102 Ind. 55. A surety in Ohio may by statute have the fact of his suretyship entered of record by making application therefor at the time the

judgment is entered. Brigel v. Creed, 65 Ohio St. 40, 60 N. E. Rep. 991. See, also Macdonald v. Whitfield (1883), 52 Law Jour. P. C. 70, at 77, S. C. 8 App. Cas. P. C. 733, in which case two directors of a trading corporation indorsed its note to enable it to obtain money from the bank in pursuance of an antecedent agreement. Held, that as between themselves, they were to be regarded as co-sureties and not as successive indorsers, their rights were to be determined not by reference to the law merchant but by reference to the antecedent agreement and therefore the second indorser could not hold the first indorser liable otherwise than as a co-surety. Citing Reynolds v. Wheeler, 10 Can. 1 Rep. N. S. 561, 30 Law J. Rep. C. P. 350.

<sup>19</sup> Clark v. Dane, 128 Ala. 122, 28 So. Rep. 960, *infra*, note 31.



which would discharge any other surety.<sup>20</sup> But it must appear that the creditor at the time the act complained of was done knew of the fact of suretyship.<sup>21</sup> The great weight of authority and of reason is in favor of the law as above stated. The cause alleged against showing the fact of suretyship by parol is, that contradicts or varies the term of the instrument signed by the surety. The answer to this is, that such proof does not controvert the terms of the contract, but is simply proving a

<sup>20</sup> Higdon v. Bailey, 26 Ga. 426; Lime Rock Bank v. Mallett, 34 Me. 547; Id., 42 Me. 349; Grafton Bank v. Kent, 4 N. H. 221; Matheson v. Jones, 30 Ga. 306; Piper v. Newcomer, 25 Iowa, 221; Cummings v. Little, 45 Me. 183; Kelley v. Gillespie, 12 Iowa, 55; Bank of St. Albans v. Smith, 30 Vt. 148; Davis v. Mikell, 1 Freeman, Ch. (Miss.) 548; Fraser v. McConnell, 23 Ga. 368; Corielle v. Allen, 13 Iowa, 289; Roberts v. Jenkins, 19 La. (Curry) 453; Brown v. Haggerty, 26 Ill. 469; Bradner v. Garrett, 19 La. (Curry) 455; Bruce v. Edwards, 1 Stew. (Ala.) 11; Jones v. Fleming, 15 La. Ann. 522; Flynn v. Mudd, 27 Ill. 323; Branch Bank at Mobile v. James, 9 Ala. 949; Kennedy v. Evans, 31 Ill. 258; Stewart v. Parker, 55 Ga. 656; Riley v. Gregg, 16 Wis. 666; Mechanics' Bank v. Wright, 53 Mo. 153; McCarter v. Turner, 49 Ga. 309; Coats v. Swindle, 55 Mo. 31; Mariners' Bank v. Abbott, 28 Me. 280; Harmon v. Hale, 1 Wash. Terr. (N. S.) 422; Welfare v. Thompson, 83 N. C. 276; Otis v. Von Storeh, 15 R. I. 41; Irvine v. Adams, 43 Wis. 468; Trustees of Schools v. Southard et al., 31 Ill. App. 359; Thompson et al. v. Coffman et al., 15 Oreg. 631; Stevens v. Oaks, 58 Mich. 343; Chapeze v. Young, 87 Ky. 476. In Manley v. Boycot, decided by the Queen's Bench in 1853, it was held that the

defense could not be set up, unless the holder when he took the note knew of the suretyship and agreed to treat the surety as such. But in Pooley v. Harradine, 7 Ell. & Bl. 431, decided in 1857, and in Greenough v. McClelland, 2 Ell. & Bl. 424, decided in 1860 by the same court, it was held that under the statute, allowing equitable defenses to be made at law, the defense might be made at law, where the creditor knew of the fact of suretyship, but did not agree to hold the surety as such. The court also held that but for the statute the defense could not have been made at law, but must have been made in equity. See, to same effect, Perley v. Loney, 17 Up. Can. Q. B. 279.

<sup>21</sup> Neel v. Harding, 2 Met. (Ky.) 247; Orvis v. Newell, 17 Conn. 97; Wilson v. Foot, 11 Met. 285; Murray v. Graham, 29 Iowa, 520; Pape v. Randall, 18 Ind. App. 53, 47 N. E. Rep. 530. In Omaha Natl Bank v. Johnson, 111 Wis. 372, 87 N. W. Rep. 231, one of three signers of a note discounted by plaintiff bank told plaintiff that in signing such papers he was to "back up" and "stand behind" the others; held, sufficient notice to the bank that he was a surety, and that the bank by taking new notes from the other two signers, without his consent, released him. In First Natl Bank v. Briggs' As-

fact outside of and beyond such terms.<sup>22</sup> "It is a fact collateral to the contract, and no part of it."<sup>23</sup> "It is not to affect the terms of the contract, but to prove a collateral fact, and rebut a presumption."<sup>24</sup> The parties still remain bound by the same instrument and in the same manner. "Can you not prove the defendant an infant, a feme covert, or a bankrupt, in order to discharge him or her, and that, too, while others remain bound? Why not also prove him a surety?"<sup>25</sup> "The general rules of evidence are the same at law as in equity; and it is no more competent to vary the terms of a written instrument by parol evidence in equitable actions than in those strictly legal, unless in exceptional cases, for the purpose of maintaining an action or defense under some recognized head of equitable jurisdiction. The confusion and apparent conflict in the authorities must, I think, have originated in the idea that defenses of this character were equitable in their nature, and conceded only to be available in a court of equity. When it was conceded that they were equally available in a court of law, it is difficult to find a reason for excluding the same evidence at law that is admissible in equity. However this may be, and without invoking any equitable rule, a conclusive answer to the objection to this evidence in any court, in my opinion, is that it does not tend to alter or vary either the terms or legal effect of the written instrument. The contract was in all respects the same, whether the defendant was principal or surety. In either case it was an absolute promise to pay \$1,000 one day after date, nothing more and nothing less. There is neither condition nor contingency. It would have been precisely the same contract if the defendant had added the word 'surety' to his name. The addition of that word would not have varied it in the slightest degree. The only service it would have performed would have been to give no-

signees, 70 Vt. 594, 41 Atl. Rep. 580, the cashier and a director of a bank signed a note apparently as joint makers which the bank discounted. No other official of the bank knew that the director was a mere surety. Held, that the cashier's knowledge of such suretyship is not to be imputed to the bank, because he was acting in his own

interest in the transaction.

<sup>22</sup> Valentine, J., in *Rose v. Williams*, 5 Kan. 483.

<sup>23</sup> Shaw, C. J., in *Carpenter v. King*, 9 Met. 511.

<sup>24</sup> Shaw, C. J., in *Harris v. Brooks*, 21 Pic. 195. Also, *Breese, J.*, in *Ward v. Stout*, 32 Ill. 399.

<sup>25</sup> Lumpkin, J., in *The Bank v. Mumford*, 6 Ga. 44.

tice to the other party of the fact. If this is shown aliunde, it is equally effective."<sup>26</sup> The equity of the surety to be discharged when he is prejudiced by the act of the creditor "does not depend upon any contract with the creditor, but upon its being inequitable in him to knowingly prejudice the rights of the surety against the principal;"<sup>27</sup> and it is as inequitable in the creditor to prejudice those rights when he is informed of the fact of suretyship by parol as when he is informed of it by the instrument itself. It has, however, been held by courts of high respectability, that the fact of suretyship could not, under the foregoing circumstances, be shown by parol.<sup>28</sup> It may be shown by parol that the maker of a promissory note was in fact an accommodation drawer for a firm who were second indorsers, and he will be entitled to the same rights as any surety.<sup>29</sup> Parol evidence is admissible to show that one of three joint and several makers of a promissory note agreed with the others after its execution to pay the same.<sup>30</sup> Recitals may be contradicted to show the fact of suretyship.<sup>31</sup> It has been held that the joint makers of a note

<sup>26</sup> See the elaborate opinion of Church, C. J., in *Hubbard v. Gurney*, 64 N. Y. 457. That the relation of suretyship may be shown aliunde, or by the instrument itself, see *O'Howell v. Kirk*, 41 Mo. App. 523.

<sup>27</sup> *Coleridge, J.*, in *Pooley v. Haradine*, 7 Ell. & Bl. 431.

<sup>28</sup> *Shriver v. Lovejoy*, 32 Cal. 574; *Bull v. Allen*, 19 Conn. 101; *Campbell v. Tate*, 7 Lans. (N. Y.) 370; *Hendrickson v. Hutchinson*, 5 Dutcher (N. J.), 180. In *Kerr v. Baker, Walker* (Miss.), 140, and *Farrington v. Gallaway*, 10 Ohio, 543, it was held it could not be shown at law. In *Stroop v. McKenzie*, 38 Tex. 132, and in *Ball v. Gilson*, 7 Up. Can. C. P. 531, it was held it could not be shown unless it was also shown that the creditor agreed to hold the surety as such. The same thing was held in *Yates v. Donaldson*, 5 Md. 389. In *Hartman v. Burlingame*, 9 Cal.

557, it was held that a joint maker of a promissory note, although known by the holder to be a surety, was not entitled to notice of demand and non-payment. The same thing was held substantially in *Kritzer v. Mills*, 9 Cal. 21. See, also, on this subject, *Aud v. Magruder*, 10 Cal. 282. In *Coots v. Farnsworth*, 61 Mich. 497, it is held, in a vigorous opinion by Morse, J., that parol evidence is inadmissible in any case to change the character of parties to a bond, as where it was sought to be shown that the principals named therein really signed as sureties.

<sup>29</sup> *Marsh v. Consolidation Bank*, 48 Pa. St. 510.

<sup>30</sup> *Vary v. Norton* (Cir. Ct. W. D. Mich. S. D.), 6 Fed. Rep. 808.

<sup>31</sup> In *Buck v. Bank of Georgia*, 104 Ga. 660, 30 S. E. Rep. 872, Buck made his own note for \$2,000 to the order of Scott purporting to be for the purchase money for

are, jointly and severally, all principals and liable for the full amount as to the payee. As to the others, each is a principal debtor as to his proportionate share, and the others are, as to such share, sureties in equal proportion.<sup>32</sup>

**§ 39. Joint maker of sealed instrument may be shown by parol to be surety.**—Where the instrument is under seal the fact of suretyship may be shown by parol at law, the same as if it was not under seal, although there is not, perhaps, quite the same unanimity in the decisions on this point as there is with reference to unsealed instruments. The same reasons which allow the fact of suretyship to be shown by parol in the case of unsealed instruments apply with equal force to the case of sealed instruments, and the uniform tendency of the later decisions is to allow a surety to make the same defenses at law as in equity. It has accordingly been held that one of the makers of a joint note under seal may, at law, show by parol that he is only a surety.<sup>33</sup> One of the makers of a joint and several sealed note may, at law, show by parol that he is a surety only.<sup>34</sup> The same thing was held with reference to a sealed note, where a statute had placed sealed and unsealed

land, and Scott indorsed the note and deposited it as collateral to his own note for \$1,500 with plaintiff bank, receiving therefor from the bank \$1,500 less the discount. Held, that in a suit at law by the bank against Buck as maker and Scott as indorser of the \$2,000 note, Buck was entitled to show that he had executed and delivered the \$2,000 note as a mere surety with the knowledge of the bank and that the bank for a good consideration had, without his consent, extended Scott's \$1,500 note for a definite time and had thereby released him as such surety, and that the recital in the \$2,000 note that it was given for purchase money of land did not render evidence of such suretyship inadmissible.

<sup>32</sup> And where one of five joint makers fails to pay, and two of

the others, without the consent of the rest, pay for him and take, to secure themselves, his notes payable in 12 months to them, they thereby extend the time for the principal and discharge the surety, i. e., the other maker who has refused to consent to such extension: *Clark, Adm'r, v. Dane*, 128 Ala. 122, 28 So. Rep. 960.

<sup>33</sup> *Rogers v. School Trustees*, 46 Ill. 428; *Smith v. Doak*, 3 Tex. 215.

<sup>34</sup> *Fowler v. Alexander*, 1 Heisk. (Tenn.) 425. And see a similar case in *Cole v. Fox*, 83 N. C. 463. The case of *Fowler v. Alexander* was decided in 1870. The same court, in 1836, in *Deberry v. Adams*, 9 Yerg. (Tenn.) 52, and in 1847, in *Dozier v. Lee*, 7 Humph. (Tenn.) 520, in similar cases, held that the fact could not, at law, be shown by parol.

instruments on the same footing.<sup>35</sup> One of two or more obligors in a joint and several bond may prove by parol that he is a surety only where nothing to indicate the fact appears on the bond, and he will be entitled to give the creditor statutory notice to sue, the same as any other surety,<sup>36</sup> and will be discharged at law by time given the principal.<sup>37</sup> A gave his individual bond and a mortgage to secure the same for a sum of money borrowed by him, one-half of which was for the use of, and was used by, B. Afterwards A paid all the money and sued B at law for his share, and it was held that A might show the fact of his suretyship, although it did not appear from the bond or mortgage.<sup>38</sup> A lease was made to two, one of whom was sole occupant of the premises, which he held over the term, and debt for the rent of the whole period of actual occupancy was brought against both. Held, that the lessee who did not occupy might show by parol that he was only a surety, and consequently not liable for the holding over.<sup>39</sup> On the contrary, it has been held that when the instrument is under seal, the fact of suretyship cannot, at law, be shown by parol,<sup>40</sup> but it may in all cases be shown in equity.<sup>41</sup>

**§ 40. Liability of surety who adds the words "surety" or "security" to his name.**—A party signed a promissory note, and added the word "security" after his name. It was held that it might be shown by parol that he was the principal. The court said the addition of the word "security" is "at most the statement of a fact forming no part of the contract; and if untrue may be shown to be so by parol as well as any other fact."<sup>42</sup> While the addition of such words as "surety" or "se-

<sup>35</sup> *Smith v. Clopton*, 48 Miss. 66.

<sup>36</sup> *Creigh v. Hedrick*, 5 West Va. 140. See, to same effect, *Scott v. Bailey*, 23 Mo. 140.

<sup>37</sup> *Dickerson v. Comm'rs Ripley Co.*, 6 Ind. 128.

<sup>38</sup> *Metzner v. Baldwin*, 11 Minn. 150; *Forbes v. Sheppard*, 98 N. C. 111.

<sup>39</sup> *Kennebec Bank v. Turner*, 2 Greenleaf (Me.), 42. So the surety may show by parol that he was only liable for the rent accruing during the term given in the original lease, and not for that which

might fall due under any renewal thereof which the lessee might elect to take. *Knowles v. Cuddeback*, 19 Hun (N. Y.), 590.

<sup>40</sup> *Levy v. Hampton*, 1 McCord, Law (S. C.), 145; *Pintard v. Davis*, 1 Spencer (N. J.), 205; *Willis v. Ives*, 1 Sm. & Mar. (Miss.) 307.

<sup>41</sup> See cases last cited and *Burke v. Cruger*, 8 Tex. 66.

<sup>42</sup> *Rose v. Madden*, 1 Kan. 445. In *Sisson v. Barrett*, 2 N. Y. 406, a promissory note was executed by A, B and C, the principal debtor being A. The last signer of the

curity" to the name of a signer of an instrument is prima facie evidence of his suretyship, yet parol evidence may be admitted to prove the contrary.<sup>43</sup> Where a note is executed by two persons, and one of them adds to his signature the word "surety," it is held that both are to be treated as makers of the note and may be joined as defendants in an action thereon.<sup>44</sup> A surety who signs a note made out in the singular number, "I promise," and adds to his name the word "surety," is liable thereon in a joint suit with the maker, who has also signed the note.<sup>45</sup> In another case such person was regarded as a joint promisor, and if he signed on the back of the note, as an original promisor.<sup>46</sup> And one who writes "principal" after his signature may prove, by parol, that he was a surety and that plaintiff had knowledge thereof.<sup>47</sup>

**§ 41. If a creditor knew of suretyship when he did the act complained of, this is sufficient to secure surety his rights.** The fact that the holder of a negotiable instrument did not know of the suretyship of some of the parties when he took it will make no difference in the rule before stated. If he had no knowledge of the fact when he took the instrument, but was informed of it before doing the act complained of, this will be sufficient to entitle the surety to all the rights of any surety.<sup>48</sup> A promissory note was signed by several parties, two

note, C, added the word "surety" to his signature. Held, that without extrinsic proof, C was not to be presumed to be a surety for both A and B. But in *Sayles v. Sims*, 73 N. Y. 551, it was held that the presumption was that he was surety for the other two, though it was not conclusive.

<sup>43</sup> *Boulware v. Hartsook's Adm'r*, 83 Va. 679.

<sup>44</sup> *Hoyt v. Mead*, 13 Hun (N. Y.), 327. In *Southern California Natl Bank v. Wyatt*, 87 Calif. 616, 25 Pac. Rep. 918, where judgment against one of the makers of a note who wrote the word "surety" after his name, in favor of the payee, was affirmed, the court said (p. 618): "Since the decision of *And v. Magruder*, in 1858,

(10 Calif. 282), where, as here, it appeared from an addendum to the name of one of the makers of the note in suit that he was a surety thereon, it has been uniformly held by the Supreme Court of this state that where one subscribes his name to a promissory note in the place of a maker, he will, as between himself and the payee, be treated as a maker, and held liable as such though he was in fact only a surety for the other makers, and this was known to the payee when he received the note."

<sup>45</sup> *Dart v. Sherwood*, 7 Wis. 523.

<sup>46</sup> *Rice v. Cook*, 71 Me. 559.

<sup>47</sup> *Postell v. Crumbaugh*, Ky. Feb., 1902, 66 S. W. Rep. 830, 23 Ky. Law Rep'r 2193.

<sup>48</sup> *Bank of Missouri v. Matson*,



of them being in fact sureties, but that not appearing from the note, the payee assigned the note to a party who did not know of the suretyship at the time of the assignment, but was afterwards informed of it, and afterwards gave time to the principal. Held, the sureties were discharged.<sup>49</sup> The court said: "The principle obtains for the protection of the sureties, and the holder of such notes, knowing their relation, should avoid any act to endanger their rights; and we are unable to perceive the distinction as to when the knowledge was obtained—whether before or after the purchase, so that it was known before the extension was made." In another case, depending on the same state of facts, the same thing was held. The court said: "The injury to the surety is the same as if the creditor had possessed the knowledge at the time the note was taken."<sup>50</sup> A financial company, by agreement with an agent, accepted bills of exchange which were discounted for the agent by a discount company, the agent guarantying payment of the bills. The discount company was not, at the time, aware of the relations between the acceptors and the agent, but was informed, before the bills matured, that the agent was principal and the acceptors were sureties, and afterwards gave time to the agent. Held, the acceptors were discharged, and might come into

26 Mo. 243; *Colgrove v. Tallman*, 2 Lans. (N. Y.) 97; *Pooley v. Harradine*, 7 Ell. & Black. 431. Contra, *Bank of Upper Canada v. Thomas*, 11 Up. Can. C. P. 515; *Scott v. Scruggs* (Ala.), 60 Fed. Rep. 721, 9 C. C. A. 246, 23 U. S. App. 280; *Scott v. Scruggs*, 95 Ala. 383, 11 So. Rep. 215; *Union Mutual Life Ins. Co. v. Hanford*, 143 U. S. 187, 191, 12 Sup. Ct. Rep. 437, 36 L. Ed. 118 and cases there cited. *Pirkle v. Chamblee*, 109 Ga. 32, 34 S. E. Rep. 276. In *Hall v. Rogers*, 114 Ga. 357, a woman signed her son's note, apparently as a joint maker thereof. To meet her defense she signed as surety only and without consideration, it was held competent for the payee to testify that the other makers represented to him that she had

signed it as principal and that he had accepted it with that understanding, this not as showing her relation to the note, but as showing the payee's want of any notice thereof. In *Crumrine v. Crumrine*, 14 Ind. App. 641, 43 N. E. Rep. 322, it was held that evidence that plaintiff's mother signed the note in question in renewal of the note of his father was sufficient to support a finding that she was a surety. To the same effect is *Duncan v. Freeman*, 109 Ala. 185, 19 So. Rep. 433.

<sup>49</sup> *Lauman v. Nichols*, 15 Iowa, 161.

<sup>50</sup> *Wheat v. Kendall*, 6 N. H. 504. To a similar effect, see *Smith v. Sheldon*, 35 Mich. 42; *Wythes v. Labouchere*, 3 De Gex & Jones, 593.



equity and have the bills canceled.<sup>51</sup> This rule is the logical and necessary result of holding that parol evidence of the creditor's knowledge of the fact of suretyship can be given at all. It is the fact of knowledge on the part of the creditor, coupled with certain equitable principles, and not any contract between him and the surety, which raises the equity on behalf of the surety; and it necessarily follows that the equity exists from the time the creditor has the knowledge. The burden of proof as to suretyship and notice thereof is on the one asserting it.<sup>52</sup> There is no presumption in favor of suretyship; it must be proven, and there must be evidence to support a finding thereof.<sup>53</sup>

**§ 42. Surety must show that creditor knew of suretyship—What is sufficient evidence of the fact.**—When a surety sets up claims depending on that relation and the fact of suretyship does not appear from the instrument signed by him, he must, in order to sustain such claims, prove that the creditor knew of the suretyship.<sup>54</sup> Where a promissory note was held by the payee and the note did not show the fact of suretyship, but it was proved that one of the makers was only a surety, the court held that it would be presumed that the creditor knew of the suretyship.<sup>55</sup> Where several persons execute a promissory note and there is nothing on its face to show

<sup>51</sup> *Oriental Financial Corporation v. Overend*, Law Rep. 7 Ch. App. Cas. 142. This decision was affirmed by the House of Lords on appeal in 1874, and is the settled law of England. *Liquidators of Overend, Gurney & Co. v. Liquidators of Oriental Financial Corporation*, Law Rep. 7 Eng. & Irish App. Cas. 348.

<sup>52</sup> *Hall v. Rogers*, 114 Ga. 357; *Whitley v. Hudson*, 114 Ga. 669; *Crumrine v. Crumrine's Estate*, 14 Ind. App. 641, 43 N. E. Rep. 322; *Pirkle v. Chamblee*, 109 Ga. 32, 34 S. E. Rep. 276; *Duncan v. Freeman*, 109 Ala. 185, 19 So. Rep. 433; *Dial v. Gambrel*, 119 Ala. 330, 24 So. Rep. 564. Compare note 10, sec. 9.

<sup>53</sup> *Stevens v. Partridge*, 88 Ill. App. 665 at 669; *Benedict v. Berger*, 64 Ill. App. 173.

<sup>54</sup> *Wilson v. Foot*, 11 Met. 285; *Goodman v. Litaker*, 84 N. C. 8; *Torrence v. Alexander*, 85 N. C. 143.

<sup>55</sup> *Ward v. Stout*, 32 Ill. 399. In *Cummings v. Little*, 45 Me. 183, it was held that whenever one having no interest in a note becomes a party to it at the request and for the accommodation of another, the relation of principal and surety exists, and the original holder, between whom and the principal consideration passed, is presumed to have knowledge of the fact.

their relations to each other, there is no presumption from the order in which they sign that any, or which, of the signers are sureties.<sup>56</sup> Where three parties signed a bond and it did not appear from the face of the bond, who, if any one, was surety, the circumstances of one obligor making payments, and being resorted to by the creditor, raises a strong presumption that he was the principal; while the circumstances of another obligor not making payments, and not being called upon for them, raises a presumption that he was only surety.<sup>57</sup> A promissory note, some of the makers of which were in fact sureties, though nothing to indicate the suretyship appeared on the note, was transferred to A after it was overdue and discredited. A, without any actual notice of the suretyship, gave time to the principal. Held, the fact that the note was overdue was not notice to A of the fact of suretyship, and that the sureties were not discharged.<sup>58</sup> The court said: "He who takes a discredited note is presumed to be acquainted with every defense to which it is subject. But whether some of those whose names are upon a note are sureties is a matter wholly immaterial to the person who purchased the note, and he cannot be presumed to have inquired or to have learned in what character they signed, because that was a circumstance with which he had no concern."

**§ 43. Property pledged by one for debt of another occupies position of surety.**—When property of any kind is mortgaged or pledged by the owner to answer for the debt, default or miscarriage of another person, such property occupies the position of a surety or guarantor, and anything which would discharge an individual surety or guarantor who was personally liable, will, under similar circumstances, discharge such property.<sup>59</sup> This rule is applicable to every variety of circum-

<sup>56</sup> *Paul v. Berry*, 78 Ill. 158; *Summerhill v. Tapp*, 52 Ala. 227.

<sup>57</sup> *Doughty v. Bacot*, 2 Desaus, Eq. (S. C.) 546.

<sup>58</sup> *Nichols v. Parsons*, 6 N. H. 30. See, also, notes 5 and 6, preceding section.

<sup>59</sup> *Robinson v. Gee*, 1 Vesey Sr. 251; *Royal Canadian Bank v. Payne*, 19 Grant's Ch. 180; *Christiner v. Brown*, 16 Iowa, 130; *Den-*

*ison v. Gibson*, 24 Mich. 187; *Joseph v. Heaton*, 5 Grant's Ch. 636; *Ryan v. Shawneetown*, 14 Ill. 20; *Lord Harberton v. Bennett*, *Beaty (Ir. Ch.)*, 386; *Rowan v. Sharp's Rifle Co.*, 33 Conn. 1; *Union Bank v. Govan*, 10 Smedes & Mar. (Miss.) 333; *Bowker v. Bull*, 1 Simons (N. S.), 29; *White v. Ault*, 19 Ga. 551; *Price et al. v. Dime Savings Bank*, 124 Ill. 317, affirming

stances. A, being indebted to B, and C being indebted to A, they get together and agree that B shall surrender up A's note and take C's in its place, A at the same time canceling his claim against C for the same amount, and it is done accordingly. C gives B a mortgage to secure his note thus given on a piece of his property; A also gives B a mortgage on some of his property to secure the same note of C. Held, that by this transaction A's property became the surety of C, and was discharged by the giving of time to C.<sup>60</sup> A materialman took the note of the contractor for the materials furnished for a building, and extended the time of payment. The owner, having no notice of the claim, paid the contractor in full, before the note fell due. Held, the building occupied the position of surety for the contractor, and that the agreement to give time discharged the building from the lien.<sup>61</sup> When a wife mortgages her real estate for the debt of a firm of which her husband is a member, such real estate occupies the position of a surety, and if it becomes released at law, equity will not charge it.<sup>62</sup> A held a judgment against B, which was a lien upon two tracts of B's land. B sold one tract to C, the other tract being sufficient to pay the debt. D, with a knowledge of the sale of the one tract to C, procured a release from A of the other tract, and then bought it of B; and also bought A's judgment against B. Held, C's land was discharged from the lien of the judgment. After the sale of the tract to C, the creditors of B were bound to resort to B's other land before coming on that sold to C. It occupied the position of a surety, and the surety's right to subrogation being destroyed, it was

Reed v. Cramb, 22 Ill. App. 34; Home National Bank v. Waterman, 30 Ill. App. 535; Burnap v. Natl Bank of Potsdam, 96 N. Y. 125; Allen v. O'Donald (Cir. Ct. D. Oreg.), 28 Fed. Rep. 346; Champion v. Whitney, 30 Minn. 177; Walker v. Goldsmith, 7 Oreg. 161; Dillon v. Dillon, Ky. Oct., 1902, no official report, 69 S. W. Rep. 1099, 24 Ky. Law Rep'r 781, where a mortgage of property by way of security was held voidable because of want of consideration. See note to § 22, supra.

<sup>60</sup> White v. Ault. 19 Ga. 551. In Kaufman v. Rowan, 189 Pa. St. 121, 42 Atl. Rep. 25, the evidence was held insufficient to sustain the proposition that the wife's property was in the position of surety for the husband's debt, and as such was released by an extension of the time of payment by the husband's creditors without her consent.

<sup>61</sup> Hill v. Witmer, 2 Phila. (Pa.), 72.

<sup>62</sup> Leffingwell v. Freyer, 21 Wis. 392.

discharged.<sup>63</sup> On the same principle, where a mortgagor sells a portion of the mortgaged premises, and in the deed of conveyance expresses that the same is "subject to the payment by the said grantee of all existing liens upon said premises," the effect of this charge is to make the part of the premises so conveyed the principal debtor for a proportionate part of the mortgage debt, and the mortgagor a surety only.<sup>64</sup> So where land subject to a judgment was sold for its full value by the judgment debtor to a third person, it was held that the land occupied the position of a surety, and was discharged by the creditor releasing subsequently acquired securities for the debt.<sup>65</sup> Where a mortgagor sells, for a consideration, mortgaged land, and conveys the same, the conveyance being silent as to the payment of the mortgage, and there is no covenant of title, the mortgagor remains the principal debtor, and the land security for the debt.<sup>66</sup> Where property standing in the relation of surety is alleged to have been discharged by an extension of time, the burden of proving the same is upon the person contending it.<sup>67</sup> Where the surety is discharged by alteration of the contract without his consent any property that he has pledged as collateral to secure performance of his contract of suretyship is likewise discharged.<sup>68</sup> When property occupies the position of surety it may be released in favor of defrauded creditors,<sup>69</sup> or innocent purchasers for value without notice.<sup>70</sup>

<sup>63</sup> *Lowry v. McKinney*, 68 Pa. St. 294.

<sup>64</sup> *Hoy v. Bramhall*, 4 C. E. Green (N. J.), 563.

<sup>65</sup> *Barnes v. Mott*, 64 N. Y. 397, affirming 6 Daly (Com. Pleas), 150.

<sup>66</sup> *Wadsworth v. Lyon, et al.* 93 N. Y. 201.

<sup>67</sup> *Brokaw et al. v. Field et al.*, 33 Ill. App. 138. In *Deweese v. Osborne*, 178 Ill. 39, a woman executed an absolute assignment of insurance policies on her husband's life to a bank cashier and her husband delivered the policies with the assignments indorsed to the bank to secure his indebtedness to it in the form of short notes. Held, that the bank by renewing the

notes without the woman's consent did not release its security and was entitled to apply the proceeds of the policies to its indebtedness especially after it had paid all premiums on the insurance subsequent to the assignment. The decision was grounded on the doctrine of estoppel.

<sup>68</sup> *Bolton v. Salmon*, L. R. 1891, 2 Ch. Div. 48.

<sup>69</sup> Thus, in *Wood v. Evans*, 98 Ga. 454, 25 S. E. Rep. 559, Gunter bought a mule from Morris giving his note for the price on which Evans became surety upon an agreement that the mule should be the surety's property until the note was paid. Wood, being igno-

**§ 44. Property of wife pledged for debt of husband occupies position of surety.**—While a married woman cannot usually<sup>1</sup> become personally bound for the debt of her husband, she may ordinarily pledge or mortgage her separate property for his debt, and if she does so, such property occupies the position of a surety or guarantor, and will be discharged by anything that would discharge a surety or guarantor who was personally liable.<sup>2</sup> Where a married woman mortgages her separate real estate for the debt of her husband, she will, after his death, be

rant of such agreement, sold goods to Gunter, who had possession of the mule, upon an agreement that he should be secured by chattel mortgage of the mule. The surety having paid the note it was held that the right of Wood to have the mule applied to payment of his debt was superior to that of the surety, even though the chattel mortgage was not executed until after Wood had obtained full knowledge of the rights of the surety.

<sup>70</sup> In *Leonard v. New England Mortgage Security Co.*, 102 Ga. 536, 29 S. E. Rep. 147, it was held that where land was mortgaged as security for a loan, by one who was grantee in a deed which was made in fraud of creditors of the grantor, and the mortgagee had knowledge thereof, at the time of making the loan, the rights of the defrauded creditors were superior to those of the mortgagee.

<sup>1</sup> Except as she has been enabled by statute. §§ 9 and 10, *supra*.

<sup>2</sup> *Johns v. Reardon*, 11 Md. 465; *Denison v. Gibson*, 24 Mich. 187; *Agnew v. Merritt*, 10 Minn. 308; *Wallace v. Hudson*, 37 Tex. 456; *Wolf v. Banning*, 3 Minn. 202; *Spear v. Ward*, 20 Cal. 659; *Niemcewicz v. Gahn*, 3 Paige 614; *Stamford, etc. Banking Co. v. Ball*, 4 De Gex, F. & J. 310; *Gahn v. Niemcewicz*, 11 Wend. 312; *Knight*

*v. Whitehead*, 26 Miss. 245; *Vartie v. Underwood*, 18 Barb. (N. Y.) 561; *Smith v. Townsend*, 25 N. Y. 479; *Bank of Albion v. Burns*, 46 N. Y. 170; *Coats v. McKee*, 26 Ind. 223; *Wilcox v. Todd*, 64 Mo. 388; *Purvis v. Carlsaphan*, 73 N. C. 575; *Hood et al. v. Jones*, 5 Del. Ch. 77; *Hassey v. Wilke*, 55 Cal. 528; *Bull v. Coe*, 77 Cal. 54; *Gray v. Holland*, 9 Oreg. 512; *Christian v. Keen*, 80 Va. 369. Wife's property occupying the position of surety is released by an extension of the time of payment made without her consent. *Eisenberg v. Albert*, 40 Ohio St. 631; *Post, Adm'r, v. Losey et al.*, 111 Ind. 74. Contrary to the weight of authority, it is held in *Alexander v. Bouton et al.*, 55 Cal. 15, that the wife's property mortgaged for the debt of her husband occupies the position, not of surety, but of principal. The court base their decision upon the principle that, when a married woman makes a contract which she is authorized by law to make, the legal presumption is that she contracts as a principal; and in an action or suit with reference to it, if she contracted otherwise than as a principal, it is incumbent upon her to prove it; for as she possesses by law all the rights, she is subject to all the duties, of a contracting party.

entitled to have her estate exonerated out of his assets. "In such case the wife is regarded as a surety."<sup>3</sup> Where a married woman pledged her property to indemnify the surety of her husband, the property thus pledged was treated in all respects as a surety.<sup>4</sup> Where a husband mortgages his property for his debt, and in the same mortgage the wife conveys her own separate property as security for the same debt, her property so conveyed will be treated in all respects as a surety.<sup>5</sup> Where the fact of suretyship does not appear from

<sup>3</sup> *Knight v. Whitehead*, 26 Miss. 245. In *Shea v. McMahon*, 16 App. Cas. (D. C.) 65, a husband conveyed city property worth \$50,000, by way of settlement, to his wife, upon which and other property was a blanket mortgage of \$10,000. Desiring to sell the other property he persuaded her to join him in executing a new mortgage for \$10,000 on the property conveyed to her, so that the other property might be released. Held, that the wife became entitled to the rights of a surety for her husband and entitled to reimbursement and exoneration out of his estate after his death.

<sup>4</sup> *Hodgson v. Hodgson*, 2 Keen 704.

<sup>5</sup> *Wheelwright v. De Peyster*, 4 Edwards' Ch. 232; *Loomer v. Wheelwright*, 3 Sandf. Ch. 135. An Indiana statute makes a married woman's contract of suretyship void. In *Cook v. Buhrlage*, 64 N. E. Rep. 603, the court of that state held and said that the question "whether or not a married woman is a surety or a principal on a note is to be determined, not from the form of the contract, nor from the basis upon which the transaction was had, but from the inquiry as to whether she received, in person or in estate, the benefit of the consideration upon which the contract rests." In that case

the real estate bought with the woman's notes was conveyed to another, the notes were therefore held void. Citing *Field v. Noblett*, 154 Ind. 357, 360, 56 N. E. Rep. 841; *Lackey v. Boruff*, 152 Ind. 371, 376, 53 N. E. Rep. 412; *Leschen v. Guy*, 149 Ind. 17, 19, 48 N. E. Rep. 344; *Chrisman v. Leonard*, 126 Ind. 202, 203, 25 N. E. Rep. 1101; *Thacker v. Thacker*, 125 Ind. 489, 490, 491, 25 N. E. Rep. 595; *Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. Rep. 811; *Dickey v. Kalfsbeck*, 20 Ind. App. 290, 293, 50 N. E. Rep. 590. See also *Vogel v. Lechner*, 102 Ind. 55, for a like statement of the rule. In *International B. & L. Assn. v. Watson* (Ind.), 64 N. E. Rep. 23, a married woman pleaded to a bill to foreclose a mortgage on her property that the mortgage was made to secure her husband's debt and was therefore void under the statute; held that it was incumbent on her to show that the mortgagee had knowledge of such purpose at the time of making the loan. In *Guy v. Lieberenz* (Ind.), 64 N. E. Rep. 527, it was held that where suit is brought on a note signed by a married woman and her husband or "where there is something about the transaction to indicate that the debt might be the debt of another," the burden of proving that the wife is not a



the mortgage, the wife must show that the creditor knew of the suretyship in order to entitle the property to stand in the position of a surety. But the fact of suretyship may be proved by parol.<sup>6</sup> Where a mortgage made by the husband and wife, of the wife's property for the husband's debt, recited that it was made in consideration of \$6,000 to the mortgagors and "each of them" paid, it was held the wife might show by parol that the debt was that of the husband, and thus avail herself of the rights of a surety with reference to the property.<sup>7</sup>

**§ 45. Property of wife pledged for death of husband, continued.**—Where the title to the wife's property mortgaged for her husband's debt is recorded, such record will be sufficient notice to the creditor of the fact of suretyship.<sup>8</sup> When a husband borrows money and secures it by mortgage on his wife's lands which she executes with him, and he lays out the money in permanent buildings and improvements on such lands, the lands do not occupy the position of a surety. The debt is, in reality, that of the wife.<sup>9</sup> A wife who joins with her husband in a mortgage of his real estate for the payment of his debt does not, as to such estate, occupy the position of a surety.<sup>10</sup> A husband mortgaged his real estate to secure his debt, and his wife joined in the mortgage, and waived her homestead rights. It was held she did not, with reference to such homestead rights, occupy the position of a surety, and could not take advantage of time given the husband.<sup>11</sup>

surety rests upon the plaintiff. Citing *Field v. Noblett*, 154 Ind. 357, 56 N. E. Rep. 841; *Cummings v. Martin*, 128 Ind. 20, 27 N. E. Rep. 173; *Miller v. Shields*, 124 Ind. 166, 24 N. E. Rep. 670, 8 L. R. A. 406; *Potter v. Sheets*, 5 Ind. App. 506, 32 N. E. Rep. 811. See also *Shea v. McMahon*, 16 App. Cas. (D. C.) 65.

<sup>6</sup> *Gahn v. Niemcewicz*, 11 Wend. 312; *Niemcewicz v. Gahn*, 3 Paige 614.

<sup>7</sup> *Spear v. Ward*, 20 Cal. 659.

<sup>8</sup> *Bank of Albion v. Burns*, 46 N. Y. 170; *Smith v. Townsend*, 25 N. Y. 479; *Trentman v. Eldridge*, 98 Ind. 525.

<sup>9</sup> *Dickinson v. Codwise*, 1 Sandf. Ch. 214. To similar effect, see *McFillen v. Hoffman*, 35 N. J. Eq. 364.

<sup>10</sup> *Hawley v. Bradford*, 9 Paige 200; *Tennison v. Tennison*, 114 Ind. 424. But see *Dawson v. Bank of Whitehaven*, Law Rep. 4 Ch. Div. 639.

<sup>11</sup> *Jenness v. Cutler*, 12 Kan. 500. In Iowa a homestead cannot be given as security for a debt. *Bockholt v. Kraft et al.*, 78 Iowa 661. While in Georgia the homestead is, by the express terms of the constitution and laws, made liable therefor. *McWatty v. Jefferson Co.*, 76 Ga. 352.



The court admitted that if the separate estate had been mortgaged she would have been entitled to the rights of a surety, but said of a homestead, "if it is an estate, it is such an estate as has never been defined by law, an estate unknown to the common law, technically, no estate at all." Where a husband and wife execute a mortgage on two separate pieces of real estate, one of which belongs to the husband and the other to the wife, and the mortgage is executed for the purpose of securing the individual debt of the husband, the wife is surety for the husband to the extent of her mortgaged separate estate.<sup>12</sup> Where husband and wife execute a mortgage on her separate estate to secure the payment of notes of a partnership of which the husband was a member, such notes having already been secured by a mortgage of partnership property, the wife is entitled to have the property mortgaged by the firm exhausted, before her separate estate can be subjected to the payment of the firm debts.<sup>13</sup> The wife, by joining in her husband's warranty deed conveying his own property, does not occupy the portion of surety.<sup>14</sup>

**§ 46. When retiring member of firm becomes surety of other partners for firm debts.**—When one member of a partnership retires from the firm, and the remaining members agree with him to pay the firm debts, and these facts are known to the creditor, the member so retiring will be considered in law a surety.<sup>15</sup> And if he is compelled to pay a debt of the firm

<sup>12</sup> Hubbard v. Ogden, 22 Kan. 363.

<sup>13</sup> Moffitt v. Roche, 77 Ind. 48.

<sup>14</sup> A Georgia statute, § 2474, civil code, forbids a married woman to become liable for the "debt, default or contract of her husband." In Sorrells v. Sorrells, 105 Ga. 36, 31 S. E. Rep. 119, it was held that when a woman joined her husband in conveying and warranting 129 acres of land, 50 of which were owned by the husband and 79 by the wife and the grantee was obliged to pay off a mortgage on the husband's portion, the wife could not be held liable for her husband's breach of warranty. For

that would be in effect making her liable for his default "either upon a contract of suretyship, which section 2488 of the civil code declares would be absolutely void, or else would be adjudging her liable upon a contract for which there was no consideration whatever."

<sup>15</sup> This is upon the far-reaching equitable principle that where A, from any cause or in any way, becomes legally compellable to pay or do that which B ought himself to pay or do and ought not to have the gall to ask A to pay or do for him, A, from the mere fact of being, under such circumstances, so

which the latter were bound to pay, he may recover the amount so paid in an action of indebitatus assumpsit against the remaining partners.<sup>16</sup> A and B, being partners and indebted, A died. B then formed a partnership with D, and B and D agreed to pay the debts of the old firm. The creditor knew of this, and gave time of payment to B and D for three years for the debt of the old firm. Held, the estate of A occupied the position of a surety and was discharged.<sup>17</sup> If a re-

liable, becomes, as to B, a surety for the payment of the debt or performance of the obligation, and the moment the creditor becomes chargeable with knowledge of the facts so giving rise to such suretyship, A is within the magic circle and entitled to all the protection that the law considerably throws around the surety. *Thurber v. Corbin*, 51 Barb. (N. Y.) 215; *Colgrove v. Tallman*, 2 Lans. (N. Y.) 97; *Williams et al. v. Boyd*, 75 Ind. 286; *Johnson v. Young*, 20 W. Va. 614; *Moore v. Topliff et al.*, 107 Ind. 241; *Barber v. Gillson*, 18 Nev. 89; *Chandler v. Higgins*, 109 Ill. 602; *Bryan v. Henderson*, 88 Tenn. (4 Pickle) 23; *Bays v. Conner*, 105 Ind. 415; *Allison v. McDonald*, 23 Can. Sup. Ct. 635; *Cooley, J.*, in *Smith v. Sheldon*, 35 Mich. 42, 47, as to which case see § 1, note 1, supra; *Wiley v. Temple*, 85 Ill. App. 69, citing *Conwell v. McCowan*, 81 Ill. 285; *Chandler v. Higgins*, 109 Ill. 602.

<sup>16</sup> *Shamburg v. Abbott*, 112 Pa. St. 6. And see *Sizer v. Ray*, 87 N. Y. 220.

<sup>17</sup> This was decided by the House of Lords in *Oakley v. Pasheller*, 10 Bligh (N. S.) 548, S. C. 4 Cl. & Fin. 207, which decision is explained and followed by *Kekewich, J.*, in *Rouse v. Bradford Banking Co.*, L. R. 1894, 2 Ch. 32, at 46. It is held inapplicable, in *Wilson v. Land Security Co.*, 26 Can. Sup.

Ct. 149, to cases in which the party assuming the debt of another was not already a co-debtor at the time of such assumption—a circumstance which does not strike the editor of this edition as having any weight whatever. See also *Cooley, J.*, in *Smith v. Sheldon*, 35 Mich. 42, § 1, note 1, supra; *Birkett v. McGuire*, 31 Up. Can. (C. P. R.) 430, S. C. 7 Ontario App. 53; *Munroe v. O'Neill*, 1 Manitoba Law Rep. 245, where the cases are ably reviewed by *Taylor, J.*, *Dubuc, J.*, dissenting; *Carruthers v. Ardagh*, 20 Grant (Ontario) 579; *Wiley v. Temple*, 85 Ill. App. 69, citing *Conwell v. McCowan*, 81 Ill. 285; *Chandler v. Higgins*, 109 Ill. 602; *Colgrove v. Tallman*, 67 N. Y. 95; *Lindley, P'ship* 448, *Oakford v. European etc. Steamship Co.*, 1 Hem. & M. 190; *Wilson v. Lloyd*, L. R. 16 Eq. 60; *Gates v. Hughes*, 44 Wis. 332; *Dodd v. Dreyfus*, 17 Hun 600. But where under such circumstances the creditor took from the continuing partner his note for the firm debt, upon the agreement that if paid it should cancel the debt, but if not he should hold the firm for it, and the note was not paid, it was held the retiring member was not discharged: *Varnam v. Harris*, 1 Hun (N. Y.) 451. In Ohio it is held that the retiring partner remains liable as principal to the same extent as if he had not retired: *Raw-*

tiring member of a firm agrees to bear a portion of the loss upon a note taken by the other partners towards their distributive share of the partnership effects, provided the note cannot be collected from the maker, he occupies the position of surety for the maker pro tanto, and will be discharged if the holders of the note give time to the maker.<sup>18</sup> A and B were partners and indebted to C; A sold his interest in the partnership to B, who covenanted to pay all the partnership debts, and this was known to C. Afterwards B made an arrangement under the bankruptcy act with his creditors, including C, by which C agreed to take a less amount for the partnership debt and to extend the time. Held, A occupied the position of a surety, and was discharged both by the giving of time and by the novation of the debt.<sup>19</sup> Where a member of a firm transferred his interest therein to a third person, who was received into the firm and assumed all the liabilities of the retiring member, it was held that such retiring member

son v. Taylor et. al., 30 Ohio St. 389. And see Palmer v. Purdy, 83 N. Y. 144. Where, after two partners left the firm and leased premises, the remaining partners agreed to pay the rent thereafter accruing, though the lessor was not aware of this agreement, it was held in an action against the retiring member of the firm to recover such rent that they were not to be treated as sureties: Palmer v. Purdy, 83 N. Y. 144, note 25, post. It has been held in New Jersey that an agreement between the debtors, after the creation of the debt, that one of them shall be principal and the other surety has no effect on the right of the creditor to maintain his action at law against both, as if no such agreement had been made. A debt was contracted by two partners. One of them retired from the firm. The other assumed the firm debts and continued the business. Held, that the creditor might still maintain his action, at law, against

both and was not bound to treat the retiring partner as a surety from the mere fact that he had retired from the firm with the creditor's knowledge, and that, therefore, an extension of time to the continuing partner did not release the retiring partner. Taylor v. Shute, 61 N. J. Law 256, 39 Atl. Rep. 663. Citations: Manning v. Shotwell, 5 N. J. Law 584; Pintard v. Davis, 19 N. J. Law 205, and 21 N. J. Law 632; Paulin v. Kaighn, 27 N. J. Law 503, 508; Anthony v. Fritts, 45 N. J. Law 1. In a court of equity, however, and in courts of law in other states, the creditor, after receiving notice of the fact that one of the principals has become a surety only, is thereafter bound to treat him as such. See Pain v. Packard, 13 Johns. 174, 2 Amer. Lead. Cas. Eq. 362, and notes.

<sup>18</sup> Wilde v. Jenkins, 4 Paige 481.

<sup>19</sup> Wilson v. Lloyd, Law Rep. 16 Eq. Cas. 60.

occupied the position of a surety for the firm debts to the extent that the assets of the firm were sufficient for their payment.<sup>20</sup> A and B were partners and dissolved their partnership, B taking the business and agreeing to pay the firm debts. Afterwards, judgment for a firm debt was recovered against A and B, which A was obliged to pay, and, by agreement with the creditor, A sued out execution on the judgment against the land of B. Held that, as between themselves, A was the surety of B, and had a right to make the agreement with the creditor, and could hold the land against subsequent creditors of B.<sup>21</sup> Three persons were in partnership in mercantile business. Two sold out to the third, who agreed to pay the partnership debts. The partner thus assuming the firm debts remained in possession of the former property of the firm, and was from time to time, for eight months, selling out the goods, when the firm debts having become due and not being paid, one of the retiring partners was sued for such firm debts, and thereupon filed a bill to compel the partner who assumed the debts to pay them from the property which had belonged to the partnership. Held, he occupied the position of a surety, and was entitled to the relief; a surety having a right to come into equity to compel the principal to pay the debt.<sup>22</sup>

**§ 47. Vendor of land who sells it subject to mortgage is surety for mortgage debt.**—If a party owning land, incumbered by mortgage to secure his debt, sells it, and the vendee, as part of the purchase price, agrees to pay the mortgage debt, the vendor, as between themselves at least, becomes the surety of the vendee for the mortgage debt, and the vendee becomes the principal, and the vendor will, as to such debt, be entitled to the same rights and remedies against the vendee that any surety has against his principal.<sup>23</sup> Whether the vendor in such case would be entitled to all the rights of a surety as against

<sup>20</sup> *Morss v. Gleason*, 64 N. Y. 204. So where a partnership takes in a new partner, and subsequently one of the original partners retires, the new firm covenanting to pay the debts of the old firm, and the retiring partner pays a judgment recovered against the old firm, he is entitled to reimbursement from the new firm under their covenant, be-

cause as to them he is a surety. *Sizer v. Ray*, 87 N. Y. 220.

<sup>21</sup> *Waddington v. Vredenberg*, 2 Johns. Cas. 227.

<sup>22</sup> *West v. Chasten*, 12 Fla. 315.

<sup>23</sup> This is upon the equitable principle stated in note 15 to the preceding section and results further from the fact that the property, which constitutes the primary

the creditor, who had knowledge of the facts, is not quite so clear upon authority. A and B purchased land jointly, and

fund for the payment of the mortgage debt—has passed into the hands and control of the vendee, which circumstance, coupled with the vendee's assumption of the mortgage debt for a valid consideration—i. e., the conveyance of the land—makes it primarily the duty of the vendee to pay the mortgage debt and makes it unconscionable that the vendee should ask the vendor to pay it, and the vendor, remaining still liable to the creditor for its payment, is thus compellable to perform the duty of another, and is therefore a surety and entitled to all the protection that the law gives a surety. Taft, J., in *Compton v. Jesup*, 68 Fed. Rep. 263, at 318, 31 U. S. App. 486, 584, 15 C. C. A. 397, at 452. In conformity with this principle it was held in *Murray v. Marshall*, 94 N. Y. 611, and in *Antisdel v. Williamson*, 165 N. Y. 372, 59 N. E. Rep. 207, that where mortgaged property is sold to a vendee who does not assume the debt, the vendor becomes a surety for the debt to the extent of the value of the property sold and remains a principal debtor as to the remainder of the debt. See also *Mills v. Watson*, 1 Sweeney (N. Y.) 374; *Cornell v. Prescott*, 2 Barb. (N. Y.) 16; *Marsh v. Pike*, 1 Sandf. Ch. 210; *Ayers v. Dixon*, 78 N. Y. 318; *Jester v. Sterling*, 25 Hun 344; *Fish v. Hayward*, 28 Hun 456; *Curry v. Hale et al.*, 15 W. Va. 867; *Tulare County v. Madden*, 109 Calif. 312, 41 Pac. Rep. 1092; *Compton v. Jesup*, 31 U. S. App. 486, at 584, 68 Fed. Rep. 263, at 318, 15 C. C. A. 397, at 452; *Murray v. Marshall*, 165 N. Y. 372, 59 N. E. Rep. 207; *Willard v. Wood*,

1 App. Cas. (D. C.) 44; *Harts v. Emery*, 184 Ill. 560; *Stelle v. Johnson*, Mo. App., Aug., 1902, 69 S. W. Rep. 1065, Div. 5 of opinion; *Mutual Life Ins. Co. v. Hall*, 31 App. Div. (N. Y.) 574, S. C. 52 N. Y. Supp. 404; affirming in 106 N. Y. 595, 59 N. E. Rep. 1127, an opinion below; *Ward v. DeOca*, 120 Calif. 102, 52 Pac. Rep. 130; *Biddell v. Brizzolara*, 64 Calif. 354, 30 Pac. Rep. 609, where the assumption was by a railroad consolidation. There seems to be no good reason why the mortgagor should not likewise be treated as a surety when a vendee removed from him by many mesne conveyances of the mortgaged property assumes the mortgaged debt. Such subsequent vendee has the property, the fund primarily liable for the debt, and when he has added to that his express promise to pay the debt, the original mortgagor occupies the position of being legally liable for a debt that another ought to pay and ought not to ask him to pay, and therefore, it would seem, should have the rights of a surety. But it has been held that a subsequent purchaser of mortgaged land does not stand as a surety, and cannot complain of an extension of the mortgage where he has a right to redeem: *Case v. O'Brien*, 66 Mich. 289. In *Ward v. DeOca*, 120 Calif. 102, 52 Pac. Rep. 130, Matthews mortgaged certain land, which he thereafter conveyed to Humphreys by a deed that did not mention the incumbrance; Humphreys conveyed to DeOca by a deed reciting that she did "assume and agree to pay" the incumbrance, and DeOca conveyed to Vickery by a deed which was ex-

gave back a joint bond and mortgage for the purchase money; A afterwards conveyed his half interest to B, and B agreed

pressly made "subject" to the mortgages. Held, that the mortgagee was not entitled to a deficiency decree against either DeOca or Vickery, even though there may have been a secret agreement with Humphreys that he should be personally liable for the mortgages, of which DeOca had no knowledge. The court said, quoting from *Biddell v. Brizzolara*, 64 Calif. 354, 30 Pac. Rep. 609, that even where a rule has been established that the purchaser is bound by his promise as a promise made for the benefit of the mortgagee, it is still necessary that the grantor should be personally liable upon the mortgage, in order to render the grantee liable upon his covenant to the holder of the mortgage assumed. In *Shepherd v. May*, 115 U. S. 505, it was held that an express promise made to a vendor by the vendee of real estate, conveyed to him subject to a deed of trust executed to secure a debt, does not, without the assent of the creditor, make the vendee the principal debtor, and the vendor the surety, and see *Chilton v. Brooks* (Md. 1890), 20 Atl. Rep. 125. In *Forrester v. Ivey*, 2 Ont. Law Rep. (1901) 480, it was held that a binding agreement between the mortgagee and the assignee of an assignee of the equity of redemption does not release the mortgagor not consenting thereto from personal liability. The first assignee had assumed; his assignee had not. Citing *Watson v. Bell* (1895), 32 Ont. Rep. 181, note, where the question is fully discussed by Meredith, J. This ruling is put upon the ground "that the

position of a mortgagor, who has sold his equity of redemption and is entitled to indemnity from his purchaser against the mortgage, and his mortgagee, is not one of principal and surety, but is simply one of mortgagor and mortgagee, and controlled by the law applicable to such cases." In this case (*Watson v. Bell*) the assignee of the equity of redemption was, by reason of facts that are not stated in the report, "under obligation to the mortgagor but not to the mortgagee to pay" the mortgage debt, and the reasoning of the court was that since there was no primary liability on the assignee's part there could be no accessory liability on the part of the mortgagor, and therefore no relation of principal and surety. In most of the cases the assignee's assumption of the mortgage debt is treated as inuring to the mortgagee, whether it is made to him directly or to the mortgagor, and, together with the transfer of the mortgaged property, as making him the principal debtor. See also *Barber v. McCuaig* (2), 1900, 31 Ont. Rep. 593, 24 Ont. App. Rep. 492, 29 S. C. R. (Sup. Ct. Can.) 126. In Canada the rule seems to be that the vendor must assign to the mortgagee the vendee's agreement to pay the mortgage as part of the purchase price before the mortgagee can avail himself of it: *Maloney v. Campbell*, 28 Can. Sup. Ct. 228. See also *Irving v. Boyd*, 15 Grant (Ont.) 157; *British Canadian Loan Co. v. Tear*, 23 Ont. Rep. 664; *Ball v. Tennant*, 21 Ont. App. R. 602.



to pay the mortgage, and gave A a bond of indemnity against the mortgage. Held, A occupied the position of a surety, and was entitled to the same rights of subrogation to which any surety would have been entitled, notwithstanding the bond of indemnity.<sup>24</sup> Under a similar state of facts of which the creditor had notice (except that no bond of indemnity was given the vendor), it was held that the vendor was not discharged because the creditor released the mortgage on a portion of the land. This was placed upon the ground that while as between themselves the vendor was the surety of the vendee, yet the vendor did not occupy that relation as to the creditor, and was not entitled to the rights of a surety as against the creditor, unless the creditor, for a valuable consideration, agreed to accept him as surety.<sup>25</sup> Where the owner of land incumbered by mortgage executed by him sold it subject to the incumbrance, it was held that in equity the land became the primary fund for the payment of the debt, that the vendor occupied the position of a surety, and upon payment of the mortgage debt was entitled to be subrogated to the rights of the creditor the same as any other surety.<sup>26</sup> Un-

<sup>24</sup> *Cherry v. Monro*, 2 Barb. Ch. 618. The same principle was held in *Succession of Daigle*, 15 La. Ann. 594.

<sup>25</sup> *James v. Day*, 37 Iowa 164. The same principle was held in *Marsh v. Pike*, 1 Sandf. Ch. 210, and the court, on a bill filed by the vendor, refused to compel the creditor to collect the money from the mortgaged premises, but granted relief against the vendee as a principal. In *Wilson v. Land Security Co.*, 26 Can. Sup. Ct. 149, Wilson, the vendee (under contract with the company) of subdivided land, assigned his interest therein to Henderson, who assumed the deferred payments, and the company, afterwards, without Wilson's consent, released certain half lots from the lien of the mortgage securing the deferred payments. Held, that Wilson was not thereby released from liability for the pur-

chase money for the rest of the lots. The court said that the assignment to and assumption by Henderson did not have the effect of making Henderson the principal debtor and Wilson a surety only because before the assumption was made Henderson and Wilson were not, both of them, debtors to the vendor as was the case in *Rouse v. Bradford Banking Co.*, L. R. 1894, 2 Ch. Div. 32, at 45-47.

<sup>26</sup> *Johnson v. Zink*, 51 N. Y. 333; *Mutual Life Ins. Co. v. Davies*, 12 J. & S. (N. Y. Sup. Ct.) 172; *Knobloch v. Zschwetzke*, 21 J. & S. (N. Y. Sup. Ct.) 391, and 23 J. & S. (N. Y. Sup. Ct.) 556; *Brown et al. v. Kirk*, 20 Mo. App. 524; *Wilcox v. Campbell*, 106 N. Y. 325, affirming 35 Hun 254, note 1, supra; note 1 to § 46. As to the principle compare *Matthews v. Fidelity Title & Trust Co.*, 52 Fed. Rep. 687, per Acheson, J.



der a similar state of facts it was held that the vendor was a surety, and was discharged by time given the vendee by the creditor, even though it was expressly agreed between the vendee and creditor that the mortgage and the debt should remain in all other respects unaffected by the giving of time.<sup>27</sup> As the rights of the surety against the creditor do not depend upon contract between them, but are founded upon equitable principles; and as it is settled that if the creditor does not know of the suretyship when he takes the obligation of the surety, but is informed of it afterwards, the rights of the surety then arise—these principles seem to apply with full force to the point under consideration, and it seems clear, on principle, that the vendor in such cases as the foregoing is entitled, as against the creditor, to all the rights of any surety. Where a vendor sold land subject to a mortgage, and gave to the purchaser thereof a bond with surety conditioned to save harmless the purchaser from said mortgage, and agreeing to pay the same himself, the purchaser cannot, upon the maturity of the mortgage, ask a court of equity to order the vendor to pay the same; and a demurrer by the surety is good when it did not appear from the bill that the purchaser had been disturbed in possession and that no demand for payment by the mortgagee had been made.<sup>28</sup> Where a mortgagor, who has covenanted for the payment of the mortgage debt, sells his equity of redemption, he becomes surety of the purchaser for the amount of such debt.<sup>29</sup>

**§ 48. Joint obligors on note or bond are sureties for each other—When sole maker of note is surety, etc.—Joint parties**

<sup>27</sup> Calvo v. Davies, 8 Hun (N. Y.) 222, affirmed 73 N. Y. 211; Fish v. Hayward, 28 Hun 456; George v. Andrews, 60 Md. 26; Paine v. Jones, 76 N. Y. 274, affirming 14 Hun 577; Murray v. Marshall, 94 N. Y. 611; Spencer v. Spencer, 95 N. Y. 353; Union Mutual Life Ins. Co. v. Hanford, 27 Fed. Rep. 588. In Penfield v. Goodrich, 10 Hun (N. Y.) 41, and Meyer v. Lathrop, 10 Hun (N. Y.) 66, it was held that the vendor of land which he conveyed subject to

a mortgage was not discharged by the creditor's giving time to the vendee for payment of the mortgage debt. But it was admitted that the land was the primary fund for the payment of the debt, and that as between themselves the vendor was the surety of the vendee.

<sup>28</sup> Leeming v. Smith, 25 Grant's Chan. (Can.) 256.

<sup>29</sup> Campbell v. Robinson, 27 Grant's Ch. (Can.) 634.

to a note are each sureties for the payment of the shares of the others. Of which fact the holder of the note is charged with knowledge. And each party will be discharged by any dealing between the payee and the other parties which would have discharged him if he had signed expressly as a surety.<sup>30</sup> This fact is of great practical importance where several appellants join in executing an appeal bond instead of each executing a bond for himself. If the judgment appealed from is set aside as to one party he may still be compelled to pay it nevertheless, because, by being a joint principal on the appeal bond, he is bound for the eventual payment of the judgment.<sup>31</sup> The principle has been held applicable to a forthcoming bond,<sup>32</sup> to the bond of two guardians,<sup>33</sup> to the bond

<sup>30</sup> Clark v. Dane, 128 Ala. 122, 28 So. Rep. 960. See note 32 to § 38, *supra*. The reason seems to be the same as stated in note 23, § 47, and note 15, § 46, that the joint obligor is legally compellable to pay the shares of his co-obligors, which payment such co-obligors ought to make themselves and ought not in fairness to ask or permit him to pay for them; therefore he is a surety within the definition of Cooley, J., in note 1, § 1, *supra*, and entitled to all the rights of a surety.

<sup>31</sup> In Lewis v. Maulden, 93 Ga. 758, 21 S. E. Rep. 147, judgment was obtained against a principal and two sureties on a note and all appealed, joining in the appeal bond. In the court of appeal judgment was rendered against the principal only and in favor of the two sureties, who were held to have been discharged because of usury in the note. It was held that nevertheless the two sureties were liable for the judgment against their principal because they had joined him in the execution of the appeal bond. "Although the verdict of the jury in the superior court relieved Maulden and Mc-

Kinney from liability as sureties on the note," said the court, "it did not relieve them of their liability on the bond which they had entered into jointly with Brown in order to take the case from the county court to the superior court. Their defence was different from that of Brown, and they could have entered a separate appeal, but they elected to join in the same appeal and bond with Brown. The general rule is that co-principals in a bond are sureties for each other [citing the text] and we see no reason why this rule should not apply to an appeal bond. According to the express terms of the bond and the provisions of the statute applicable thereto \* \* the obligor in such a bond is liable for the eventual condemnation money, and the eventual condemnation money, in this case, was the amount of the final judgment against Brown. If Maulden and McKinney have to pay this, they will of course be entitled to be subrogated to all the rights of the plaintiff in the judgment against Brown."

<sup>32</sup> In Waldrop v. Wolff, 114 Ga. 610, at 614, plaintiff brought a bail

of two administrators.<sup>84</sup> Where several persons purchase land, it being understood between them that each shall have an equal share of it, and they all join in a bond for the purchase money, they are sureties for each other; and if one fails to pay any portion of his share, and the others pay it, the one failing to pay will have no interest in the land, which he or his creditors can reach, until his share is paid up.<sup>85</sup> In a similar case, where one of two joint purchasers paid more than his share, it was held that he was surety for the excess, and entitled to set up the bond as a speciality debt against the estate of his co-purchaser.<sup>86</sup> Each principal obligor in a joint bond is, as be-

trover suit against Waldrop and Bryans to recover a stock of merchandise. Waldrop and Bryans retained the property, giving their joint and several forthcoming bond, on which one Hayes was surety, conditioned for the return of the property or the payment of the eventual condemnation money. A non-suit was entered as to Bryans at the trial and judgment recovered against Waldrop alone. The trial court decided that the discharge of Bryans in the main suit ended his liability on the bond also, and entered judgment on the bond against Waldrop and Hayes only. The supreme court held that this was erroneous. Citing the text, the court said: "The general rule is that joint obligors are sureties for each other. \* \* This rule has been applied by this court to defendants who unite in an appeal bond. *Lewis v. Maulden*, 93 Ga. 758. In that case three persons were sued as defendants in the county court, and judgment was there rendered against all of them. All of the defendants appealed, uniting in one appeal bond, and giving another person as security. In the superior court a verdict was rendered against one of the defendants only, and two of them were released from lia-

bility from the verdict in the original cause of action. It was held that, although they were released as principals, they, together with the surety on the appeal bond, were all sureties for the principal who was held bound as such. If this rule is applicable in the case of an appeal bond, we see no good reason why it should not apply in the case of an eventual condemnation money bond given by defendants jointly sued in an action of trover and who unite in a bond with a surety, in which they bind themselves 'jointly and severally to pay the eventual condemnation money in the case.' Bryans and Waldrop need not have united in a common bond when they were arrested on the bail process, each one having the right and privilege of giving a separate bond, if he had seen proper; but having chosen to unite in a common bond, they became subject to the general rule above referred to, that joint principals in a bond are sureties for each other."

<sup>83</sup> *Freeman v. Brewster*, 93 Ga. 648, 21 S. E. Rep. 165.

<sup>84</sup> *Lancaster v. Lewis*, 93 Ga. 727, 21 S. E. Rep. 155.

<sup>85</sup> *Deitzler v. Mishler*, 37 Pa. St. 82.

<sup>86</sup> *Stokes v. Hodges*, 11 Rich. Eq.

tween them, a surety for his co-obligor.<sup>37</sup> Where two administrators and two sureties executed a joint and several administration bond, it was held that each of the administrators was surety for the other, and if one committed a devastavit the other was chargeable *pari passu* with the other sureties, but was not liable as principal.<sup>38</sup> When a promissory note is executed by two persons, the consideration going one-half to each of them, as between themselves, they are each principal for one-half the debt, and surety of the other for the other half.<sup>39</sup> The sole maker of a promissory note is sometimes entitled to stand in the position of a surety. Thus W who was absent, wrote to N, requesting him to borrow of M a sum of money to pay a debt of W, promising in the letter to repay the money on his return. This letter was shown to M, and the money was obtained, for which N gave his individual note. W, on his return, went to M with the money, and offered to pay N's note, but M permitted W to retain the money and agreed to wait for it. Held, N was a surety and was discharged.<sup>40</sup> A agreed to take B's note for a certain debt about to be created, and also certain railroad shares as collateral security for the notes, provided B would furnish him the bond of responsible parties conditioned that they would take the shares and notes at the end of two years and pay what should remain due on the notes. Held, that, although such parties did not sign the notes, they were in fact sureties of B, and not original promisors, and that they were entitled to all the rights of sureties.<sup>41</sup> If a purchaser of goods, subsequent to the sale, gives a portion of them to A, and A unites with the purchaser in a joint note for the purchase money, with the understanding that A signs as surety only, the fact that A

(S. C.) 135. To the same effect, see *Crafts v. Mott*, 4 N. Y. 604.

<sup>37</sup> *Hatch v. Morris*, 36 Me. 419. For special case on the same subject, see *Cox v. Thomas's Adm'r*, 9 Gratt. (Va.) 312.

<sup>38</sup> *Morrow's Adm'r v. Peyton's Adm'r*, 8 Leigh (Va.) 54. And see *Nanz v. Oakley*, 120 N. Y. 84, reversing 37 Hun 495.

<sup>39</sup> *Hall v. Hall*, 34 Ind. 314, distinguished in *Mullendore et al. v.*

*Wertz*, 75 Ind. 431; holding that a court of equity will look at all the circumstances of a case to determine whether or not a party is a surety. See *Eyre v. Hollier*, Lloyd & Goold (Temp. Plunket) 250. And see *Clark v. Dane*, 128 Ala. 122, 28 So. Rep. 960, note 32, § 38.

<sup>40</sup> *McQueeten v. Noyes*, 6 N. H. 19.

<sup>41</sup> *Watriss v. Pierce*, 32 N. H. 560.

received a part of the goods from the purchaser as a gift does not make him a principal in the note.<sup>42</sup> Where two persons give their joint note for money borrowed and received by them in equal shares, they will be held liable jointly as principals, each for the whole, and not as sureties for one another.<sup>43</sup>

**§ 49. Stockholders of a corporation liable for its debts; whether or not its sureties—When surety becomes principal, etc.**—Upon principle it seems clear that the stockholder of a corporation is as to its creditors a surety for the payment of its debts to the extent of the amount due upon his stock subscription, under statutes that give creditors of the corporation the right to resort to the stockholders upon the corporation's failure to pay. And it has been expressly so held by high authority.<sup>44</sup> The debt is primarily the debt of the corporation. The corporation controls the assets constituting the fund out of which it should be paid. The stockholder is liable if the corporation do not pay. The liability of the corporation to the creditor is primary; the liability of the stockholder is secondary. The elements of a suretyship seem to be all there,<sup>45</sup> but the courts are slow to concede the logical consequence that the stockholder's liability is ended when the corporation and the creditor, without his consent, alter the contract, as, for instance, by stipulating for further time.<sup>46</sup>

<sup>42</sup> *Fraser v. McConnell*, 23 Ga. St. Rep. 618, note 6, § 1, *supra*; 368; *Bridgewater v. England*, 23 Ky. Law Rep. 338, 62 S. W. Rep. 882. *Patterson v. Wyomissing Co.*, 40 Pa. St. 117.

<sup>45</sup> Note 1, § 1, *supra*; *Smith v. Sheldon*, 35 Mich. 42, 47.

<sup>43</sup> *Small v. Older*, 57 Iowa 326. In *Traders' National Bank v. Clare*, 76 Tex. 47, it is held that under such circumstances the parties, as between themselves, are principals for the amount each received, and sureties as to the balance, and one of the sureties may assume the debt of one or more for whom he is surety and take a conveyance from such principal to protect himself.

<sup>44</sup> *Cooley, J.*, in *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557, following *Hanson v. Donkersley*, 37 Mich. 184; *Harpold v. Stobart*, 46 Ohio St. 397, 405, 15 Amer.

<sup>46</sup> This may be due in part to the inconvenience that would result from giving the subscriber for stock all the rights of a surety. *Hanson v. Donkersley*, 37 Mich. 184, is perhaps the only case holding the stockholder released from stock liability by the creditor's giving time to the corporation. *Morawetz, Corp's.*, § 879, thinks the court there erred in treating the corporation as an entity distinct from the stockholder, and says that the extension of time should have been treated as having been given to

Where the charter of a corporation made the stockholders "jointly and severally, personally liable for the payment of all debts or demands contracted by the said corporation," it was held the stockholders were principal debtors in their individual as well as their corporate capacity, and were not sureties of the corporation, nor discharged by time given to it.<sup>47</sup> Where the directors of a railroad company, in order to secure a loan for the company from a bank, each gave his individual promissory note to the bank as collateral security, the relation of principal and surety is created between the company

the stockholder. It might be argued, perhaps with greater force, against the view stated by Mr. Ackley in the text, that the corporation and the stockholder occupy toward the creditor substantially the positions of debtor and garnishee and are not, like principal and surety, both of them directly liable to the creditor in the first instance. And that an alteration of the contract between the debtor and the creditor never releases the garnishee from his indebtedness. In this connection see *Wilson v. Land Security Co.*, 26 Can. Sup. Ct. 149, cited in notes 17 and 25, *supra*, to §§ 46 and 47. See also *Neal v. Head*, 133 Calif. 110, 65 Pac. Rep. 131 and 576, cited in note 1 to § 1, *supra*. As against the stockholder regarded as a surety for the payment of the corporation's debts a judgment against the corporation is "at least prima facie evidence that a debt was contracted, if not conclusive." *Grand Rapids Savings Bank v. Warren*, 52 Mich. 557, at 561, citing to this point *Milliken v. Whitehouse*, 49 Me. 529; *Wilson v. Pittsburgh Coal Co.*, 43 Pa. St. 424; *Howes v. Anglo-Saxon Co.*, 101 Mass. 385-387; *Grund v. Tucker*, 5 Kan. 70; *Dilworth v. Coolbaugh*, 5 Iowa 300; *Bohn v. Brown*, 33 Mich. 257, 263.

*Contra*, *Miller v. White*, 50 N. Y. 137.

<sup>47</sup> *Harger v. McCullough*, 2 Denio (N. Y.) 119, 123, holding that, by reason of the words of the charter quoted, the stockholders were, in their individual as well as their corporate capacity, principal debtors, and that, therefore, an extension of time without their consent did not release them. Compare *Campbell, J.*, in *Hanson v. Donkersley*, 37 Mich. 184, holding that a statute making stockholders individually liable does not necessarily make them primarily liable. *Moss v. McCullough*, 7 Barb., N. Y., 279. *Harrell v. Blount*, 112 Ga. 711, at 720, 38 S. E. Rep. 56, was a suit by creditors of an insolvent corporation to compel stockholders to pay their stock subscriptions. The court there said (p. 720): "When, as in the case of *Heard v. Sibley*, 52 Ga. 310, proceedings are instituted against a stockholder to enforce against him an individual liability, imposed by statute, with respect to debts contracted by the corporation, it may with much force be argued that he occupies the position of a surety, and therefore is not, in that capacity, concluded by a judgment rendered against the corporation in an action to which he was not a



and the bank.<sup>48</sup> When two parties, for mutual accommodation, loan their notes to each other, neither thereby becomes a surety for the other. A loaned two of his individual notes to B. which B discounted, and A had to pay. At the same time as the former loan, B loaned two of his individual notes for the same amount, and due at the same time, to A. After paying the notes, A claimed certain rights of subrogation as the surety of B in the two notes which he had paid. Held, he was not a surety, and was not entitled to the subrogation.<sup>49</sup> A surety may, by subsequent dealings between himself and the creditor, become a principal. A surety on a note given for the price of a negro gave his note for a balance remaining due on the original note, in discharge of such balance. Held, that by this transaction the surety ceased to be the surety of his principal, and became his creditor, and that he could not make the defense to the last note that the negro was unsound, and the consideration of the first note had failed.<sup>50</sup> Judgment having been obtained against a surety, he entered into a new arrangement with the creditor, irrespective of the principal, by which execution was not to issue while he kept up certain policies on his life for securing the debt, and the creditor was to take a less amount than the judgment. It was held that by this arrangement the surety became a principal, and was no longer entitled to any of the rights of a surety.<sup>51</sup> Where a surety, for valuable consideration, agrees with the principal to pay the indebtedness, he thereby becomes the principal, and the principal becomes his surety.<sup>52</sup> Where a surety on a note against whom judgment has been obtained purchases real estate from the principal, who retains a lien for the purchase money, and it is agreed between them that the surety shall pay the judg-

party and which he had no opportunity to defend. But when, in a case such as the one now before us, a creditor merely seeks to compel a stockholder to pay a debt which he owes to the corporation, and which constitutes a part of its equable assets, we are by no means sure the same reasoning can logically be said to apply." See also note 6, § 1, *supra*.

<sup>48</sup> *Street v. Old Town Bank*, 67 Md. 421.

<sup>49</sup> *Stickney v. Mohler*, 19 Md. 490.

<sup>50</sup> *Fluker v. Henry's Adm'r*, 27 Ala. 403. See also *Lamoille Co. National Bank v. Hunt*, 72 Vt. 357, 47 Atl. Rep. 1078.

<sup>51</sup> *Reade v. Lowndes*, 23 Beav. 361. To the effect that a surety does not become a principal by joining in a new obligation after his liability is fixed, see *Merriken v. Godwin*, 2 Del. Ch. 236.

<sup>52</sup> *Chaplin et al. v. Baker*, 124 Ind. 385.



ment, the surety becomes the principal and the principal the surety.<sup>53</sup> Where a surety is paid by the principal the amount of a debt for which he is liable, and thereupon agrees to pay the creditor, he becomes the principal, and the principal becomes the surety, as between them.<sup>54</sup>

**§ 50. Surety entitled to same rights after judgment against him as before.**—The relation of principal and surety continues after judgment against the surety, and a surety is, both at law and in equity, entitled to the same rights, and will be discharged by the same act of the creditor after, as before, judgment.<sup>55</sup> It has in a few cases been held that the character of the surety as such became merged in the judgment, and that thenceforth he became a principal and was not entitled to the rights of a surety.<sup>56</sup> There is, however, very little conflict of

<sup>53</sup> *Rhea v. Preston*, 75 Va. 757.

<sup>54</sup> *Coggeshall v. Ruggles*, 62 Ill. 401. See further, as to when surety may become principal, *Hurlun v. Ely*, 55 Cal. 340.

<sup>55</sup> *Commercial Bank v. Western Reserve Bank*, 11 Ohio 444; *Brown v. Ayer*, 24 Ga. 288; *Commonwealth v. Miller's Adm'rs*, 8 Serg. & Rawle 452; *Moss v. Pettengill*, 3 Minn. 217; *Chambers v. Cochran*, 18 Iowa 159; *Rice v. Morton*, 19 Mo. 263; *Bangs v. Strong*, 7 Hill (N. Y.) 250; *Smith v. Rice*, 27 Mo. 505; *Davis v. Mikell*, 1 Freeman's Ch. (Miss.) 548; *Newell v. Hamer*, 4 How. (Miss.) 684; *Curan v. Colbert*, 3 Kelly (Ga.) 239; *Brown v. Ex'rs of Riggins*, 3 Kelly (Ga.) 405; *Delaplaine v. Hitchcock*, 4 Edwards' Ch. 321; *Allison v. Thomas*, 29 La. Ann. 732. A judgment against principal and sureties on a bond does not extinguish that relation; their rights inter sese remain after as before judgment. *West v. Brison*, 99 Mo. 684. In *New York Bank Note Co. v. Kerr*, 77 Ill. App. 53, Fish made a draft on appellee Kerr, in favor of the New York Bank Note Co., and Kerr, as surety, accepted the draft to cover

the cost of certain engraving to be done for Fish by the Bank Note Co. The Bank Note Co. afterwards recovered judgment on the draft against Kerr in New York, and Kerr filed his bill to enjoin suit upon the judgment in Illinois, on the ground that the Bank Note Co. had in fact done no work for Fish and was entitled to nothing from him. Held, that he was entitled to the injunction prayed for. His rights as against his principal were not affected by entry of the judgment.

<sup>56</sup> *McNutt v. Wilcox*, 1 Freeman's Ch. (Miss.) 116. In *Bay v. Tallmadge*, 5 Johns. Ch. 305, Chancellor Kent held that, after judgment against bail in a civil case, the relation of principal and surety ceased, and the bail was not discharged by time given. The same principle was held in *La Farge v. Herter*, 3 Denio 157, but the decided weight of New York authority is the other way. In *Findlay's Ex'rs v. United States*, 2 McLean 44, it was held that judgment against the accommodation drawer of a bill of exchange merged the relation of principal and surety, and that thereafter the only right of

authority on this subject. There is no good reason why a surety should not be entitled to the same rights after, as before, judgment. "The recovery of a judgment against the surety does not merge or destroy his character as such, or the relation which he sustains to his principal. Its only effect is to change the form of the security as between him and the debtor. Merging the contract between the creditor and the principal debtor or surety cannot affect the relation between the principal and surety. This relation is not necessarily created by the contract to which the creditor is a party, but may be created even without his knowledge."<sup>57</sup> "The judgment is technically a security of a higher nature, but it is a security for the same debt or duty as the contract on which it is founded."<sup>58</sup> "To give time, or to discharge the principal after judgment, would be as injurious to the surety as before judgment. In either case the injury is the same, and why not have the same protection?"<sup>59</sup> In another case the court said: "Had the facts now proved occurred before this judgment was rendered they would have opposed a good defense to the recovery of it; and if not availed of in defense, the judgment would have concluded them; occurring after the judgment, they are no more concluded by it than payment, or a release, or any other matter going to discharge it."<sup>60</sup> After joint judgment against principal and surety, the surety will be discharged by time given the principal,<sup>61</sup> by creditor releasing

the surety was to pay and have subrogation. In *Marshall v. Aiken*, 25 Vt. 328; *McDowell v. Bank*, 1 Harr. (Del.) 369, and *Dunham v. Downer*, 31 Vt. 249, it was held that the judgment merged the relation of principal and surety, so that at law the surety no longer had any rights as such, but that in equity all his rights remained. In *Jenkins v. Robertson*, 2 Drewry 351, A as principal, and B as surety, were indebted to C. B died, and C, in a creditor's suit, obtained a decree against his estate. Afterwards C sued A and took judgment, thereby giving time. Held, the estate of B was not discharged. Its character as surety was merged in

the decree, and all that followed was simply an execution of the decree. See also on this subject, *Dougherty v. Richardson*, 20 Ind. 412; *Thomas et al. v. Stewart et al.*, 117 Ind. 50.

<sup>57</sup> *Bangs v. Strong*, 4 N. Y. 315, per Pratt, J.

<sup>58</sup> *Carpenter v. King*, 9 Met. 511, per Shaw, C. J.

<sup>59</sup> *Trotter v. Strong*, 63 Ill. 272, per Walker, J.

<sup>60</sup> *Shelton v. Hurd*, 7 R. I. 403, per Ames, C. J.

<sup>61</sup> *Storms v. Thorn*, 3 Barb. (N. Y.) 314; *Blazer v. Bundy*, 15 Ohio St. 57; *McCrary v. Coley*, Ga. Dec. 104; *Carpenter v. Devon*, 6 Ala. 718; *Crawford v. Gaulden*, 33 Ga. 173.

levy on property of principal, and taking from principal bond and mortgage in payment for the debt,<sup>62</sup> by creditor releasing principal, who is taken in execution, and taking from him a fresh security for the debt.<sup>63</sup> The same rule prevails where separate judgments are recovered against the principal and surety.<sup>64</sup> After judgment against both principals and sureties they are at liberty the same as before to show by parol evidence which were principals and which sureties and, generally, their relation to each other.<sup>65</sup>

§ 51. **Surety, who in terms binds himself as principal, not entitled to rights of surety.**—Where a surety binds himself in terms as a principal in the obligation which he signs, he will be held as principal, and will be entitled to none of the rights of a surety. “There is no rule of law which prohibits a surety from waiving the right which belongs to him as such. Such a waiver has nothing in itself offensive to the policy of the law.” The express terms of the obligation in such case exclude the idea of suretyship, and the creditor has a right to avail himself of the contract his vigilance has obtained.<sup>66</sup> Where three parties signed a joint and several note, the first one adding to his name the word “principal,” the other two adding the word “sureties,” it was held the one to whose name the word “principal” was attached could not show by parol that he was in fact a surety, and known to be such by the creditor. The court said that if the note had been silent as to who was principal and who surety, the suretyship might have been shown without contradicting the note; but in the present case, to allow the proof would be to contradict the terms of the note.<sup>67</sup> Several parties signed a note to a bank commencing as follows: “We, severally and jointly, all as principals, promise to pay,” and it was held none of them could show they

<sup>62</sup> *La Farge v. Herter*, 11 Barb. (N. Y.) 159.

<sup>63</sup> *Eales v. Fraser*, 6 Man. & Gr. 755.

<sup>64</sup> *Manufacturers' & Mechanics' Bank v. Bank of Pennsylvania*, 7 Watts & Serg. 335.

<sup>65</sup> Thus, in *Bulkeley v. House*, 62 Conn. 459, 26 Atl. Rep. 352, 21 L. R. A. 247, judgment was obtained against four signers of a note. One

of them was permitted to show that he signed as surety for a surety and therefore was not liable for contribution to another who, without defendant's knowledge, was a surety in fact, though he signed the note as an apparent maker.

<sup>66</sup> *Picot v. Signiogo*, 22 Mo. 587; *McMillan v. Parkell*, 64 Mo. 286.

<sup>67</sup> *Waterville Bank v. Redington*, 52 Me. 466.

were sureties.<sup>68</sup> The court said: "Here is an express contract that each signer is a principal. Each contracts for himself with the holder that he is a principal; that he will so stand upon the note. This constitutes a part of the contract with the bank, as much as the sum to be paid or the time of payment or the promise to pay anything at any time does, and this fact as to the capacity in which the signer of the note binds himself, may often be as important a part of the contract as any other." A principal and several sureties signed a bond reciting that they all signed "as principals," and nothing appeared on the face of the bond to indicate that any of them were sureties. Held, the sureties were estopped by the bond to show they were sureties, and that they were not discharged by time given.<sup>69</sup> Where a note commenced, "We, each as principal, jointly and severally promise to pay," but one of the signers was a surety, and known to the creditor to be such, and time was given to the principal which would ordinarily have discharged a surety, it was held the surety was not discharged.<sup>70</sup> But where in such a case the surety added to his signature the word "surety," it was held that he had all the rights of a surety and was discharged by time given.<sup>71</sup> A surety may also be estopped by his conduct from claiming the rights of a surety. A appeared on a note as principal and B as surety, and in various litigations concerning it for eight years A professed to be the principal. In the meantime judgments had been recovered against B by certain of his creditors. In a contest between A and such creditors it was held that A could not show, to the prejudice of the creditors, that he was in fact surety and B principal on such note.<sup>72</sup> The surety's

<sup>68</sup> Derry Bank v. Baldwin, 41 N. H. 434. This decision was made at law, and one of the parties filed a bill in equity, claiming relief as a surety there, but it was denied him, and the court held that both at law and in equity he was concluded by the terms of his obligation. Heath v. Derry Bank, 44 N. H. 174.

<sup>69</sup> Sprigg v. Bank of Mount Pleasant, 10 Pet. (U. S.) 257; Menaugh et al. v. Chandler et al., 89 Ind. 94.

<sup>70</sup> Claremont Bank v. Wood, 10 Vt. 582.

<sup>71</sup> People's Bank v. Pearsons, 30 Vt. 711.

<sup>72</sup> Goswiller's Estate, 3 Penr. & Watts 200. In California National Bank v. Ginty, 108 Calif. 148, 41 Pac. Rep. 38, Livingston, Clarke & Co. and Ginty and Luce, being sued on a note signed by all with nothing on its face to indicate that the two latter were sureties, Ginty and Luce pleaded that they were sureties and were released by plaintiff's release of their principal. The court found that

assumption of the character of principal must be clear before the courts will hold that he has waived his rights as surety and for the purpose of determining whether he has consented to be bound as principal the court examines the whole instrument and construes doubtful expressions in favor of his retaining the character of surety.<sup>73</sup>

**§ 52. Surety estopped to deny recitals of his obligation.—**

The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this whether the recitals are true or false in fact. Having once solemnly alleged the existence of the facts they cannot afterwards be heard to deny it.<sup>74</sup> The plaintiff in a replevin suit, as a con-

Ginty and Luce as between themselves and Livingston, Clarke & Co. were sureties and that the payee had knowledge thereof when the note was made, but also found, from circumstances outside the note, that as to the payee they all signed as principals and were dealt with as such. It was held that "where one signs as principal he will be held as such, notwithstanding the creditor knew that as between the one thus signing and the principal debtor the former was in fact only a surety."

<sup>73</sup> In *Foerderer v. Moors*, 91 Fed. Rep. 476, 33 C. C. A. 641, 62 U. S. App. 538, the Keen-Sutterle Co., importers, made a written agreement with Moors, bankers, by which Moors agreed to give them £15,000 credit, and Foerderer gave to Moors attached to that agreement a guaranty of payment in which he wrote: "And I do hereby expressly waive \* \* demand upon the said Keen-Sutterle Company, \* \* holding myself liable to you, under said agreement, and the letter of credit named in said agreement, equally with said Keen-Sutterle Company in all respects." With reference to this the court said (p. 548): "The final clause of the guaranty was not intended to turn the defendant into

a principal, and had no such effect. It waived demand and notice, and made him liable as upon a contract of strict suretyship, but it did not deprive him of the benefit of a previous provision in the guaranty which recognized and conserved his rights."

<sup>74</sup> *Monteith v. Commonwealth*, 15 Gratt. (Va.) 172; *Duhamp v. Nicholson*, 14 Martin (La.) 2 N. S. 672; *Cordle v. Burch*, 10 Gratt. (Va.) 480; *Borden v. Houston*, 2 Tex. 594; *Cecil v. Early*, 10 Gratt. (Va.) 198; *Cox v. Thomas' Adm'x*, 9 Gratt. (Va.) 312; *Lee v. Clark*, 1 Hill (N. Y.) 56; *State v. Lewis*, 73 N. C. 138; *May v. May*, 19 Fla. 373; *Thompson v. Rush*, Neb., Dec., 1902, 92 N. W. Rep. 1060, citing the text. Recitals control dates. In *Brown & Haywood Co. v. Ligon* (C. C. Mo.), 92 Fed. Rep. 851, a building contractor's bond antedated the contract therein recited. Held, that the sureties were concluded by the recitals (p. 855). *McNamara v. Mattei*, Conn., Sept. 1901, 50 Atl. Rep. 35. With respect to the liability of sureties on bonds, the doctrine as laid down in the text is held to apply only "to acts in connection with bonds possible and legal in themselves." *Tinsley v. Kirby*, 17 S. C. 1.

dition for a continuance granted him, was required to give an additional bond, and, in pursuance of such requirement, A, long after it had been taken in the case, signed the original replevin bond to the sheriff, which had been signed by other sureties. In a suit against A on the bond, he set up the defense that the sheriff had no right to take a replevin bond in the suit at the time he, A, signed it, and that the bond was void. The bond on its face imported that it was executed when the suit was instituted, and when the sheriff had a right to take it, and it was held that the surety was estopped to deny that it was taken at that time.<sup>75</sup> In an action against the sureties in an undertaking purporting to have been given to procure the discharge of an attachment, they will not be allowed to show as a defense that no attachment was in fact issued. It is not essential to the validity of such an undertaking that an attachment should actually be issued. Giving an undertaking which recites the issuance of an attachment when none has been issued is conclusive evidence of a waiver of the issuance of the attachment.<sup>76</sup> The surety on a receiver's recog-

<sup>75</sup> Decker v. Judson, 16 N. Y. 439.

<sup>76</sup> Coleman v. Bean, 1 Abbott's Rep. Omitted Cas. (N. Y.) 394. To similar effect, see Higgins v. Healy, 15 J. & S. (N. Y. Sup. Ct.) 207. In Sheldon Co. v. Cooke, 177 Mass. 441, 59 N. E. Rep. 77, the surety on an attachment bond was held estopped from setting up by way of defense that there was in fact no attachment. In an action on a bond to dissolve an attachment neither the sufficiency of the grounds of the attachment nor the liability of the property levied upon can be inquired into. Thompson v. Ornett, Ky., Oct., 1901, no off'l report; 64 S. W. Rep. 735, 23 Ky. Law Rep. 1082, citing Hazelrigg v. Donaldson, 2 Metc. (Ky.) 445; Inman v. Strattan, 4 Bush (67 Ky.) 445. The reason is thus expressed in Hazelrigg v. Donaldson, 2 Metc. (59 Ky.) 445: "As the execution of the bond has the effect to discharge the attachment, no question as to the validity of the

attachment can afterwards be made in the cause; and as the court, after the bond is executed, has no longer any power or control over the property attached, no claim which any person may have to it can be investigated in the action. When the bond is executed is stands in lieu of the attachment, and the action proceeds as if no attachment had ever issued." In Brown v. Tidrick, 14 S. D. 249, 85 N. W. Rep. 185, the obligors on an attachment bond were held estopped from questioning the regularity of the attachment. In Munks v. Jackson, 66 Fed. Rep. 571, 13 C. C. A. 641, a vessel having been libeled, the owner before service of the monition filed a release bond with the clerk instead of with the marshal. Held, that the surety could not defend on the ground that the statute prescribed that such bond should be filed with the marshal and by him submitted to the court for approval.



nizance, which recites that it has been duly acknowledged before a commissioner of the court is estopped to deny that fact.<sup>77</sup> When the bond of a city treasurer recited the fact that he had been elected to that office, and the sureties on the bond were sued for money received by him while acting in that capacity, it was held that they could not deny that he had been elected. The court said that by signing the bond they had enabled him to get the money of the city, and it was too late for them to deny his election.<sup>78</sup> When the bond of a borough collector recited that he was duly elected, it was held that the sureties therein could not show that the office had been abolished before his election.<sup>79</sup> Where the condition of a bond recited that A was guardian, etc., it was held that neither A nor the sureties on his bond could deny that he was guardian, nor set up as a defense any supposed irregularity in obtaining the appointment.<sup>80</sup> Obligors on an appeal bond are held estopped to deny that a judgment or stay order as therein recited was entered,<sup>81</sup> or that the court had jurisdiction to enter the order appealed from.<sup>82</sup> The surety on an appeal bond is estopped from availing himself of any defense that the prin-

<sup>77</sup> Driscoll v. Blake, 9 Irish Ch. Rep. 356.

<sup>78</sup> City of Paducah v. Cully, 9 Bush (Ky.) 323. To same effect, see People v. Jenkins, 17 Cal. 500; Phenix Ins. Co. v. Findley et al., 59 Ia. 591. In People v. Hammond, 109 Calif. 384, 42 Pac. Rep. 36, the sureties on the official bond of a tax collector reciting his election for a second term were held estopped from *showing* that he was a holdover from *his first term* and had not taken the oath of office for the second term.

<sup>79</sup> Seiple v. Borough of Elizabeth, 3 Dutcher (N. J.) 407.

<sup>80</sup> Fridge v. The State, 3 Gill & Johns. (Md.) 103; State ex rel. Metsker v. Mills et al., 82 Ind. 126. So the sureties on a trustee's bond are estopped from impeaching the validity of the appointment. Bassett v. Crafts, 129 Mass. 513. Compare note 17 to § 57.

<sup>81</sup> Healy v. Newton, 96 Mich. 228, 55 N. W. Rep. 666; Hallenbeck v. Breakey, 127 Mich. 555, 86 N. W. Rep. 1055; Creswell v. Herr, 9 Colo. App. 185, 48 Pac. Rep. 155.

<sup>82</sup> In an action on an appeal bond given on appeal from a decree dissolving an injunction, held that obligors were estopped from denying the jurisdiction of the court entering the decree. Terre Haute etc. R. R. Co. v. Peoria etc. Ry. Co., 81 Ill. App. 435, 444. The court, Dibell, J., said (p. 444): "Where an obligor has voluntarily given the undertaking and delayed the enforcement of the decree lack of jurisdiction in the court does not prevent a valid defence to an action on the bond. In such cases the obligors are estopped from denying that it is a valid obligation." Citing Walton v. Develing, 61 Ill. 201.



principal might have made upon the trial.<sup>83</sup> And the surety or guarantor is estopped to make a defense that the principal is estopped to make.<sup>84</sup>

**§ 53. Estoppel continued—Jurisdiction—Consideration.**—In an action against C as surety for S, in a replevin bond conditioned for the redelivery of property attached to abide the final order of the court, he pleaded that at the time of, and prior to the institution of the original suit by attachment, S, the defendant therein, and the principal in the replevin bond, was dead. It was held that by signing the bond which purported to be signed by S as a co-obligor, C was estopped to deny that S had signed it.<sup>85</sup> The official bond of an executor was made payable to four justices, one of whom was not a member of the court at the time. Held, that the surety, having executed the bond, was estopped to deny that any of those named in the bond as justices were such.<sup>86</sup> So where the bond of a guardian recites that the principal has been appointed guardian, the sureties therein are estopped to deny the jurisdiction of the court making the appointment.<sup>87</sup> The sureties on the bond of an Indian agent, which recites his appointment as such, are estopped to deny that fact.<sup>88</sup> The bond given by

<sup>83</sup> Thus, in *Terre Haute Ry. Co. v. Peoria Ry. Co.*, 81 Ill. App. 435, 454, debt on an appeal bond continuing on injunction in force pending an appeal, it was held that the sureties could not avail themselves of a defence which the court had found insufficient on trial of the main case.

<sup>84</sup> *Vankirk v. Adler*, 111 Ala. 104, 20 So. Rep. 336.

<sup>85</sup> *Collins v. Mitchell*, 5 Fla. 364. That a misrecital in a replevin bond may be corrected on motion, see *Dale v. Gilbert*, 128 N. Y. 625, 28 N. E. Rep. 512. Compare § 57 and *Blaney v. Rogers*, 174 Mass. 277, 54 N. E. Rep. 561, there cited.

<sup>86</sup> *Franklin's Adm'r v. Depriest*, 13 Gratt. (Va.) 257.

<sup>87</sup> *Norton v. Miller*, 25 Ark. 108. Same ruling as to the committee of a lunatic: *Pannill's Adm'r v. Cal-*

*loway*, 78 Va. 387. Surety on replevin bond is estopped from denying jurisdiction of justice. *Harbaugh v. Albertson*, 102 Ind. 69. But it is held that the sureties on a recognizance may show that the officer before whom the recognizance was taken had no authority to take it. *Dickenson et al. v. State*, 20 Neb. 72. And see *Crum v. Wilson*, 61 Miss. 233, where it was held that sureties on a guardian's bond were not estopped from showing that the court appointing him had no jurisdiction.

<sup>88</sup> *Bruce v. United States*, 17 How. (U. S.) 437. So the sureties on the bond of an administrator (*Johnston v. Smith*, 25 Hun 171; *White v. Weatherbee*, 126 Mass. 450), or guardian (*Gray v. State*, 78 Ind. 68; *Williamson v. Woodman*, 73 Maine 163), or wharfinger (*People v. Hu-*

a coroner upon assuming the duties of sheriff recited that the sheriff was dead, and that thereby the coroner had become sheriff, and it was held that the sureties on the bond were estopped to deny those facts.<sup>89</sup> A guaranty purported to have been made in consideration of one dollar, but the actual consideration was that moving between principal and creditor. The guarantor attempted to prove that the one dollar had not been paid. Held, the parties in such a case are taken to have agreed that the actual consideration shall be estimated in money, at the sum expressed as a consideration in the contract, and where the parties have agreed that a legal consideration shall assume such a form, for the purposes of the contract, they are estopped from denying, in an action on the contract, that it was such in fact.<sup>90</sup> But where a contract for the delivery of sheep recited that \$1,000 had been paid by the purchaser, and it was signed by the seller and certain sureties for him, in a suit on the contract it was held that the fact of the payment of the money might be contradicted. The court

son, 78 Cal. 154), are estopped from denying the appointment respectively of such officers. In *Coleman v. People*, 78 Ill. App. 210, defendants were sued in debt on a dram-shop keeper's bond which recited that a dram shop license had been issued to the principal for a period ending February 28th, 1897. Held, that defendants were estopped from setting up by plea that his license expired on May 31st, 1896. The court said (p. 214): "The parties having executed a bond are bound by the recitals and are not permitted to deny the same. \* \* Their liability continues during the time mentioned in the bond." Citing *Harding v. Kuessner*, 172 Ill. 125, and the text. The bond given by a saloonkeeper under the Iowa Mule law recited that the principal had obtained the requisite consent of property owners. Held, the sureties were estopped from showing that such consents had in fact not been obtained: *Breeding v. Jordan*, 115 Iowa 566, 88 N. W.

Rep. 1090. In *Moore v. Earl*, 91 Calif. 632, 27 Pac. Rep. 1087, it was held that a recital in an executor's bond that the principal "was appointed executor" estopped the sureties from asserting that the order appointing the executor was void because notice was not given to the heirs residing in the county as required by law. It has been held that the sureties on the official bond of a public administrator cannot dispute the regularity of his appointment to administer any particular estate committed to him. *Kling v. Connell*, 105 Ala. 590, 17 So. Rep. 121.

<sup>89</sup> *Albee v. The People*, 22 Ill. 533.

<sup>90</sup> *Redfield v. Haight*, 27 Conn. 31. In *Fidelity & Deposit Co. of Md. v. Mobile County*, 124 Ala. 144, an action on the official bond of a tax collector, the surety was held estopped to show that its bond was void for want of consideration, for failure to observe prerequisite formalities.

said: "We are of opinion, as it was stated to be a part of the consideration for the execution of said writing, that the writing is not conclusive upon the subject. The truth may be inquired into."<sup>91</sup>

**§ 54. Estoppel continued—Ultra Vires.**—The holder of the bond of a corporation guarantied it as follows: "I hereby guaranty the due payment of the money secured thereby." In a suit against him on the guaranty, the guarantor offered to show that the bond was invalid, and the corporation had no authority to make it; but it was held that he was estopped to show those facts. The court said: "The guaranty of the payment of the bond by the defendant imports an agreement or undertaking that the makers of the bond were competent to contract in the manner they have, and that the instrument is a binding obligation upon the makers."<sup>92</sup> But the corporation itself would not be estopped from showing that the contract of suretyship entered into in its name was ultra vires and void, in other words, that no such contract had been in fact made by the corporation.<sup>93</sup> In an action of covenant on a sealed guaranty of a lease, it was objected that there was no proof that one of the lessors executed the lease, but it was

<sup>91</sup> *Swope v. Forney*, 17 Ind. 385. In *Kennedy's Estate*, 129 Calif. 384, 62 Pac. Rep. 790, it was held that sureties on a stay bond are not estopped by their undertaking from showing that the stay bond was not required by the statute in that case and was wholly ineffectual as a stay and that it was therefore void for want of consideration. The court said (p. 389): "When want of consideration is pleaded there is no estoppel, whatever the terms of the instrument may be, which can interfere with that defence. The idea of such estoppel comes down to us from the days of sealed instruments. Seals were abolished by the Code, \* \* and that there is a good and sufficient consideration for an instrument in writing is expressly made a disputable presumption which may be controverted by other evidence."

Citing to this point, *Reay v. Butler*, 118 Calif. 113, 50 Pac. Rep. 375.

<sup>92</sup> *Remsen v. Graves*, 41 N. Y. 471, per Mason, J.

<sup>93</sup> *Lucas v. White Line Transfer Co.*, 70 Iowa 541; *Kelley, Maus & Co. v. O'Brien Varnish Co.*, 95 Ill. App. 287; *Best Brewing Co. v. Klassen*, 185 Ill. 37. Even where all its stockholders assented to the making of the ultra vires contract. *Murphy v. Arkansas & Louisiana Land and Improvement Co.* (C. C. W. D. Ark.), 97 Fed. Rep. 723; *First Nat'l Bank of Gadsden v. Winchester*, 119 Ala. 168, 24 So. Rep. 351; *Swift v. Smith*, 65 Md. 428, 57 Am. Rep. 336; *Steiner v. Steiner Land & Lumber Co.*, 120 Ala. 128, 26 So. Rep. 494. In *Wheeler v. Home Savings Bank*, 188 Ill. 34, it was held that where a corporation's property is pledged by its manager with knowledge of

held that the guarantors were estopped from denying the execution of the lease by the lessees. The court said: "Entering into this guaranty was an acknowledgment by the guarantors that the lease was duly executed by both lessees."<sup>94</sup> In the cases already referred to on this subject, the question came up in a suit against the surety, on the obligation signed by him. The facts recited were, in most instances, within the knowledge of the surety, and the principal had usually acted in the capacity which the obligation recited he occupied, and derived a benefit therefrom, and became a defaulter therein. In such cases the issue is not the right of the principal to fill the position, but his right to retain money received by him while filling the same, and which belongs to others. To such cases the principles of equitable estoppel, as well as the rule that a man cannot aver against his own deed, apply. When the issue is as to the right of the principal to fill the position, different principles will apply. A person was appointed to fill an office created by a city, and gave an official bond with sureties, which recited that he had been appointed collector of assessments for street improvements, and was conditioned that he should pay the city treasurer all moneys which he might receive as such collector. The city had, in fact, no authority to create the office, but the court held the sureties were estopped to deny that the collector was an officer de facto.<sup>95</sup> The distinction above referred to was noticed by the court as follows: "The action is not to enforce upon him the execution of the duties of his office, or to recover damages for his failure to perform them. In such a case both he and his sureties might answer and say, perhaps successfully, there was no such office, and he was without legal power. But here the suit is founded upon an actual, complete execution of the duties of the office he claims to fill. He is *functus officio* as collector of taxes. The money he has is the money of the city, which he has

its secretary for the manager's individual debt, it is not estopped to replevin its property and make reply of *ultra vires* to the pledgee's claim for the property.

<sup>94</sup> *Otto v. Jackson*, 35 Ill. 349.

<sup>95</sup> *Hoboken v. Harrison*, 1 Vroom (N. J.) 73. See also *Middleton et*

*al. v. State*, 120 Ind. 166, where it was held that the sureties on the bond of a city clerk were estopped to deny the validity of an ordinance under which their principal received moneys which ordinance was in existence when the bond was executed.

no right to retain, and which his sureties on the whole case, just as it is, have stipulated that he shall pay over to the city treasury.”

**§ 55. Estoppel continued—Character of obligee—Replevin bonds—Covenant not to sue—Pleading.**—Sureties on a note or bond executed to a corporation or partnership are estopped from denying the legal existence of such corporation or partnership.<sup>1</sup> A guarantor of promissory notes is estopped from setting up as a defense, illegality of dealings between the original parties.<sup>2</sup> A surety on a bond is estopped from avoiding liability thereon, because the bond is other than he thought it to be, when he was not prevented from reading the same by any fraud of the obligee.<sup>3</sup> A surety for the payment of alimony is estopped from denying that the woman for whose benefit the money was directed to be paid was the wife of the principal.<sup>4</sup> A surety for the purchase of slaves was held estopped from setting up that they were unsound.<sup>5</sup> Sureties on purchase-money notes, who have notice of all defects in title to the land sold, are estopped from setting up clouds upon the title.<sup>6</sup> Where sureties agreed with their principal to pay certain judgments rendered against them, they are estopped from denying the validity of such judgments.<sup>7</sup> Sureties to a replevin bond are estopped from setting up a superior title to the replevined property in themselves and from showing that the property replevied was of less value than the amount stated in the replevin writ and bond.<sup>8</sup> A surety on the bond

<sup>1</sup> *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16; *The Father Matthew Society v. Fitzwilliams*, 84 Mo. 406, affirming 12 Mo. App. 445; *Teutonia Nat. Bank v. Wagner et al.*, 33 La. Ann. 732; *Pharr v. McHugh & Vinson et al.*, 32 La. Ann. 1280. See *Ahrend v. Odiorne*, 125 Mass. 50; *Jefferson v. M'Carthy*, 44 Minn. 26.

<sup>2</sup> *Jackson v. Foote* (Cir. Ct. N. D. Ill.), 12 Fed. Rep. 37.

<sup>3</sup> *Johnston et al. v. Patterson*, 114 Pa. St. 398. A surety is estopped from questioning the validity of a bond which he signed in blank, with the understanding that it was to be of a different character from the

bond that was actually written and delivered. *Willis v. Rivers*, 80 Ga. 556; *Craig v. Herring & Turner*, 80 Ga. 709.

<sup>4</sup> *Comm'rs of Charities v. O'Rourke*, 34 Hun 349.

<sup>5</sup> *Grier v. Wallace*, 7 Rich. (S. C.) 182.

<sup>6</sup> *Ellis, Adm'r, v. Adderton*, 88 N. C. 482.

<sup>7</sup> *Apperson v. Gogin et al.*, 3 Bradwell (Ill. App.) 48.

<sup>8</sup> *Washington Ice Co. v. Webster*, 125 U. S. 426. In *Campbell v. Bush*, 112 Ga. 737, 38 S. E. Rep. 50, Bush, the actual owner of certain personal property, became surety on the bond

of an insolvent defaulting trustee, who, in ignorance of his right to proceed against a sound surety on an indemnifying bond executed in his favor, accepts notes of his principal in payment of the loss incurred by him in virtue of his suretyship on the bond, is estopped from proceeding against the surety on the indemnifying bond.<sup>9</sup> Where a wife transferred her separate real estate to her husband, for the purpose of enabling him to mortgage it as his property to secure a loan for his benefit, she will be estopped, as against a mortgagee who is not shown to have had knowledge that the conveyances were a contrivance to evade the statute prohibiting her from entering into contracts of suretyship, from asserting that such transfer was not bona fide.<sup>10</sup> Surety or principal may be estopped by his covenant not to sue.<sup>11</sup> Sureties on official bond are held estopped to dispute showing of the official records of their principal.<sup>12</sup> It is held that facts giving rise to an estoppel, to be availed of, must be specially pleaded.<sup>13</sup>

**§ 56. When surety not estopped by recitals of obligation signed by him.**—A surety is not in all cases estopped to deny the facts recited in the obligation signed by him. Thus, where the bond of a township recited that the township officers executing the same had been authorized, as the law required, to

of one Campbell, who brought an action of bail-trover to recover possession thereof from one Morgan. Campbell was defeated because it was proved that the title was in Bush. Held, that Bush was estopped from asserting his own right to the property because of his execution of the bail trover bond, which was conditioned for the forthcoming of the property "to answer such judgment as [might] be rendered or issued in the case" and that judgment having been rendered in favor of Morgan he was bound to abide by it.

<sup>9</sup> *Bowers v. Cobb, Ex'r* (Cir. Ct. D. Mass.), 31 Fed. Rep. 678.

<sup>10</sup> *Long v. Crosson*, 119 Ind. 3. For other cases, generally, on the doctrine of estoppel as governing sureties, see *Steele v. Tutwiler*, 57 Ala. 113; *Nevin v. Fouch*, 77 Ga. 47;

*Snyder v. Chick*, 112 Ind. 293; *Zurcher v. Krohne, Feiss & Co.*, 63 Tex. 118.

<sup>11</sup> *McChesney v. Bell*, 59 Ill. App. 84, per Gary, J. Compare *Babcock v. City of Chicago*, 143 Ill. 358, 32 N. E. Rep. 271.

<sup>12</sup> Thus, in *Longan v. Taylor*, 130 Ill. 142, 22 N. E. Rep. 745, the sureties of a township treasurer were held estopped to dispute charges against their principal shown by his books and were not permitted to show that the shortage there shown was due to defalcation by his predecessor in office, which money collected by their principal had gone to pay.

<sup>13</sup> *International Building & Loan Assn. v. Watson, Ind.*, 63 N. E. Rep. 23; *Centre School Township v. State*, 150 Ind. 168, 49 N. E. Rep. 961.



issue such bond, in a suit on the bond it was held the township might show that no such authority had been given. The court said that the doctrine that a party is estopped from contradicting the recitals of his own deed is applicable only where the deed is admitted to be the act of such party.<sup>14</sup> A court had appointed a guardian for a minor, and, while such appointment was unrevoked, appointed another, who gave a bond with surety, reciting that he had been appointed guardian. In a suit on this bond against the surety, it was held that the appointment of the last guardian was absolutely void, and that the surety might show the fact.<sup>15</sup> The court said: "It is certainly true that where a party makes a distinct and clear recital of any fact in a deed or other valid obligation, he will be estopped from denying the truth of such recital. But this doctrine presupposes a valid legal obligation, and we do not know any authority, and reason is certainly against the proposition, that a party is estopped, by any recital contained in an instrument, from showing that the instrument containing it is absolutely null and void." An appeal bond was conditioned for the prosecution of an appeal from the judgment of a justice of the peace to the Anne Arundel county court. There was, in fact, no such court. Held, the sureties were not estopped to deny the existence of the court by the recital in the bond.<sup>16</sup> The court said: "Whether a court exists or not is something more than a mere question of fact, as to which parties may agree or be concluded by admissions. It must depend on the constitution or laws; and when the court can see that the supposed tribunal is not known to these, it must so decide, no

<sup>14</sup> *Hudson v. Inhabitants of Winslow*, 6 Vroom (N. J.) 437. Railway aid bonds issued by a township in Kansas recited that the requirements of the statute making it the duty of the county commissioners to issue such bonds had been complied with. It was held that the township was estopped, as against an innocent purchaser for value, to deny compliance with such requirements and that it could defend only on the ground "that upon their face they appear to have been issued in violation of some

constitutional or statutory restriction." *Township of Washington v. Coler*, 51 Fed. Rep. 362, 2 C. C. A. 272, 4 U. S. App. 622.

<sup>15</sup> *Thomas v. Burrus*, 23 Miss. 550, per Yerger, J. And it is likewise held that a surety on a constable's bond is not estopped from showing that the appointment of his principal was illegal and therefore a nullity. *Tinsley v. Kirby*, 17 S. C. 1.

<sup>16</sup> *Tucker v. The State*, 11 Md. 322, per Tucker, J.



matter what the parties may have admitted by estoppel or agreement.”

**§ 57. When surety not estopped by recitals, continued—**  
**Fraud—Mistake.**—A defendant was taken under a bail writ, and the sheriff by mistake took a bond for the prison bounds, which recited the defendant’s imprisonment to have been under a ca. sa. Held, the bond was void, and that the surety was not estopped to show there was no ca. sa. The grounds of the decision are set forth as follows: “It is a general rule of law, and a correct one too, that a man cannot aver against his own deed; but that is where he has alleged some particular fact within his own knowledge and which forms a part of the consideration for his undertaking; and that is the whole extent to which the cases relied on go. But the principle cannot be extended to an allegation coming from the other party, and which can be necessarily known only to him, although contained in the recital of a deed made by the defendant. \* \* The person supposed to be estopped is the very person imposed upon. \* \* It is to be observed that this is an allegation coming from the sheriff and not from the defendant. He could not find under what authority the sheriff acted but by his own representation; a person is only estopped from denying his own acts, but not the acts of another.”<sup>17</sup> A surety on

<sup>17</sup> *Miller v. Bagwell*, 3 McCord, Law (S. C.) 429, per Nott, J. In *Blaney v. Rogers*, 174 Mass. 277, 54 N. E. Rep. 561, a building contractor, in order to bring about the distribution of the proceeds of a building loan, procured a surety company to become surety on his bond conditioned that certain buildings which were therein recited to be in process of erection on the land covered by the building loan mortgage “shall be finished in a good and workmanlike manner.” The bond was drawn by the owner’s attorney, who, by mistake of fact, had inserted therein the recital mentioned. The agent of the surety company had referred the contractor to the owner’s attorney as the proper per-

son to draw the bond. As a matter of fact the recital mentioned was false. The buildings were not being built on the land covered by the mortgage. It was held that the surety company was not bound by the recitals of the bond. “The case seems to us,” said Morton, J., speaking for the court, “to be one where the recital was induced by a mutual mistake of fact without any fault or negligence of the surety company, and in such a case the recital cannot operate by way of estoppel to give validity to the bond.” Citing *Conant v. Newton*, 126 Mass. 105, in which case the sureties on the bond of one who had been appointed trustee by the verbal, and therefore void, order of a pro-

a note who was induced to become such by fraudulent representations is not estopped from setting up such fraud as a ground for setting aside a judgment confessed by him upon the note, it being shown that he had no knowledge of such fraud.<sup>18</sup> And a married woman who has executed a mortgage on her lands to secure her husband's notes is not estopped from setting up fraud in the procurement of the mortgage.<sup>19</sup> It has been held that the surety is not estopped to deny recitals that are questioned in plaintiff's declaration.<sup>20</sup> An apparent maker of a note is not estopped to show that he is only a surety by the fact that he made an inconsistent defense in another suit on the same note that was not prosecuted to final judgment.<sup>21</sup> The sureties on a release bond given to release a garnishment were held not to be estopped from showing

bate judge, were held not to be estopped by a recital in the bond that he had "been duly appointed trustee of the estate" from showing that the obligee had no lawful authority to require or take the bond. The court said that "a misrecital in the bond induced by a mutual mistake of fact cannot operate by way of estoppel to give validity to the bond." See also *Brooke v. Haymes*, L. R. 6 Eq. 25 (1868).

<sup>18</sup> *Melick v. First Nat. Bank of Tama City*, 52 Iowa 94.

<sup>19</sup> *Henry et al. v. Sneed et al.*, 99 Mo. 407; *McNamara v. Mattei*, Conn., Sept., 1901, 50 Atl. Rep. 35.

<sup>20</sup> In *Lamar v. Walton*, 99 Ga. 356, 27 S. E. Rep. 715, Capers filed with the Ordinary his \$2,000 bond, by order of court, conditioned for the faithful performance of a trust involving real and personal property. The realty having been sold, increasing the personalty about \$11,000, at the request of the beneficiaries, and without order of court, and to prevent his removal from the trusteeship, he filed a new bond reciting that the principal desired "to strengthen the bond heretofore filed and give this additional bond," re-

citing also that he had invested the proceeds of said sale in Georgia bonds as required by order of court and "now held" the same as trustee, and conditioned for the performance by the principal of "all and singular the duties required of him as trustee aforesaid." Held, that the new bond rested upon a sufficient consideration, that the failure of the trustee to comply with an order to turn over the assets to his successor was a breach of the bond, that the Ordinary to whom it was made payable might bring suit for the use of an injured beneficiary under the trust, that the bond was binding only as to future breaches of duty, in the absence of an express or implied stipulation for liability as to past waste or misconduct, and that since the declaration left it doubtful whether the trustee had the proceeds of the sale in his possession at the time of giving the new bond, the new sureties were not estopped by their recital from showing that the entire estate had in fact been wasted before the execution of their bond.

<sup>21</sup> *Fisher v. Denver Nat'l Bank*, 22 Colo. 373, 45 Pac. Rep. 440.

in mitigation of damages that there was no money in fact due from the garnishee to the debtor, and that the debtor had assigned to a third party money that had formerly been due him.<sup>22</sup>

**§ 58. Cases holding guaranty of note negotiable.**—There is an irreconcilable conflict of authority as to whether or not a guaranty is negotiable, and when, if at all, it passes by an assignment of the original obligation, and there is no decided preponderance of authority either way. A stranger to a negotiable promissory note indorsed it in blank when it was made. The payee transferred the note, and the holder wrote a guaranty above the stranger's indorsement and brought suit upon it. Held, he was entitled to recover.<sup>23</sup> The court said: "The guaranty is general, specifying no person to whom the guarantor undertakes to be liable, and is upon the back of a negotiable instrument. In such case the guaranty runs with the instrument on which it is written and to which it refers, and partakes of its quality of negotiability, and any person having the legal interest in the principal instrument takes in like manner the incident and may sue upon the guaranty." A guaranty on the back of a negotiable promissory note, signed by the payee, was as follows: "I guaranty the payment of the within note." Held, the guaranty passed with the note, so that any subsequent bona fide holder, as well as the first holder after the guaranty was made, might sue on the guaranty.<sup>24</sup> These cases hold that where the guaranty is general, specifying no particular person to whom it runs, it is negotiable and passes with the note, and may be sued on at law, in his own name, by any subsequent holder of the note. It has been held that where the guaranty of a promissory note is a separate instrument from the note, the title to it will pass by delivery

<sup>22</sup> *McNamara v. Mattei*, 74 Conn. 170, 50 Atl. Rep. 35.

<sup>23</sup> *Webster v. Cobb*, 17 Ill. 459. See also on same point, *Heaton v. Hulburt*, 3 Scam. (Ill.) 489. Guaranty of note is, in general, negotiable, even though an assignment of the same is made after the maturity of the note. *Ellsworth v. Harmon*, 101 Ill. 274.

<sup>24</sup> *Partridge v. Davis*, 20 Vt. 499.

To the same effect, see *Killian v. Ashley*, 24 Ark. 511. See also *Studebaker v. Cody*, 54 Ind. 586; *Cole et al. v. Merchants' Bank*, 60 Ind. 350; *Harbord v. Cooper*, 43 Minn. 466. It is held that a guaranty may be transferred before a note to which it is attached, and which it was given to secure, becomes due. *Everson v. Gere*, 40 Hun 248; affirmed,

122 N. Y. 290.

with the note for a good consideration, and this without any written assignment of the guaranty.<sup>25</sup> It has likewise been held that when a guaranty is written on a promissory note, and the note is transferred, the sale and delivery of the note with the guaranty upon it furnishes prima facie evidence of a sale of the contract of guaranty and that the holder of the note is the owner of the guaranty.<sup>26</sup> A general guaranty of payment of a promissory note, which named no person as the party guarantied, was not written on or attached to the note, and it was held that it might be enforced at law by any one who advanced money upon it declaring on it as a promise to himself. But it was further held that the guaranty, not being attached to or a part of the note, was not negotiable, and an action could only be brought upon it in the name of the person in whose hands it first became available. The court said that if it had been attached to the note, it might have been treated as an indorsement and would have been negotiable.<sup>27</sup> Where a guaranty written on a promissory note named the person guarantied, and proceeded, "I hereby guaranty the payment and collection of the within note to him or bearer," it was held that any subsequent holder of the note might sue on it in his own name.<sup>28</sup> The court said it was a new note for the pay-

<sup>25</sup> Gould v. Ellery, 39 Barb. (N. Y.) 163.

<sup>26</sup> Cooper v. Dedrick, 22 Barb. (N. Y.) 516.

<sup>27</sup> McLaren v. Watson's Ex'rs, 26 Wend. 425, per Walworth, C. Senator Verplanck, in an able and exhaustive opinion, contended that the guaranty in this case was negotiable, but the majority of the court of errors held otherwise. Where a negotiable promissory note was indorsed by the payee for the accommodation of the maker, and on the back thereof was the following guaranty, viz.: "We hereby guaranty the payment of the within note," it was held that the contract of the guarantors was not with the payee, but with the first holder for value who took the note with the guaranty upon it. Baldwin v. Dow,

130 Mass. 416; Jones v. Dow, 142 Mass. 130.

<sup>28</sup> Ketchell v. Burns, 24 Wend. 456, per Nelson, C. J. In Edgerly v. Lawson, 176 Mass. 551, 57 N. E. Rep. 1021, a stranger to a note wrote and signed on the back of it, "We hereby guaranty the payment within note." Held, that the guaranty was not negotiable and that an endorsee of the note could sue on the guaranty only in the name of the payee. In Lemmon v. Strong, 59 Conn. 448, 22 Atl. Rep. 293, defendant signed the following words written on the back of the demand note of Karrman: "I hereby warrant the within note good and collectible until paid." Thereafter the payee wrote upon the back of the note under said guaranty the following: "February 12, 1884, for value re-

ment of money, and, by its terms, negotiable. A note was drawn and signed by H, payable to N, and indorsed by N, the latter being an accommodation indorser for H, who was the principal. E guarantied the note generally on its back, and the note was discounted by a bank, and the bank sued E on his guaranty. Held, the bank need not prove affirmatively that the contract of guaranty was made with it. As N indorsed for the accommodation of H, and the bank was the first holder for value, the law implied that the guaranty was made to it. The court said that the guaranty was not distinguishable from a general letter of credit, on which an action might be maintained in the name of the person who gave the credit on the faith of it.<sup>29</sup>

**§ 59. Cases holding that guaranty of debt passes to assignee of debt.**—When the guaranty is not of the payment of a note, it has also been held that it passes by a transfer of the debt as an incident thereto. Thus, where a party by a separate covenant guarantied the payment of rent and the performance

ceived I hereby sell and assign this note to D. S. Lemmon—B. A. Sherman.” At the time of the transfer the maker was insolvent and the guarantor abundantly good. It was held that the guaranty was assigned as well as the note. Answering the contention that there was no specific assignment of the guaranty, the court said (p. 454): “Is such a specific assignment necessary under the circumstances? We know of no law which prescribes the form in which the intention of the parties in such cases shall be embodied, and where the law prescribes no form, it will, to accomplish rather than defeat their intent, give effect to such form as they choose to adopt. \* \* We hold, therefore, that Sherman assigned in equity to Lemmon all the beneficial interest which the latter had in the contract of guaranty, and so Lemmon became the equitable and bona fide holder thereof,

and, as such, was entitled to sue in his own name under our statutes.” See also *Wooley v. Moore*, 61 N. J. Law 16, 38 Atl. Rep. 758, in which case the supreme court of New Jersey, passing upon the question for the first time, after alluding to the conflict of authority, said: “An examination of the cases has led us to the conclusion that the better view is that an assignment of the principal debt, if not limited in its scope, carries with it the promises and undertakings connected therewith.” Citing *Lemmon v. Strong*, 59 Conn. 448, 22 Atl. Rep. 293; *Stillman v. Northrup*, 109 N. Y. 473, 17 N. E. Rep. 379; *Clafin v. Ostrom*, 54 N. Y. 581; *Craig v. Parkis*, 40 N. Y. 181.

<sup>29</sup> *Northumberland Bank v. Eyer*, 58 Pa. St. 97, per Sharswood, J. See to like effect, *Baldwin v. Dow*, 130 Mass. 410; *Jones v. Dow*, 142 Mass. 130.

of the covenants of a lease, it was held that the guaranty ran with the land and passed to the grantee of the reversion, who might sue the guarantor in his own name for a breach of the covenant. The court said: "When the thing to be done or omitted concerns the lands or estate, that is the medium which creates the privity between the plaintiff and defendant."<sup>30</sup> A being the owner of a bond, and mortgage securing the same, by writing on the back of the mortgage assigned the bond and mortgage to B, and the assignment then proceeded, "and hereby guaranty the collection of the within amount as it becomes due." B assigned the bond and mortgage to C, the assignment to C saying nothing about the guaranty. C sued A on the guaranty in his own name at law, and it was held he had a right to maintain the suit, even though the guaranty was not in terms assigned to him. "The transfer of the debt to him carried with it as an incident all the securities for its payment."<sup>31</sup> It has been held that parol evidence is competent to rebut the presumption that a judgment against an indorser passes by an assignment of a judgment against the principal when nothing is said in the assignment about the judgment against the indorser.<sup>32</sup> The state of Virginia guaranteed the payment of interest on coupon bonds issued by the city of Wheeling, the guaranty being that the state guaranteed the "punctual payment of the interest." It was held that if the guaranty was not transferable at law, it was in equity, and an interest passed in equity to each successive holder of the bond or coupon. The guaranty is an accessory of the bond or coupon, and follows and adheres to it in equity, and the right to enforce the guaranty must be determined by the

<sup>30</sup> *Allen v. Culver*, 3 Denio 284, per Jewett, J. The assignment of a lease by the lessee does not release a guarantor of the lessee from liability for a default of the lessee in the payment of the rent subsequent to such assignment. *Oswald v. Fratenburgh*, 36 Minn. 270. In *Potter v. Gronbeck et al.*, 117 Ill. 404, it is held that a guaranty of rent is not assignable, so that the assignee may sue in his own name at law. Holding that an assign-

ment of a note carries with it a guaranty of its collectibility, see *Lemmon v. Strong*, 59 Conn. 448.

<sup>31</sup> *Craig v. Parkis*, 40 N. Y. 181, per Lott, J. And to similar effect where defendants assigned a bond and mortgage, it was held that the assignment carried with it a guaranty of the payment of the mortgage. *Stillman v. Northrup*, 109 N. Y. 473, overruling *Smith v. Starr*, 4 Hun 123.

<sup>32</sup> *Bank v. Fordyce*, 9 Pa. St. 275.

right to demand payment of the bond or coupon.<sup>33</sup> H and O being partners, H sold out his interest in the firm property to O, who agreed to pay the firm debts, among them a debt to the plaintiff. The defendant guarantied the performance of this agreement. The plaintiff's debt not having been paid, H assigned to him his interest and claim under the agreement and the guaranty. Held, the plaintiff was entitled to recover against the defendant on the guaranty, which, having been made for his benefit, he could adopt and enforce.<sup>34</sup> Under a similar state of facts, except that H did not assign the agreement and guaranty to the plaintiff, it was held that there was no privity between the plaintiff and the defendant, and the plaintiff could not recover against the defendant.<sup>35</sup>

§ 60. **Cases holding guaranty of note not negotiable.**—The payee of a negotiable promissory note indorsed it as follows: "I guaranty the payment of the within note without demand or notice," and sold it to A, who sold it to B, and B sued the guarantor on the guaranty. Held, the guaranty was not negotiable, and the action could not be maintained.<sup>36</sup> Where a stranger to a note indorsed it in blank and added to his name the word "holden," it was held that this constituted him a guarantor, but that the guaranty was not negotiable, and could be enforced by no one except the person with whom it was made.<sup>37</sup> A negotiable promissory note and a guaranty of its payment by a stranger indorsed thereon were made at the same time. Held, the guaranty was not negotiable, and did not pass by a transfer of the note.<sup>38</sup> Where a guaranty was made on the back of a promissory note after the note was delivered, it was held that it did not pass by an assignment of the note.<sup>39</sup> A negotiable promissory note was signed by A as maker. Underneath the note was written the following guar-

<sup>33</sup> *Arents v. The Commonwealth*, 18 Gratt. (Va.) 750.

<sup>34</sup> *Clafin v. Ostrom*, 54 N. Y. 581.

<sup>35</sup> *Campbell v. Lacock*, 40 Pa. St. 448.

<sup>36</sup> *Springer v. Hutchinson*, 19 Me. 359. To the same effect, see *Ten Eyck v. Brown*, 3 Pinney (Wis.) 452, and *Turley v. Hodge*, 3 Humph. (Tenn.) 73.

<sup>37</sup> *Irish v. Cutter*, 31 Me. 536; *Bray v. Marsh*, 75 Me. 452.

<sup>38</sup> *Tinker v. McCauley*, 3 Mich. 188.

<sup>39</sup> *How v. Kemball*, 2 McLean, 103. In *Levi v. Mendell*, 1 Duvall (Ky.) 77, it was held that only the equitable title to a guaranty on the back of a note passed by an assignment of the note.



anty: "We will guaranty the payment of the above note given to (A) for forty-two hundred and eighty dollars." Held, the guaranty was not negotiable, not being so by its terms, and that it could not be sued on by any one except the person to whom it was originally given.<sup>40</sup> A guaranty is not negotiable, nor does it become so by being indorsed upon negotiable paper, the payment of which it is designed to secure.<sup>41</sup>

§ 61. **Whether guaranty of bond negotiable, or lease assignable—When guaranty on back of note transfers title to note—Obligation of surety cannot be sold alone.**—A guaranty of the payment of a certain bond and mortgage "to Arthur Childs, the present owner and holder of said bond and mortgage, his executors and administrators," is not a personal guaranty, confined to Childs, his executors and administrators, and an assignee of said bond and mortgage may maintain an action on the guaranty for the payment of the same.<sup>42</sup> On the other hand, it has been held that a covenant of guaranty, written on the back of a bond, is no part of the bond, and does not pass by an assignment of it.<sup>43</sup> A guaranty of the interest on bonds, given in payment for the construction of a railroad, is not negotiable.<sup>44</sup> A guaranty for the payment of rent, and the performance of other covenants on the part of a lessee in a lease, is not assignable, so as to pass legal title to the assignee.<sup>45</sup> A guaranty on the back of a negotiable promissory note signed by the payee, although it may not in itself be negotiable, is a sufficient indorsement of the note to transfer the title to it.<sup>46</sup> A warehouseman is not a guarantor of the title of property placed in his custody, although warehouse receipts are, by

<sup>40</sup> *Smith v. Dickinson*, 6 Humph. (Tenn.) 261.

<sup>41</sup> *Hayden v. Welden*, 43 N. J. Law 128.

<sup>42</sup> *Stillman v. Northrup*, 109 N. Y. 473, overruling *Smith v. Starr*, 4 Hun 123. To similar effect, see *Craig v. Parkis*, 40 N. Y. 181.

<sup>43</sup> *Beckley v. Eckert*, 3 Pa. St. 292.

<sup>44</sup> *Eastern Township Bank v. St. Johnsbury & L. C. R. Co.* (Cir. Ct. D. Vt.), 40 Fed. Rep. 423.

<sup>45</sup> *Potter v. Gronbeck et al.*, 117 Ill. 404. Assignment of lease by

lessee with lessor's consent does not release a guarantor who has guaranteed that the lessee would perform his part of the agreement. *Farnham v. Monroe*, 35 Ill. App. 114, following *Dietz v. Schmidt*, 27 Ill. App. 114.

<sup>46</sup> *Myrick v. Hasey*, 27 Me. 9. To same effect, see *Heaton v. Hulbert*, 3 Scam. (Ill.) 489; *Russell & Co. v. Klink*, 53 Mich. 161; *Heard et al. v. Dubuque County Bank*, 8 Neb. 10; adhered to in *State Nat. Bank v. Haylen et al.*, 14 Neb. 480.

statute, negotiable.<sup>47</sup> Principal and surety signed an obligation; judgment was recovered against the holder of the obligation, and at an execution sale the debt due by the surety was sold, the principal being insolvent. It was held that the sale was invalid, and that the obligation of a surety could not be sold separate from that of the principal. The court said the obligation of the surety was accessory to that of the principal, and could not be separated from it.<sup>48</sup> The assignment of a judgment from which an appeal has been taken carries with it the assignor's right to recover on the appeal bond.<sup>49</sup>

<sup>47</sup> *Insurance Co. v. Kiger*, 103 U. S. 352. As to whether the sale and transfer of a shipbuilder's interest in a schooner transfers a guaranty that the earnings shall amount to a certain per cent. of her cost, see *Bishop v. Alcott*, 86 N. Y. 503, affirming 21 Hun 253.

<sup>48</sup> *Andrus v. Chretien*, 7 La. O. S. (4 Curry) 318.

<sup>49</sup> In *Knight v. Griffey*, 161 Ill. 85, 43 N. E. Rep. 727, affirming 57 Ill. App. 583, Griffey, a judgment

creditor, assigned his judgment to Burry. Afterwards an attachment and garnishment suit was begun against Griffey and the judgment debtor. It was held that the rights of the assignee were superior to those of the attaching creditor and that the assignment of the judgment carried with it the appeal bond so that the assignee might maintain an action on the bond in the name of the obligee for his use.

## CHAPTER II.

### OF THE STATUTE OF FRAUDS.

- § 62. Text of the Statute of Frauds—General observations.
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64. Meaning of the words “any special promise.”
65. What included in the words “debt, default or miscarriage.”
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67. If there is no remedy against a third party the promise need not be in writing—Leading case.
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- § 75. Creditor relinquishing lien which does not inure to benefit of promisor does not take promise out of statute.
76. When the transaction amounts to a purchase of debt or lien by promisor, promise not within statute.
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79. When promisor previously liable, promise not within statute.
80. New consideration passing between promisee and promisor will not alone take promise out of statute.
81. Promise not within statute when main object is to benefit promisor himself—Observations.
82. Promise of del credere agent not within statute.
83. Promise not within statute unless made to party to whom principal is liable.
84. False representations of another’s credit not within statute.

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| <p>§ 85. Promise in substance to pay debt of another, no matter what its form, is within statute.</p> <p>86. Promise to answer for future liability of third party is within the statute.</p> <p>87. Promise within statute if any credit given to third person.</p> <p>88. When promise is original or collateral—Cases holding it original.</p> <p>89. Whether promise original or collateral is question of fact — Evidence — Cases holding promise collateral.</p> <p>90. If original promise in writing, verbal subsequent promise takes case out of Statute of Limitations—Verbal guaranty sufficient to support verbal account stated.</p> <p>91. The form of the writing.</p> <p>92. The whole promise must appear from the writing.</p> | <p>§ 93. Whether the consideration must appear from the writing.</p> <p>94. Reasons why the consideration should appear from the writing — Observations.</p> <p>95. When the consideration sufficiently appears from the writing.</p> <p>96. When consideration does not sufficiently appear, or, consideration appearing, is insufficient—Instances.</p> <p>97. When writing ambiguous, it may be explained by parol evidence.</p> <p>98. When several papers may be read together to express consideration for promise.</p> <p>99. Whether guaranty of note, judgment, certificate of deposit, or assigned mortgage must express consideration.</p> <p>100. Signature by party to be charged.</p> <p>101. Signature by agent.</p> <p>102. Pleading.</p> |
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**§ 62. Text of the Statute of Frauds—General observations.—**

It was not necessary at common law that the contract of a surety or guarantor should be in writing in order to charge him.<sup>50</sup> This being so, the Statute 29 Charles II., chapter 3, commonly called the Statute of Frauds, was passed. The fourth section of that statute, so far as pertinent to the subject under consideration, was as follows, viz.: “No action shall be brought whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person, unless the agreement upon which such action

<sup>50</sup> In *Caldwell v. School City of Huntington*, 132 Ind. 92, 31 N. E. Rep. 566, a complaint alleging that after defendant had employed plaintiff as teacher for a year, beginning in the future, its secretary “willfully and purposely failed

and refused” to put the contract in writing, so that it would not be obnoxious to the statute of frauds, was held bad on demurrer. *Caylor v. Roe*, 99 Ind. 1; *Glass v. Hulbert*, 102 Mass. 24.

shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or by some person thereunto by him lawfully authorized." The object of this statute was the "prevention of many fraudulent practices which are commonly endeavored to be upheld by perjury and subornation of perjury," and in certain cases, which from their nature particularly demanded it, the substitution of the certainty of written, for the uncertainty of unwritten, evidence. It was a wise and salutary enactment, and has been in terms, or with more or less modifications, generally re-enacted in the United States. Many decisions have been rendered on every portion of the Statute of Frauds, and among them will be found great conflict of authority. Perhaps the clearest method of presenting this subject will be to commence with the first words of the statute as above given, and proceed seriatim to the last, and this course will be pursued.

**§ 63. Effect of the words "no action shall be brought."**—The Statute of Frauds does not provide that the contract to answer for another shall be illegal or void if not in writing. It says "no action shall be brought." The contract is just as legal since the enactment of the statute as it was before, but no action can be brought to enforce it. In most cases this amounts to the same thing as if the contract had been declared illegal, but in other cases it does not. When the contract has been entirely executed on both sides, the statute will not in any manner affect the relations of the parties.<sup>51</sup> Money paid by a surety or guarantor in pursuance of an unwritten promise cannot be recovered by him, although he could not have been compelled by law to pay it,<sup>52</sup> and in such case the principal will not be obliged to reimburse the surety or guarantor for the money thus paid.<sup>52a</sup> By virtue of the authority of courts over their own officers, they will sometimes enforce an unwritten agreement by their officers which could not otherwise be en-

<sup>51</sup> Stone v. Dennison, 13 Pick. 1; Smith, 9 Minn. 252; Crane v. Lord Bolton v. Tomlin, 5 Adol. & Gough, 4 Md. 316; Watrous v. Ell. 856; Mushat v. Brevard, 4 Dev. Chalker, 7 Conn. 224; Pawle v. (N. C.) 73; City of Greenville v. Gunn, 4 Bing. N. C. 445; Andrews Greenville Water Works Co., 125 v. Jones, 10 Ala. 400. Ala. 625, 642.

<sup>52a</sup> Craig v. Vanpelt, 3 J. J.

<sup>52</sup> Shaw v. Woodcock, 7 Barn. & Marsh. (Ky.) 489. Cres. 73, Bayley, J.; McCue v.

forced, because of the Statute of Frauds. Thus, the attorney for the defendant in a case, in consideration of the plaintiff's staying proceedings therein, agreed to compromise the action and give his two promissory notes in payment. This he afterward refused to do, and the court entered a rule upon him compelling him to carry out his agreement. The court said: "Even supposing the undertaking to be void by the Statute of Frauds, this court may nevertheless exercise a summary jurisdiction over one of its own officers, an attorney of the court. The undertaking was given by the party in his character of attorney, and in that character the court may compel him to perform it. An attorney is conversant of the law, and if he give an undertaking which he knows to be void, he shall not be allowed to take advantage of his own wrong, and say that the undertaking cannot be enforced."<sup>53</sup> As the prohibition is against the remedy, the courts of a country in which the statute prevails will not enforce an unwritten contract of suretyship or guaranty made in another country, which was perfectly valid and enforceable in the country where the contract was made.<sup>54</sup> This is upon the principle that while the validity and binding force of a contract depends upon the law of the country in which it is made, the remedy is always governed by the law of the country in which the action is brought. When a promise is, as to the thing promised, partly within and partly not within the Statute of Frauds, if the parts are so connected that the contracting parties must reasonably be considered to have contracted with reference to the performance of the whole, or a distinct promise cannot reasonably be made out as to the portion not within the statute, no action can be brought on any portion of the contract;<sup>55</sup> but where the portion of the promise which is not within the statute can be separated from that which is, an action may be sustained upon the portion not within the statute.<sup>56</sup> The fact that the verbal promise to pay the debt of another has been made upon good consideration

<sup>53</sup> In re Greaves, 1 Crompt. & Jer. & Cres. 664; Thayer v. Rock, 13 374, n. See also Evans v. Duncan, Wend. 53; McMullen v. Riley, 6 1 Tyrwh. 283. Gray, 500; Dyer v. Graves, 37 Vt.

<sup>54</sup> Leroux v. Brown, 12 Com. B. 369. 801. See, also, Huber v. Steiner, <sup>55</sup> Wood v. Benson. 2 Crompt. & Jer. 94; Id., 2 Tyrwh. 93; Rand v. 2 Scott, 304. Mather, 11 Cush. 1. See, also,

<sup>56</sup> Chater v. Becket, 7 Term R. Hess v. Fox, 10 Wend. 436; Trow- 201; Thomas v. Williams, 10 Barn.

and that the consideration has been fully performed makes no difference; the promise cannot be enforced.<sup>57</sup> But a court of chancery will sometimes, as a condition precedent to the granting of relief, compel the plaintiff to perform a verbal agreement to answer for the default of another which could not be enforced in an action at law by the promisee.<sup>58</sup>

**§ 64. Meaning of the words "any special promise."**—With reference to the kind of promise which the statute provides shall be in writing, the words are "any special promise." The intention was by these words to confine the statute to actual promises or promises in fact made, and so it has been interpreted.<sup>59</sup> Promises implied by law are not within the operation of the statute.

bridge v. Wetherbee, 11 Allen, 361; Wetherbee v. Potter, 99 Mass. 354; Dock v. Hart, 7 Watts & Serg. 172.

<sup>57</sup> In *Strauss v. Garrett* 101 Ga. 308, 28 S. E. Rep. 850, Kaufmann was indebted to Garrett and also to Strauss. Garrett agreed to assume and pay Kaufmann's debt to Strauss in consideration that Kaufmann would convey to him, Garrett, his stock of goods and that Strauss would not interfere with such conveyance. The transfer having been made, Strauss sued Garrett on his assumption of Kaufmann's debt. Held, that Garrett's promise being verbal was clearly within the statute and that there could be no recovery although Strauss might have collected his debt by interfering with the transfer to Garrett and by forbearance had performed his part of the agreement. See § 80, post.

<sup>58</sup> Thus, in *Kirkland v. Downing*, 106 Ga. 530, 32 S. E. Rep. 652, Downing bought certain land and took title thereto in the name of Kirkland both as security for part of the purchase money which Kirkland had furnished and as security for any indebtedness that might thereafter be owing by Downing

"or any firm of which he might be a member" to Kirkland. On Downing's suit for specific performance it was held that, though Downing's agreement to answer for the debt of the firm was verbal and therefore could not be enforced at law by reason of the statute of frauds, yet equity would not decree a specific performance unless Downing should first pay an indebtedness due from the Downing Company, a corporation that had succeeded to his firm business, to Kirkland, which indebtedness had been incurred on the strength of the land as security.

<sup>59</sup> *Pike v. Brown*, 7 Cush. 133; *Sage v. Wilcox*, 6 Conn. 81; *Goodwin v. Gilbert*, 9 Mass. 510; *Allen v. Pryor*, 3 A. K. Marsh (Ky.) 305. *Goodman v. Cohen*, 132 N. Y. 205, 30 N. E. Rep. 399. In *Williamson v. Rexroat*, 55 Ill. App. 116, it was held that appellant's agreement to deliver 2,000 bushels of corn provided distress proceedings against his father were dismissed was not a promise to answer for the debt of another and need not be in writing. *Resseter v. Waterman*, 151 Ill. 169, 37 N. E. Rep. 875, was assumpsit by Resseter against Water-



§ 65. What included in the words "debt, default or miscarriage."—The liability which the statute contemplated was for the "debt, default or miscarriage of another." These words, "debt, default or miscarriage," include torts of the principal as well as breaches of contract by him, and apply to every case in which one person can become responsible for another. It seems at one time to have been considered that, if the principal was not chargeable on a contract, but was only liable in tort, the promise to answer for him would not be within the statute;<sup>60</sup> but all doubts on this subject have been set at rest, and it is settled that a promise to answer for the tort of another is within the statute. Thus, where one person, without the license of another, had ridden such other's horse and thereby caused its death, it was held that a promise by a third person to answer the damage caused thereby, in consideration that the owner of the horse would not bring an action against the person causing its death, was within the statute, and no action could be brought upon it unless it was in writing. The court said: "The wrongful riding the horse of another without his leave and license, and thereby causing his death, is clearly an act for which the party is responsible in damages, and therefore, in my judgment, falls within the meaning of the word 'miscarriage.'"<sup>61</sup> These words have been variously commented upon by different courts. It has been said by some that the words "debt" and "default" both referred to a liability accruing upon a contract; the word "debt" to such as is already incurred, and the word "default"

man on Waterman's verbal promise that if Resseter would become surety on Severson's note to Waterman he, Waterman, would immediately get Severson and his wife to execute a chattel mortgage securing the note. Resseter therefore signed the note; Waterman failed to get the chattel mortgage, Severson failed to pay and judgment was obtained against Resseter for the amount of the note by the holder. He thereupon brought the present suit against Waterman whose defense was the statute of frauds. Held, reversing 45 Ill.

App. 155, that Waterman's promise was an original undertaking, and not a promise to answer for the debt default or miscarriage of another and need not be in writing. *Fish v. Glover*, 154 Ill. 86, 39 N. E. Rep. 1081, that the statute does not apply to implied promises.

<sup>60</sup> *Birkmyr v. Darnell*, 2 Lord Raymond, 1085. See, also, *Reed v. Nash*, 1 Wils. 305.

<sup>61</sup> *Kirkham v. Marter*, 2 Barn. & Ald. 613, per Abbott. C. J. See, also, to same effect, *Turner v. Hubbell*, 2 Day (Conn.), 457.

to such as may be incurred in the future.<sup>62</sup> Of the word "mis-carriage" it has been said: "Now the word 'mis-carriage' has not the same meaning as the word 'debt' or 'default;' it seems to me to comprehend that species of wrongful act for the consequences of which the law would make the party civilly responsible."<sup>63</sup> Whatever meaning may be attached to any one of these words, the three together cover every case in which a surety or guarantor can become responsible in a civil action for another.

**§ 66. The words "of another" contemplate the present or future primary liability of a principal.**—The words "of another person" have given rise to a vast number of decisions. As said by an able court: "The cases on this branch of the Statute of Frauds are so numerous that it would be a difficult task to review them; and the distinctions as to cases which are or are not within the statute are so nice, and often so shadowy, that it would be still more difficult to reconcile them."<sup>64</sup> The result of the authorities is that in order to bring the promise within the prohibition of the statute, it must be "collateral" to a liability on the part of a principal. In other words, there must, at the time the promise is made, be an actual primary liability of a principal to the promisee which continues after the making of the promise, or there must be contemplated, as the basis of such promise, the future primary liability of a principal. The foundation of the contract of suretyship and guaranty is the primary liability of another. In order to a clear and full understanding of the above general statement of the result of the authorities on this subject, a more detailed examination of such authorities will be necessary.

**§ 67. If there is no remedy against a third party the promise need not be in writing—Leading case.**—A leading and cele-

<sup>62</sup> *Castling v. Aubert*, 2 East, 325, per Lord Ellenborough. See, also, *Mountstephen v. Lakeman*. Law Rep. 7 Q. B. 196, per Willes, J.

<sup>63</sup> *Kirkham v. Marter*, 2 Barn. & Ald. 613, per Abbott, C. J.

<sup>64</sup> *Shaw, C. J.*, in *Chapin v. Lap-ham*, 20 Pick. 467. In *Voris v. Star City Building & Loan Assn.*, 20 Ind. App. 630, 50 N. E. Rep.

779, it was held that a promise to pay the amount of certain void township warrants, if they were not paid when due, in reliance upon which the promisee bought them from the promissor, was not within the statute and need not be in writing. The bonds being void there was no debt of another to answer for.

brated case on this subject is reported as follows: Declaration—that in consideration the plaintiff would deliver his gelding to A, the defendant promised that A should redeliver him safe, and evidence was given that the defendant undertook that A should redeliver him safe; and this was held a collateral undertaking for another; for where the undertaking comes in aid only to procure a credit to the party, in that case there is a remedy against both, and both are answerable according to their distinct engagements; but where the whole credit is given to the undertaker, so that the other party is but his servant, and there is no remedy against him, this is not a collateral undertaking. But it is otherwise in the principal case, for the plaintiff may maintain detinue upon the bailment against the original hirer, as well as assumpsit upon the promise against the defendant. Et per cur: if two come to a shop, and one buys, and the other, to gain him credit, promises the seller, ‘if he does not pay you, I will,’ this is a collateral undertaking, and void without writing, by the Statute of Frauds. But if he says, ‘let him have the goods, I will be your paymaster,’ or ‘I will see you paid,’ this is an undertaking as for himself, and he shall be intended to be the very buyer, and the other to act but as his servant.”<sup>65</sup> The principle here announced, that if there is “no remedy” against the third person, the promise is original and need not be in writing, has been applied to a great variety of circumstances.

**§ 68. When no liability incurred by third person, promise need not be in writing—Liability of principal need not be express.**—When no liability, present or prospective, is incurred by a third person, that is, when there is no principal, the Statute of Frauds does not apply. Thus, where A brought an action for assault and battery against B, and the case was

<sup>65</sup> *Birkmyr v. Darnell*, 1 Salk. 27; same case reported, 6 Mod. 248; and 2 Lord Raymond, 1085. For a review of this case, and generally on this subject, see opinion of Willes, J., in *Mountstephen v. Lake-man*, Law Rep. 7 Q. B. 196. And see the principle announced in the text illustrated in *Baldwin v. Hires*, 73 Ga. 739; also, *Cruse v. Foster & Estes*, 76 Ga. 723. In

*Brandner v. Krepps*, 54 Ill. App. 652, plaintiff, a physican, was requested by defendant to treat a third party who had fallen and was unconscious; there was no evidence of any agreement by the injured man; held, that it was not necessary to prove a written promise to pay on the part of defend-  
ant.

about to be tried, and C, in consideration that A would withdraw his record, verbally promised to pay him £50 and costs, held, the promise of C was not within the statute.<sup>66</sup> The ground upon which the decision was put is thus stated by the court: "Johnson [B] was not a debtor; the cause was not tried; he did not appear to be guilty of any debt, default or miscarriage; there might have been a verdict for him, if the cause had been tried, for anything we can tell; he never was liable to the particular debt, damage or costs." So where a party promised, in consideration of the widow of an intestate permitting him to be joined with her in the letters of administration, that he would make good any deficiency of assets to pay debts, it was held the statute did not apply.<sup>67</sup> On the same principle, where goods are furnished to a person gratuitously, a verbal promise of a third person to pay for them is binding.<sup>68</sup> While there must be a liability on the part of some one to which the liability of the promisor is collateral, such liability need not be express; it is sufficient if it is implied by law.<sup>69</sup> In all cases where the promise is to answer for the tort of the principal, it is manifest that the liability of the principal is implied by law.

**§ 69. When party for whom promise is made cannot become liable, promise need not be in writing.**—A promise to answer for a party not legally competent to contract, or not answerable for his wrongful acts, is not within the Statute of Frauds as to any matter within such disability. There is in such case no liability on behalf of any one to which the promise is collateral. It is therefore an original promise, and needs not be in writing.<sup>70</sup> Thus A procured B to advance money to pay for work in the garden of an infant. B sued A for the money, and the question was as to whether the evidence was sufficient

<sup>66</sup> Read v. Nash, 1 Wils. 305, per Lee, C. J. The rule is that, if a third party is not liable, the undertaking is not within the statute. Anderson v. Spence, 72 Ind. 315. See notes 64 and 65, supra.

<sup>67</sup> Tomlinson v. Gill, Amb. 330; Boos v. Hinkle, 18 Ind. App. 509, 48 N. E. Rep. 383.

<sup>68</sup> Loomis v. Newhall, 15 Pick. 159.

<sup>69</sup> Redhead v. Caton, 1 Starkie, 12; Whitcomb v. Kephart, 50 Pa. St. 85.

<sup>70</sup> As bearing on the question whether a promise to answer for a married woman need or need not be in writing, see Connerat v. Goldsmith, 6 Ga. 14; White v. Cuyler, 1 Esp. 200; Id., 6 Term R. 176; Darnell v. Tratt, 2 Car. & P. 82; Kimball v. Newell, 7 Hill, 116.

to sustain the verdict. Although not strictly necessary to the decision of the case, one judge said: "The infant was not liable, and therefore it could not be a collateral undertaking. It was an original undertaking of the defendant to pay the money."<sup>71</sup> A father requested a merchant to assist his minor son in business, and promised verbally to indemnify him against any loss he might incur in so doing, and it was held the promise need not be in writing. The court, after saying that the son was a minor and not liable for the debt, proceeded: "The undertaking and promise of the defendant, therefore, was not collateral to any promise of the son, but was separate, independent and original."<sup>72</sup> A tailor furnished an infant ward with a frock coat, without the order of the guardian, but the guardian afterwards, in consideration of indulgence, verbally promised the tailor to pay for the coat. Held, the guardian was liable. The court, after saying that the ward was not liable for the price of the coat said: "the promise of the defendant [the guardian] was original, and binding on him."<sup>73</sup> A wife, whose husband had died, leaving her his estate for life, remainder to his nephew, herself died, leaving particular directions as to her funeral. These directions a friend of the family undertook to see carried out, and bought certain articles for that purpose, telling the merchant verbally that the estate of the husband would pay for them, and if it did not, she would. Held, the estate of the husband was not liable for the articles thus purchased, and such friend

<sup>71</sup> Foster, J., in *Harris v. Huntbach*, 1 Burrows, 373.

<sup>72</sup> Shaw, C. J., in *Chapin v. Lapham*, 20 Pick. 467. The same principle was applied where a father promised to pay for a substitute in the army for his minor son who had been drafted. See *Downey v. Hinchman*, 25 Ind. 453. See, also, *Duncombe v. Tickridge*, Aleyn, 94.

<sup>73</sup> *Roche v. Chaplin*, 1 Bailey (S. C.), 419, per Johnson, J. In *Dexter v. Blanchard*, 11 Allen, 365, the supreme court of Massachusetts decided expressly that the verbal promise of a father to pay the debt of a minor son was within the Stat-

ute of Frauds, and must be in writing, even though it was a debt which the son could not be coerced to pay. The decision was placed upon the ground that the contract of the minor was not void, but voidable, and was valid till avoided, etc. Neither the preceding case of *Chapin v. Lapham*, 20 Pick. 467, in the same court, nor any of the cases herein cited on this subject were referred to or noticed. The cases referred to in the text seem to be founded on much the better reason, and are more in harmony with the cases on other phases of this subject.

was liable on her verbal promise. The court said: "When no action will lie against the party undertaken for, it is an original promise."<sup>74</sup>

**§ 70. When promise to indemnify within the statute—Principles involved.**—With reference to whether a promise to indemnify a person from loss in consequence of such person doing an act or assuming an obligation is within the statute, no general rule which will reconcile all the cases can be laid down. A mere promise of indemnity which is not collateral to any liability on the part of another, either express or implied, is not within the statute, and such a case illustrates the rule that when there is no principal the promise need not be in writing. On the other hand, when the promise to indemnify is in fact a promise to pay the debt of another, then clearly such promise is within the statute, and the fact that it is in form a promise to indemnify will make no difference.<sup>75</sup> These propositions are correct in principle and are fully sustained by authority. Many cases do not fall plainly under either head, and the confusion in the authorities has chiefly arisen from not keeping the distinction between the two cases clearly in mind, or from the application of these recognized principles to different states of fact. Great stress has often been laid upon the word "indemnify," when in fact none should be given to it, and the actual transaction should be carefully scanned to ascertain the true nature and bearings of the promise. The law on this subject has been thus stated by a celebrated judge: "Now it has been laid down that a mere promise of indemnity is not within the Statute of Frauds, and there are many cases which would exemplify the correctness of that decision. On the other hand, an undertaking to

<sup>74</sup> Mease v. Wagner, 1 McCord (S. C.), 395, per Hoyer, J. See, also, Drake v. Flewellen, 33 Ala. 106.

<sup>75</sup> Carville v. Crane, 5 Hill, 483. See generally, on this subject, the exhaustive opinion of Comstock, C. J., in Mallory v. Gillett, 21 N. Y. 412. The weight of American authority is in favor of applying the Statute of Frauds to a contract of indemnity against the liability of a

surety or guarantor for a third person, though an exception is generally recognized where the indemnitor is himself primarily liable for the debt guaranteed. Brand v. Whelan, 18 Bradwell (Ill. App.), 186; Lowe v. Turpie, 147 Ind. 652 44 N. E. Rep. 25; Neal v. Brandon, Ala., Jany, 1902, 66 S. W. Rep. 200; Hartley v. Sandford, N. J. Err. & App., Nov., 1901, 50 Atl. Rep. 454.

answer for the debt or default of another is within the Statute of Frauds, and no doubt some cases might be put where it is both the one and the other; that is to say, where the promise to answer for the debt or default of another would involve what might very properly and legally be called an indemnity. Where that is the case, in all probability the undertaking would be considered as within the Statute of Frauds if it were to answer for the debt or default of another, notwithstanding it might also be an indemnity.<sup>76</sup>

**§ 71. When promise to indemnify need not be in writing—Instances.**—A promise to indemnify a party against loss if he will commence or defend a suit has been held not to be within the Statute of Frauds. As where the indorser of a dishonored bill of exchange verbally promised to indemnify a subsequent indorsee against costs if he would bring an action against the acceptor, it was held the promise was not within the statute.<sup>1</sup> A promise to indemnify a party, if he will commit a trespass in order to raise a question of title, has been held not to be within the statute. The court said: “The promise was not to indemnify for the default of another; but was made to the plaintiff himself for an act to be done by him as the servant of the defendant below. It was an original understanding, and not a collateral promise.”<sup>2</sup> So, also, a verbal promise to indemnify an occupier of land if he will resist a suit of the vicar for tithes has been held not to be within the statute.<sup>3</sup> An attorney authorized a distress for rent due his client, and verbally promised to indemnify the party executing the distress warrant from damage by reason of the

<sup>76</sup> Per Pollock, C. B., in *Cripps v. Hartnoll*, 4 Best & Smith, 414; *Dougherty v. Bash*, 167 Pa. St. 429, 31 Atl. Rep. 729. &c., 728; *Reader v. Kingham*, 13 C. B. (N. Y.), 344; *Wildes v. Dallow*, L. R. 19 Eq. 198. *Contra Winckworth v. Mills*, 2 Esp. 484.

<sup>1</sup> *Bullock v. Lloyd*, 2 Car. & P. 119. See, also, to same effect, *Howes v. Martin*, 1 Esp. 162; *Jones v. Bacon*, 145 N. Y. 446, 40 N. E. Rep. 216, affirming 25 N. Y. Supp. 212; *Chapin v. Merrill*, 4 Wend (N. Y.), 657. See, also *Marroly v. Gillett*, 21 N. Y. 412; *Sanders v. Gillespie*, 59 N. Y. 250; *Tighe v. Morrison*, 116 N. Y. 263, 22 N. E. Rep. 164; *Thomas v. Cook*, 8 Barn. & C., 728; *Reader v. Kingham*, 13 C. B. (N. Y.), 344; *Wildes v. Dallow*, L. R. 19 Eq. 198. *Contra Winckworth v. Mills*, 2 Esp. 484.

<sup>2</sup> Per Redcliff, J., in *Allaire v. Ouland*, 2 Johns. Cas. 52. See, also, to same effect, *Marcy v. Crawford*, 16 Conn. 549; and see *Weld v. Nichols*, 17 Pick. 538; *Chapman v. Ross*, 12 Leigh (Va.), 565.

<sup>3</sup> *Adams v. Dansey*, 6 Bing. 506. See comments on this case by Lord Denman in *Green v. Creswell*, 10 Adol. & Ell. 453. And see *Goodspeed v. Fuller*, 46 Me. 141.



goods being privileged from distress. Held, the promise to indemnify was not within the statute.<sup>4</sup> A party agreed to pay a certain sum annually to certain trustees of a church toward the support of a minister. The minister, for a consideration, promised to indemnify the party against loss by reason of such agreement. Held, the promise was not within the statute.<sup>5</sup> Where A, being bound to indemnify B in a certain civil suit in which he was arrested, requested C to become special bail for B, and promised to indemnify him, the promise was held to be an original undertaking and not within the statute. This decision was put upon the ground that, as A was himself bound for B, the promise to C was for A's own benefit.<sup>6</sup> A promise to indemnify one if he will become bail for another in a criminal case has been held not to be within the statute.<sup>7</sup> The reason given for this holding in one case is that the person bailed is under no obligation to indemnify the bail, and in another is that if the person bailed is under an implied obligation to indemnify the bail, the party requesting the bail to become such should be held to be the original promisor, and the party bailed only collaterally liable. Where a party who was surety for the maker of a note procured others to sign as sureties, by promising to indemnify them, and save them harmless, it was held that such promise was an original undertaking, and not within the statute.<sup>8</sup> An oral guaranty to save

<sup>4</sup> *Topliss v. Grane*, 5 Bing. N. C. 636.

<sup>5</sup> *Conkey v. Hopkins*, 17 Johns. 113.

<sup>6</sup> *Harrison v. Sawtel*, 10 Johns. 242. See, also, *Ferrell v. Maxwell*, 28 Ohio St. 383. In a celebrated case which differed from the above only in the fact that A was not bound to indemnify B, it was held that the promise must be in writing. *Green v. Creswell*, 10 Adol. & Ell. 453; *Id.*, 2 Perry & Dav. 430.

<sup>7</sup> *Cripps v. Hartnoll*, 4 Best & Smith, 414; *Holmes v. Knights*, 10 N. H. 175. And to precisely similar effect, see *Anderson v. Spence*, 72 Ind. 315, and *Keeshug v. Frazier*, 119 Ind. 185; the former case, *An-*

*derson v. Spence*, overruling *Brush v. Carpenter*, 6 Ind. 78.

<sup>8</sup> *Horn v. Bray*, 51 Ind. 555. To same effect, see *Thomas v. Cook*, 8 Barn. & Cress. 728; *Id.*, 3 Man. & Ry. 444. For cases holding or tending to establish that under various circumstances a promise to indemnify need not be in writing, see *Chapin v. Merrill*, 4 Wend. 657; *Barry v. Ransom*, 12 N. Y. 462; *Taylor v. Savage*, 12 Mass. 98; *Smith v. Sayward*, 5 Greenl. 504; *Aldrich v. Ames*, 9 Gray, 76; *Cutter v. Emery*, 37 N. H. 567; *Harris v. Brooks*, 21 Pick. 195; *Whitehouse v. Hanson*, 42 N. H. 9; *Blake v. Cole*, 22 Pick. 97; *Hodges v. Hall*, 29 Vt. 209; *Hendrick v. Whit-*

harmless a person in consideration of his becoming surety on an administrator's bond is an original promise and not within the statute.<sup>9</sup>

§ 72. **When promise to indemnify must be in writing—Instances.**—Where an attorney requested a party to execute to the sheriff a bail bond in a civil case for his client, and promised to indemnify such party for so doing, it was held the promise was within the statute. The court said the test was that "the original party remained liable, and the defendant incurred no liability except from the promise."<sup>10</sup> A promise by one person to indemnify another against loss or damage in becoming the surety for a third in an undertaking of replevin has been held to be within the statute.<sup>11</sup> The court said: "If, therefore, the third person against whose debt, default or miscarriage the promise of indemnity is made, would himself be legally liable to pay the promisee such debt or damage, the promise of indemnity is to be regarded as collateral to his liability as principal, and within the statute." A promise by one person to another that he will indemnify such other from loss which he may sustain by reason of signing a sheriff's bond, has been held to be within the statute.<sup>12</sup> The same thing was held when one who was himself indemnified by property of the principal promised to indemnify a

temore, 105 Mass. 23; Keith v. Goodwin, 31 Vt. 268; Byers v. McClanahan, 6 Gill & Johns. 250; Dunn v. West, 5 B. Mon. (Ky.) 376; Apgar's Adm'r v. Hiler, 4 Zab. (N. J.) 812; Lucas v. Chamberlain, 8 B. Mon. (Ky.) 276; Marsh v. Consolidation Bank, 48 P. St. 510; D'Wolf v. Raband, 1 Pet. 476; Stocking v. Sage, 1 Conn. 519; Jones v. Shorter, 1 Kelley (Ga.), 294; Townsley v. Sumrall, 2 Pet. 170; Emerson v. Slater, 22 How. (U. S.) 28; Shook v. Vanmater, 22 Wis. 507; Hoggatt v. Thomas et al., 35 La. Ann. 298. In Warren v. Abbett, 65 N. J. Law 99, 46 Atl. Rep. 575, two directors of a corporation verbally promised plaintiff that if he would become accommodation indorser on the cor-

poration's paper they would each stand one-third of any loss he might be obliged to pay. Held, that the promise was binding and based on a sufficient consideration.

<sup>9</sup> Tighe v. Morrison, 116 N. Y. 263, 22 N. E. Rep. 164.

<sup>10</sup> Per Lord Denman in Green v. Cresswell, 2 Perry & Dav. 430; Id., 10 Adol. & Ell. 453.

<sup>11</sup> Easter v. White, 12 Ohio St. 219, per Sutliff, J. See to same effect, Kingsley v. Balcombe, 4 Barb. (N. Y.) 131. So a promise by one person to indemnify another against loss or liability in becoming security for stay of execution for a third person is within the statute. Nugent v. Wolfe, 111 Pa. St. 471.

<sup>12</sup> Brown v. Adams, 1 Stew. (Ala.) 51.

third person if he would sign a note of the principal as surety.<sup>13</sup> From the examples given, the confusion in the authorities on this subject will be apparent, as well as the necessity of carefully analyzing the facts of each case as it arises, and applying to it the principles which have already been shown to be established.

§ 73. **If original debt extinguished or novated, promise not within the statute.**—When the new promise has the effect of extinguishing the old debt, it amounts to an original undertaking, and is not within the statute.<sup>14</sup> In such case there is no third person liable as principal; there is no liability to which the promise is collateral; nor is there any obligation with which the promise concurs or runs together. A son did work for his father, for which the father was indebted, and the defendant, in consideration of the son releasing the father from such debt, verbally promised to pay it. Held, the promise was not within the statute and the defendant was bound.<sup>15</sup> The court said: “The plaintiff discharged the debt due to him from his father, in consideration of the defendant’s promise to pay him the amount due him. This promise was not a promise to pay the debt of another within the Statute of Frauds, but an original undertaking. The defendant promised to pay the money, not as surety or guarantor, but as the sole debtor; not as a collateral promise, but as a

<sup>13</sup> *Draughan v. Bunting*, 9 Ired. Law (N. C.), 10. For cases holding or tending to show that certain promises to indemnify must be in writing, see *Simpson v. Nance*, 1 Spears (S. C.), 4; *Martin v. Black’s Ex’rs*, 20 Ala. 309; *Macey v. Childress*, 2 Tenn. Ch. (Cooper) 438.

<sup>14</sup> *Curtis v. Brown*, 5 Cush. (Mass.) 488; *Allshouse v. Ramsay*, 6 Whart. (Pa.) 311; *Stone v. Symmes*, 18 Pick. 467; *Bird v. Gammon*, 3 Bing. N. C. 883. As further illustrating this subject, see *Gull v. Lindsay*, 4 Wels. Hurl. & Gor. 45; *Eddy v. Roberts*, 17 Ill. 505; *Watson v. Randall*, 20 Wend. 201; *Click v. McAfee*, 7 Port. (Ala.) 62;

*Mead v. Keyes*, 4 E. D. Smith (N. Y.), 510; *Gleason v. Briggs*, 28 Vt. 135; *Andre v. Bodman*, 13 Md. 241; *Watson v. Jacobs*, 29 Vt. 169; *Robinson v. Lane*, 14 Sm. & Mar. (Miss.) 161; *Quintard v. D’Wolf*, 34 Barb. (N. Y.) 97; *Mosely v. Taylor*, 4 Dana, (Ky.) 542; *Stewart v. Hinkle*, 1 Bond, 506; *Hedges v. Strong*, 3 Oreg. 18; *Hamlin v. Drummond*, 91 Me. 175, 39 Atl. Rep. 551; *Hanson v. Nelson*, 82 Minn. 220, 84 N. W. Rep. 724, in which case the evidence was held insufficient to show a novation and defendant’s verbal promise was held not binding.

<sup>15</sup> *Wood v. Corcoran*, 1 Allen (Mass.), 405, per Hoar, J.

substituted promise. There was no debt of another as soon as the defendant's promise was made." Where a party was taken on a ca. sa., and in consideration of the creditor discharging him from custody, a third person verbally promised to pay the debt, it was held that by such discharge the debt was extinguished and the promise was not within the statute. The court said: "By the discharge of Chase with the plaintiff's consent, the debt as between those persons was satisfied. \* \* Then, if so, the promise by the defendant here is not a collateral but an original promise, for which the consideration is the discharge of the debt as between the plaintiff and Chase."<sup>16</sup> For the same reasons, where there is an entire novation of the debt, and the third party becomes verbally bound for the new debt along with the original debtor, the new agreement is not within the statute. Thus, where one person was indebted, and entered into partnership with another, and the two said to the creditor of the one that they wished the debt to be their joint debt and they would pay it, and the creditor consented, it was held the agreement was binding upon both, and need not be in writing, the effect of the agreement being to extinguish the first debt and substitute another for it.<sup>17</sup> Where a debtor asked his creditor to purchase certain railroad bonds, he guarantying that no loss would result therefrom, and the creditor relying upon this guaranty purchased the same and canceled the indebtedness, it was held that the guaranty was an original promise and not within the statute.<sup>18</sup>

**§ 74. When promise to pay out of proceeds of debtor's property not within statute.**—A promise to pay the debt of another out of the proceeds of the property of such other, placed in the hands of the promisor for that purpose, is not within the statute.<sup>19</sup> In such case the promisor is simply an agent to distrib-

<sup>16</sup> *Goodman v. Chase*, 1 Barn. & Briggs, 8 Pick, 122; *Choppin v. Ald.* 297; per Lord Ellenborough, *Gobbold*, 13 La. Ann. 238; *Roth v. Miller*, 15 Serg. & Rawle, 100; *Burghart*, 1 Adol. & Ell. (N. S.) 933; *Cooper v. Chambers*, 4 Dev. Marsh. (Ky.) 525; *Musgrave v. (N. C.)* 261; *Butcher v. Stewart*, 11 Glasgow, 3 Ind. 31. *Mees. & Wels.* 857; *Maggs v. Ames*, 4 Bing. 470. <sup>18</sup> *Allen v. Eighmie*, 14 Hun (N. Y.), 559.

<sup>17</sup> *Ex parte Lane*, 1 De Gex, 300. <sup>19</sup> *Meyer v. Hartman*, 72 Ill. 442; See, also, on this subject, *Baker v. Runde v. Runde*, 59 Ill. 98; *Corbin*

ute the property. The promise is an original one for the promisor alone. The party owing the debt is not liable on the promise, nor is any other person liable thereon except the promisor himself. In a leading case, one Taylor being in arrears for rent, and insolvent, conveyed all his effects for the benefit of his creditors, who employed Leper to sell them. On the day advertised for the sale, the landlord came to distrain the goods in the house, whereupon Leper promised to pay the rent if he would desist. Held, this promise was not within the statute.<sup>20</sup> Here the landlord relinquished his prior lien on the property, or, in other words, left the property in the hands of Leper, and Leper in effect agreed to apply the proceeds of the sale of the property to the payment of the debt of its owner. One of the judges said that "Leper became the bailiff of the landlord, and when he had sold the goods the money was the landlord's in his own bailiff's hands." Another judge said that Leper was not bound to pay the landlord more than the goods sold for. The property must be within the control of the promisor, in order to take the promise out of the statute; it is not sufficient that he is the agent of those who do control it.<sup>21</sup> A debtor left certain notes of third persons with another for collection, and he promised the debtor to collect the notes and pay the creditor a debt due him from the debtor. Held, the promise was not within the statute.<sup>22</sup> The court said: "This is no undertaking to pay the

v. McChesney, 26 Ill. 231; Stephens v. Pell, 2 Crompt. & Mees, 710; Id., 4 Tyrwh. 6; Hitchcock v. Lukens, 8 Port. (Ala.) 333; Loomis v. Newhall, 15 Pick. 159; Andrews v. Smith, Tyrwh. & Gr. 173; Id., 2 Crompt. Mees. & Ros. 627; Todd v. Tobey, 29 Me. 219; Nelson v. Hardy, 7 Ind. 364; Lucas v. Payne, 7 Cal. 92; Stoudt v. Hine, 45 Pa. St. 30; Consolidated Presbyterian Society v. Staples, 23 Conn. 544; Wilson v. Bevans, 58 Ill. 232; McLaren v. Hutchinson, 22 Cal. 187; Clymer v. De Young, 54 Pa. St. 118; Cameron v. Clark, 11 Ala. 259; Hilton v. Dinsmore, 21 Me. 410; Goddard v. Mockbee, 5 Cranch (C. C.),

666; Laing v. Lee, Spencer (N. J.), 337; Lee v. Fontaine, 10 Ala. 755; Stanly v. Hendricks, 13 Ired. (N. C.) 86; McKenzie v. Jackson, 4 Ala. 230; Rounsavel v. Osgood, 68 N. H. 418, 44 Atl. Rep. 535. Contra, Jackson v. Rayner, 12 Johns. 291.

<sup>20</sup> Williams v. Leper, 3 Burr. 1886; Id., 2 Wils. 308. To same effect, see Edwards v. Kelly, 6 Maule & S. 204; Bampton v. Paulin, 4 Bing. 264; Crawford v. King, 54 Ind. 6.

<sup>21</sup> Quin v. Hanford, 1 Hill (N. Y.), 82.

<sup>22</sup> Prather v. Vineyard, 4 Gilman (Ill.), 40, per Purple, J. To same

debt of a third party, within the Statute of Frauds; but it is an agreement by two persons for the use and benefit of a third, upon which such third person may maintain an action against the person promising, without proof of any written memorandum or consideration moving between the promisor and the party for whose benefit the contract has been made. It is a trust which, having once undertaken to execute, and entered upon the performance of the same, although voluntarily and without consideration other than such as the law implies, he is bound in law and equity to complete." The mere fact, however, that the promisor has in his possession property of the original debtor, which was not deposited with him for the purpose of paying the debt, will not of itself alone take the promise out of the statute.<sup>23</sup> It is also clearly established that when the creditor has a lien on property of the principal for the payment of his debt, which he relinquishes in consideration of the promise, and such lien inures to the benefit of the promisor, the promise is not within the statute.<sup>24</sup>

**§ 75. Creditor relinquishing lien which does not inure to benefit of promisor does not take promise out of statute.**—Whether the relinquishment of a lien which the creditor holds upon the property of the principal for the payment of the debt, when the lien does not inure to the benefit of the promisor, is sufficient to take the promise out of the statute, seems to be clear upon principle, but is a very vexed question upon authority. In a leading case usually referred to as establishing that the relinquishment of a lien under such circumstances does take the promise out of the statute,<sup>25</sup> the prom-

effect, see *Drakeley v. Deforest*, 3 Conn. 272; *Sullivan v. Murphy*, 23 Minn. 6.

<sup>23</sup> *Dilts v. Parke*, 1 South. (N. J.) 219; *State Bank at New Brunswick v. Mettler*, 2 Bosw. (N. Y.) 392; *Simpson v. Nance*, 1 Spears (S. C.), 4; *Hughes v. Lawson*, 31 Ark. 613.

<sup>24</sup> See cases cited in this section. See, also, *Teague v. Fowler*, 56 Ind. 569.

<sup>25</sup> *Houlditch v. Milne*, 3 Esp. 86.

It seems, however, that this case can be sustained upon other grounds. The case of *Williams v. Leper*, 2 Wils. 308; *Id.*, 3 Burr. 1886, has also by several courts been thought to establish the same proposition, and decisions to that effect have been founded upon its authority. But from a careful examination of that case, it will appear that it is more properly referable to other grounds, and that it is an authority showing that a promise to



isor had sent certain carriages belonging to one Copey to the plaintiff to be repaired, and the promisor gave the orders concerning them. The bill for repairs was made out to Copey, but the promisor ordered the carriages packed and shipped, and verbally promised to pay for the repairs. The court<sup>26</sup> held the promise not within the statute, on the ground that the plaintiff had parted with his lien. A landlord, who had a lien for board upon the baggage of his guest, released the lien and allowed the guest to take the baggage upon the verbal promise of a third person to pay the debt. It was squarely held that the promise was not within the statute. The court said: "Where one has a complete and enforceable lien on the property of his debtor, a promise of a third person to pay the debt on condition that the property under the lien is given up will be held binding, and not within the Statute of Frauds. This upon the ground that the release of the lien is the surrender of a security operating in the nature of a payment, and therefore, if not a benefit to the promisor, is a prejudice to the creditor to the extent of his loss."<sup>27</sup> If, as here suggested, the surrender of the lien discharged the original debt, then, as already shown, the promise for that reason would not be within the statute. But the surrender of the lien does not usually extinguish the original debt. The surrender of the lien, being a detriment to the creditor, is undoubtedly a sufficient consideration for the promise; but why it should take the promise out of the statute, any more than any consideration which is a detriment to the creditor, or in fact any other sufficient consideration, it is difficult to perceive. What seems to be the true view of this subject, and the one which is sustained by the weight of authority, is

apply the debtor's property in the hands of the promisor for that purpose, to the payment of his debt, is not within the statute.

<sup>26</sup> Lord Eldon.

<sup>27</sup> Per Butler, J., in *Dunlap v. Thorne*, 1 Rich. (S. C.) 213. To same effect, or sustaining same view, see *Shook v. Vanmater*, 22 Wis. 507; *Love's Case*, 1 Salk. 28; *Slingerland v. Morse*, 7 Johns. 463; *Adkinson v. Barfield*, 1 McCord (S. C.), 575; *Mercien v. Andrus*,

10 Wend. 461; *Bushell v. Beavan*, 1 Bing. N. C. 103. Nearly all of the authority holding to this effect is founded upon what is believed to be an erroneous view of the grounds upon which *Williams v. Leper*, 2 Wils. 308, rested. Mr. Browne, in his able work on the Statute of Frauds, pp. 195-204, holds that the mere relinquishment of a lien by the creditor does not take the promise out of the statute.



thus well expressed: "Where the plaintiff, in consideration of the promise, has relinquished some lien, benefit or advantage for securing or recovering his debt, and where by means of such relinquishment the same interest or advantage has inured to the benefit of the defendant, there his promise is binding without writing. In such case, though the result is that the payment of the debt of a third person is effected, it is so incidentally and indirectly, and the substance of the contract is the purchase by the defendant from the plaintiff of the lien, right or benefit in question. \* \* It is not enough that the plaintiff has relinquished an advantage or given up a lien in consequence of the defendant's promise, if that advantage has not directly inured to the benefit of the defendant, so as to make it a purchase by the defendant from the plaintiff." <sup>28</sup>

**§ 76. When the transaction amounts to a purchase of debt or lien by promisor, promise not within statute.**—When the promise to pay the debt of another is made in consideration of the delivery by the creditor to the promisor of a security for such debt, or of an assignment of the debt itself to the promisor—that is, when the transaction amounts to a sale by the creditor to the promisor of the lien or the debt—the promise is not within the statute. The fact that the payment of the price by the purchaser is to take the form of discharging the debt of another is an incident in the transaction which does not deprive the purchase of its essential character as such. Thus an agent who had a lien on certain policies of insurance effected for his principal, for whom he had given his acceptances, was induced by the defendant to give him the policies and waive the lien; and the defendant, in con-

<sup>28</sup> Per Shaw, C. J., in *Curtis v. Thomas*, 5 Gray, 45; *Stern v. Brown*, 5 Cush. 488. Supporting this view, see *Chater v. Becket*, 7 Term R. 201; *Nelson v. Boynton*, 3 Met. (Mass.) 396; *Tomlinson v. Gell*, 6 Adol. & Ell. 564; *Cross v. Richardson*, 30 Vt. 641; *Alger v. Scoville*, 1 Gray, 391; *Sampson v. Hobart*, 28 Vt. 697; *Mallory v. Gillett*, 23 Barb. (N. Y.) 610; *Smith v. Sayward*, 5 Greenl. (Me.) 504; *Spooner v. Dunn*, 7 Ind. 81; *Fish v. Thomas*, 5 Gray, 45; *Stern v. Drinker*, 2 E. D. Smith (N. Y.), 401; *Scott v. Thomas*, 1 Seam. (Ill.) 58; *Van Slyck v. Pulver*, Hill & Denio (Lalor's Sup.), 47; *Corkins v. Collins*, 16 Mich. 478; *Arnold v. Stedman*, 45 Pa. St. 186; *Bird v. Gammon*, 5 Scott, 213; *Woodward v. Wilcox*, 27 Ind. 207; *Stoudt v. Hine*, 45 Pa. St. 30; *Fulham v. Adams*, 37 Vt. 391.

sideration thereof, promised to pay one of the acceptances, and to deposit money for the payment of the others as they became due. Held, the promise was not within the statute.<sup>29</sup> The chief justice said that the defendant "had in contemplation, not principally the discharge of Grayson [original debtor], but the discharge of himself. This was his moving consideration, though the discharge of Grayson would eventually follow. It is therefore rather a purchase of the securities which the plaintiff held in his hands. This is quite beside the mischief provided against by the statute, which was that persons should not, by their own unavouched undertaking, without writing, charge themselves for the debt, default or miscarriage of another." Another judge said: "This is to be considered as a purchase by the defendant of the plaintiff's interest in the policies. It is not a bare promise to the creditor to pay the debt of another due to him, but a promise by the defendant to pay what the plaintiff would be liable to pay if the plaintiff would furnish him the means of doing so." In another case, one Marden, being insolvent, a verbal agreement was entered into between several of his creditors and one Weston, whereby Weston agreed to pay the creditors ten shillings in the pound in satisfaction of their debts, which they agreed to accept and to assign their debts to Weston. Held, the promise of Weston was not within the statute. The court said: "It is perfectly clear that this was a contract to purchase the debts of the several creditors, instead of being a contract to pay or discharge the debts owing by Marden. \* \* Instead of being a contract to discharge Marden from his debts, it was a contract to keep them on foot. \* \* We all agree fully upon the point that it is a contract for the purchase of the debts of Marden, which is not prohibited by the Statute of Frauds."<sup>30</sup>

<sup>29</sup> *Castling v. Aubert*, 2 East, 325, per Lord Ellenborough, C. J., and Lawrence, J. See, also, *Walker v. Taylor*, 6 Car. & P. 752; *Fitzgerald v. Dresler*, 7 Com. B. (N. S.) 374.

<sup>30</sup> *Anstey v. Marden*, 1 Bos. & Pul. N. R. 124, per Chambre, J. See, also, as bearing upon this subject, *Love's Case*, 1 Salk. 28; *Allen v. Thompson*, 10 N. H. 32; *Doo-*

*little v. Naylor*, 2 Bosw. (N. Y.) 206; *French v. Thompson*, 6 Vt. 54; *Therasson v. McSpedon*, 2 Hilton (N. Y.), 1; *Hindman v. Langford*, 3 Strobb. (S. C.) 207; *Gardner v. Hopkins*, 5 Wend. 23; *Olmstead v. Greenly*, 18 Johns. 12. Mr. De Colyar, in his valuable work on the Law of Guaranties, pp. 171-174, holds to the view that the

§ 77. When promisor who is debtor to third person agrees to pay his debt to creditor of such third person, promise not within statute.—If A be indebted to B, and B be indebted to C, and they get together and agree that B's debt to C shall be canceled, and A shall pay the debt which he owed B to C, such agreement is valid and binding without writing.<sup>31</sup> In such case A pays his own debt with his own money to a substituted creditor, and the fact that by the transaction of the debt another is paid makes no difference. So where the defendant's brother was indebted to the plaintiff, and, being pressed for payment, sold the defendant a pair of horses at a price less than the debt due the plaintiff, and the defendant promised his brother that he would pay the purchase price to the plaintiff, the court said the promise was not within the statute: "It was not a promise to answer for the debt of another person, but merely to pay the debt of the person making the promise to a particular person designated by him to whom the debt belonged, and who had a right to make such payment a part of the contract of sale. Such promise was no more within the Statute of Frauds than it would have been if the defendant had promised to pay the price of the horses directly to his brother, of whom he purchased them."<sup>32</sup>

following cases may be supported by the rule here under consideration: *Houlditch v. Milne*, 3 Esp. 86; *Barrell v. Wessel*, 4 Taunt. 117; *Williams v. Leper*, 3 Burr. 1886; *Id.*, 2 Wils. 308; *Edwards v. Kelly*, 6 Maule & S. 204; *Bampton v. Paulin*, 4 Bing. 264.

<sup>31</sup> *Dearborn v. Parks*, 5 Greenl. (Me.) 81; *Wilson v. Coupland*, 5 Barn. & Ald. 228; *Hodgson v. Anderson*, 5 Dow. & Ry. 735; *Id.*, 3 Barn. & Cress. 842; *Lacy v. McNeile*, 4 Dow. & Ry. 7. It seems that the debt of B must be extinguished by the transaction, in order to take the case out of the statute. *Jackson v. Rayner*, 12 Johns. 291; *Wharton v. Walker*, 6 Dow. & Ry. 288; *Cuxon v. Chadley*, 3 Barn. & Cress. 591; *Liversidge v. Broadbent*, 4 Hurl. & Nor. 603.

<sup>32</sup> Per Jewett, J., in *Barker v. Bucklin*, 2 Denio, 45. For cases deciding and tending to establish these views, see *Roe v. Hough*, 3 Salk. 14; *Rice v. Carter*, 11 Ired. (N. C.) 298; *Barringer v. Warden*, 12 Cal. 311; *Israel v. Douglas*, 1 H. Black, 239; *Brown v. Strait*, 19 Ill. 88; *Fairlie v. Denton*, 2 Man. & Ry. 353; *Id.*, 8 Barn. & Cress. 395; *Ford v. Finney*, 35 Ga. 258; *Cailleux v. Hall*, 1 E. D. Smith (N. Y.), 5; *Wharton v. Walker*, 6 Dow. & Ry. 288; *Id.*, 4 Barn. & Cress. 163; *Rowe v. Whittier*, 21 Me. 545; *Cuxon v. Chadley*, 3 Barn. & Cress. 591; *McLaren v. Hutchinson*, 22 Cal. 187; *Meyer v. Hartman*, 72 Ill. 442; *Haydon v. Christopher*, 1 J. J. Marsh. (Ky.) 382; *Connor v. Williams*, 2 Rob. (N. Y.) 46; *Robbins v. Ayres*, 10

§ 78. When promise is in effect to pay promisor's own debt, it is not within the statute, although it incidentally guaranty debt of another.—Whenever the promise is in effect to pay the debt of the promisor, even though the performance of the promise may extinguish the debt of a third person, the promise is not within the statute. A debtor gave to his creditor the note of a third person for the same amount as the debt, and guarantied the payment of the note. Held, the guaranty need not be in writing.<sup>33</sup> The same thing was decided where the payee and holder of a note transferred it in payment of his debt, and guarantied its payment by an instrument which did not sufficiently express the consideration. The court said: "Although this is in form a promise to answer for the debt or default of another in substance, it is an engagement to pay the guarantor's own debt in a particular way. He does not undertake as a mere surety for the maker, but on his own account, and for a consideration which has its root in a transaction entirely distinct from the liability of the maker."<sup>34</sup> A plaintiff advanced money for a defendant, and in payment of the debt thus created the defendant transferred to the plaintiff the note of a third person, payable in chattels, and guarantied its payment. Held, the guaranty need not be in writing.<sup>35</sup> The court said: "This was not an undertaking by the defendant to pay the debt of Eastman [maker of the note], but an agreement to pay his own debt in a particular

Mo. 538; Clymer v. De Young, 54 Pa. St. 118; Mt. Olivet Cemetery Co. v. Sherbert, 2 Head (Tenn.), 116; Sanders v. Clason, 13 Minn. 379; Maxwell v. Haynes, 41 Me. 559. promissory note, the vendor guaranties that it is good and will be paid at maturity, such guaranty is not within the Statute of Frauds and is valid though not in writing. Milk v. Rich, 15 Hun, 178.

<sup>33</sup> Dyer v. Gibson, 16 Wis. 508. To same effect, see Barker v. Scudder, 56 Mo. 272; Hall v. Rodgers, 7 Humph. (Tenn.) 536; Fowler v. Clearwater, 35 Barb. (N. Y.) 143; Durham v. Manrow, 2 N. Y. 533; Adcock v. Fleming, 2 Dev. & Batt. Law (N. C.), 225; Eagle Mowing & Reaping Machine Co. v. Shattuck, 53 Wis. 455; Weeks v. Widgeon, 23 Ind. App. 405, 55 N. E. Rep. 487. Where, upon the sale of a

<sup>34</sup> Brown v. Curtiss, 2 N. Y. 225, per Bronson, J. To same effect, see Dauber v. Blackney, 38 Barb. (N. Y.) 432; Pitts v. Congdon, 2 N. Y. 352; Sheldon v. Butler, 24 Minn. 513; Wilson v. Hentges, 29 Minn. 102.

<sup>35</sup> Johnson v. Gilbert, 4 Hill, 178, per Bronson, J.; Mobile & G. R. Co. v. Jones, 57 Ga. 198; Nichols v. Allen, 22 Minn. 283.

way. The plaintiff had upon request paid a debt of \$25 which the defendant owed to Sherwood, and had thus made himself a creditor of the defendant to that amount. If the matter had not been otherwise arranged, the plaintiff might have sued the defendant and recovered as for so much money paid for him upon request. But the plaintiff agreed to accept payment in a different way, to wit: by the transfer of Eastman's note for the wood-work of a wagon, with the defendant's undertaking that the note should be paid. The defendant, instead of promising that he would pay himself, agreed that Eastman should pay. He might do that, whether Eastman was his debtor or not; and the fact that Eastman was a debtor does not change the character of the defendant's undertaking and make it a case of suretyship within the statute of frauds." The purchaser of personal property agreed by parol, in consideration thereof, to pay certain debts of his vendor due to a third person. Held, the promise was not within the statute. The court said: the promisor "received the property contracted for, and it is wholly immaterial to him what direction was given to the purchase money. The vendor contracted to have it paid to his creditors instead of himself, and it imposes no hardship upon the purchaser. It was his contract so to pay the purchase money, and such a contract is valid and binding in law, although it is not evidenced by any writing."<sup>36</sup> On the same general principles a verbal acceptance or promise to accept a bill of exchange is not within the statute when the promisor has funds of the drawer in his hands to pay it.<sup>37</sup> It amounts to a payment of

<sup>36</sup> Per Scott, J., in *Wilson v. Beavans*, 58 Ill. 232. To the same effect, and illustrating this subject, see *Ashford v. Robinson*, 8 Ired. (N. C.) 114; *Stewart v. Malone*, 5 Phila. 440; *Carpenter v. Wall*, 4 Dev. & Batt. (N. C.) 144; *Huntington v. Wellington*, 12 Mich. 10; *Ardern v. Rowney*, 5 Esp. 254; *Smith v. Finch*, 2 Scam. (Ill.) 321; *Reed v. Holcombe*, 31 Conn. 360; *Runde v. Runde*, 59 Ill. 98; *Allen v. Pryor*, 3 A. K. Marsh. (Ky.) 305; *Wait v. Wait*, 28 Vt. 350; *Hackleman v. Miller*, 4 Blackf. (Ind.) 322; *Rowland v. Borke*, 4 Jones (N. C.), 337; *Devlin v. Woodgate*, 34 Barb. (N. Y.) 252; *Jones v. Palmer*, 1 Doug. (Mich.) 379; *Cardell v. McNeil*, 21 N. Y. 336; *Gold v. Phillips*, 10 Johns. 412; *Hodgson v. Anderson*, 5 Dow. & Ry. 735; *Id.*, 3 Barn. & Cres. 842; *Stephens v. Squire*, 5 Modern, 205; *Orrell v. Coppock*, 26 Law Jour. Ch. 269; *Aiken v. Cheeseborough*, 1 Hill, Law (S. C.), 172. Contra, *Wood v. Wheelock*, 25 Barb. (N. Y.) 625.

<sup>37</sup> *Pillans v. Van Mierop*, 3 Burr. 1663; *Townsley v. Sumrall*, 2 Pet.

his own debt, and it makes no difference whether he pay it to the prayer himself or to a creditor of the drawer who is designated by the bill of exchange.

**§ 79. When promisor previously liable, promise not within statute.**—If the promisor is already liable for the payment of the debt, his promise to pay it if a third person does not is not within the statute. This is but another application of the principle that a promise to pay the promisor's own debt is not within the statute, even though its performance may discharge the debt of another. Thus A, through the agency of a broker, sold a parcel of linseed to B, who, through the same broker, sold it at an increased price to C. The time for C to pay the price was to arrive before that fixed for the payment by B. C sent his clerk to the broker for the delivery order for the seed, and the broker took him to A, from whom the clerk obtained the order, upon the faith of a promise that C would pay A for the seed. It was held that the promise was not within the statute. The court said: "We are all agreed that the case is not within the Statute of Frauds. The law upon this subject is, I think, correctly stated in the notes to *Forth v. Stanton*, 1 Wms. Saund. 211e, where the learned editor thus sums up the result of the authorities: 'There is considerable difficulty on the subject, occasioned perhaps by unguarded expressions in the reports of the different cases, but the fair result seems to be that the question whether each particular case comes within this clause of the statute (sec. 4), or not, depends not on the consideration for the promise, but on the fact of the original party remaining liable, coupled with the absence of any liability on the part of the defendant or his property, except such as arises from his express promise.' I quite concur in that view of the doctrine, provided the proposition is considered as embracing the qualification at the conclusion of the passage; for though I agree that the consideration alone is not the test, but that

182; *Spaulding v. Andrews*, 48 Pa. 522; *Grant v. Shaw*, 16 Mass. 341; St. 411; *Jones v. Council Bluffs* *Strohecker v. Cohen*, 1 Spears (S. Bank, 34 Ill. 313; *O'Donnell v. C.*), 349; *Nelson v. First Nat. Smith*, 2 E. D. Smith (N. Y.), 124; *Bank of Chicago*, 48 Ill. 36; *Shields Mason v. Dousay*, 35 Ill. 424; *Van v. Middleton*, 2 Cranch, C. C. 205; *Reimsdyck v. Kane*, 1 Gall. C. C. *Pike v. Irwin*, 1 Sand. (N. Y.) 14. 633; *Leonard v. Mason*, 1 Wend.



the party taking upon himself the obligation upon which the action is brought makes himself responsible for the debt or default of another, still it must be taken with the qualification stated in the note above cited, viz.: an absence of prior liability on the part of the defendant or his property."<sup>38</sup> The doctrine here announced in terms, that, in order to bring the promise within the statute, there must be an absence of liability on the part of the promisor, except such as arises from his express promise, is based upon the soundest reason, and affords an explanation for many cases which could not otherwise be sustained upon principle. This doctrine is also applicable where the promise is to pay what the promisor was previously liable for jointly with others only; as in the case of a partnership, where the verbal promise of one partner to pay the partnership debt is valid.<sup>39</sup> But a promise by a firm to pay the individual debt of one partner;<sup>40</sup> or by a stockholder of a corporation to pay its debts,<sup>41</sup> must be in writing; because in neither case is there any pre-existing liability on the part of the promisor to pay.

**§ 80. New consideration passing between promisee and promisor will not alone take promise out of statute.**—In many of the cases which have held a verbal promise to answer for another binding when the original debtor also remained bound, great stress has been laid upon the fact that the promise was founded upon a new consideration moving between the creditor and the promisor, and the promise has been decided to be not within the statute for that reason alone. In a cele-

<sup>38</sup> *Fitzgerald v. Dressler*, 7 Com. B. (J. Scott) N. S. 374, per Cockburn, C. J. To this principle may be referred *Williams v. Leper*, 2 Wils. 308; *Id.*, 3 Burr. 1886; *Bampton v. Paulin*, 4 Bing. 264; *Thomas v. Williams*, 10 Barn. & Cress. 664; *Houlditch v. Milne*, 3 Esp. 86. See, also, as further illustrating this point, *Macrory v. Scott*, 5 Wels., Hurl. & Gor. 907; *Nelson v. Boynton*, 3 Met. (Mass.) 396; *Chambers v. Robbins*, 28 Conn. 544; *Hoover v. Morris*, 3 Ohio, 56, and also cases heretofore cited on other branches of this subject.

<sup>39</sup> *Stephens v. Squire*, 5 Modern, 205; *Aikin v. Duren*, 2 Nott & McCord (S. C.), 370; *Files v. McLeod*, 14 Ala. 611; *Howes v. Martin*, 1 Esp. 162; *Rice v. Barry*, 2 Cranch, C. C. 447.

<sup>40</sup> *Taylor v. Hillyer*, 3 Blackf. (Ind.) 433; *Wagnon v. Clay*, 1 A. K. Marsh. (Ky.) 257.

<sup>41</sup> *Trustees of Free Schools v. Flint*, 13 Met. (Mass.) 539; *Wyman v. Gray*, 7 Harris & Johns. (Md.) 409; *Rogers v. Waters*, 2 Gill & Johns. (Md.) 64.



brated case, often cited to sustain this position, a most learned judge<sup>42</sup> said that "when the promise to pay the debt of another" arose "out of some new and original consideration of benefit or harm moving between the newly contracting parties," that promise was not within the statute. Numerous cases have been decided upon the authority of this statement of the law; and it has been given as a reason for the decision of many cases which may well rest upon other grounds. The proposition of the learned judge was not necessary to a decision of the case in which it was laid down, and, as stated by him, cannot be supported on principle, nor by the later and best-considered authorities. There must be a consideration for every contract of suretyship or guaranty; and to hold that in every case where the consideration moves from the creditor to the surety or guarantor, the promise is not within the statute, would be to repeal the statute altogether in a very large class of cases. If such were the law, the verbal promise of a surety or guarantor, made in consideration of the payment to him of \$1 by the creditor, would be valid if the promise was to pay a still subsisting debt of the principal, amounting to \$1,000, or any greater sum. When the consideration passes between the surety or guarantor and the creditor, the promise will be within the statute or not, according to circumstances; but there must be some other circumstance besides the mere passage of the consideration to take the case out of the statute. In determining whether any particular case is within or without the statute, the true question is, "What is the promise?" not "What is the consideration?" An able court has said: "We believe it will be found that in all the cases now regarded as sound, where it has been held that a parol promise to pay the debt of another is binding, the promisor held in his hands funds, securities or property of the debtor devoted to the payment of the debt, and his promise to pay attaches upon his obligation or duty growing out of the receipt of such fund."<sup>43</sup> In another case in which this question was involved, the court said: "It must be admitted that the cases respecting the application of the Statute

<sup>42</sup> Kent, C. J. (afterwards Chancellor), in *Leonard v. Vredenburg*, 8 Johns. 29; *Strans v. Garrett*, note 57, § 63, *supra*.

<sup>43</sup> See elaborate opinion of Poland, C. J., in which he sustains the views expressed in the text, *Fullam v. Adams*, 37 Vt. 391.

of Frauds are greatly confused and irreconcilable with each other. Upon no subject perhaps has there been more diversity of judicial decision. The value of the statute is everywhere admitted, and its language is plain, but in the supposed justice of a particular case a court has often lost sight of the exact rule prescribed by the legislature. As much ingenuity has been expended in efforts to take individual cases out of the statute, as was formerly devoted to avoiding the Statute of Limitations, and in these ingenious efforts principles have been asserted, which, if sound, practically deny all effect to the expressed will of the legislature. Happily, there are glimmerings of late of a tendency to return to a plainer reading of the act, and to give to it a construction more consonant to the apparent mind of the legislature. \* \* Without attempting any extended review of them [the authorities], we think certain principles may be safely considered as settled, or, if not settled, sustained by reason and the authority of the best-considered adjudications. It is not true, as a general rule, that a promise to pay the debt of another is not within the statute, if it rests upon a new consideration passing from the promisee to the promisor. A new consideration for a new promise is indispensable without the statute; and if a new consideration is all that is needed to give validity to a promise to pay the debt of another, the statute amounts to nothing, nor can it make any difference that the new consideration moves from the promisee to the promisor. The object of the statute is protection against 'fraudulent practices commonly endeavored to be upheld by perjury,' and to these all suits upon verbal contracts to answer for another's debt or default are equally exposed, no matter whence the consideration of the contract proceeded, or to whom it passed."<sup>44</sup> It is held that where the debtor conveys his property to a third person who in consideration thereof promises to pay the debtor's debt, the promise is original and need not be in writing.<sup>45</sup>

<sup>44</sup> Per Strong, J., in *Maule v. Denio*, 45; *De Colyar on Guaranties*, p. 141; *Kelsey v. Hibbs*, 13 *Bucknell*, 50 Pa. St. 39; *Kingsley v. Balcombe*, 4 Barb. (N. Y.) 131; *Ohio St.* 340. See, also, on this subject, *Price v. Truesdell*, 28 N. *Cross v. Richardson*, 30 Vt. 647; *Floyd v. Harrison*, 4 Bibb (Ky.), J. Eq. (1 Stew.) 200. 76; *Lampson v. Hobart*, 28 Vt. 700; <sup>45</sup> In a recent case the New York *Noyes v. Humphreys*, 11 Gratt. Court of Appeals said: "What (Va.) 636; *Barber v. Bucklin*, 2 constitutes an original promise

**§ 81. Promise not within statute when main object is to benefit promisor himself—Observations.**—Another rule upon which many decisions have been founded is that where the main or immediate object of the promisor is not the payment of the debt of another, but to subserve some purpose of his own, the promise is not within the statute, although its performance may have the effect of discharging the debt of another. A contractor had been employed by a railroad company to build certain bridges on its line, and the company failing to make its payments as agreed, the contractor refused to go on. The defendant, who was a large stockholder in the road, had leased the company railroad iron to the value of \$68,400, and, as security for payment, held an assignment of the proceeds of the road for that amount, which was to be paid in monthly instalments. If the bridges were not completed there would be no proceeds, and the company could not pay for the iron. The defendant verbally promised the contractor to pay him if he would go on and complete the bridges, and, to secure himself from loss by reason of such promise, the defendant took from the company securities, con-

upon which the statute of frauds does not operate, and which therefore may be valid and effectual without a writing, is fairly settled in one direction at least. Wherever the facts show that the debtor has transferred or delivered to the promisor, for his own use and benefit, money or property in consideration of the latter's agreement to assume and pay the outstanding debt, and he thereupon has promised the creditor to pay, that promise is original upon the ground that, by the acceptance of the fund or property under an agreement to assume and pay the debt, the promisor has made that debt his own, has become primarily liable for its discharge, and has assumed an independent duty of payment irrespective of the liability of the principal debtor. (Citing to this point *Ackley v. Parmenter*, 98 N.

Y. 425; *White v. Rintoul*, 108 N. Y. 223, 15 N. E. Rep. 318.) In such a case the debt has become that of the new party promising. His promise is not to pay the debt of another, but his own." \* \* Finch, J., in *First National Bank of Sing Sing v. Chalmers*, 144 N. Y. 432, 39 N. E. Rep. 331, affirming 23 N. Y. Supp. 1143, in which case Leary & Spruce, manufacturers of files, conveyed their stock to defendant Chalmers, their principal customer, in consideration of his promising to pay their indebtedness to plaintiff bank; held, that Chalmers' promise need not be in writing. That a guaranty of payment of a mortgage owned by the seller made to the buyer for the purpose of inducing the purchase need not be in writing, see *Crawford v. Pyle*, 190 Pa. St. 263, 42 Atl. Rep. 687.

sisting of real estate, and the company's bonds, secured by mortgage on the road, to an amount deemed by the company and himself sufficient to indemnify him. The company was insolvent. Held, the defendant's promise was not within the statute.<sup>46</sup> The court said: "Whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability." This rule is but another application of the principle that a verbal promise to pay the promisor's own debt is valid even though its performance incidentally extinguishes the debt of a third person. The words of the statute themselves, taken in their ordinary meaning, afford the means of threading the labyrinth of authority on this subject, and in every new case, as it arises, of arriving at a proper result. The object of the statute was to require written evidence when the promise was merely to answer for another, and not to afford a pretext by which the

<sup>46</sup> *Emerson v. Slater*, 22 How. (U. S.), 28, per Clifford, J. To this principle may be referred the cases of *Castling v. Aubert*, 2 East, 325; *Elkins v. Heart*, Fitzg. 202; *Macrory v. Scott*, 5 Wels., Hurl. & Gor. 907; *Jarmain v. Algar*, 2 Car. & P. 249, and many of the cases already recited herein under other divisions of this subject. See, also, *Lemmon v. Box*, 20 Tex. 329; *Clay v. Walton*, 9 Cal. 328; *Wolff v. Alpena Natl Bank*, Mich., Nov., 1902, 92 N. W. Rep. 287; *Butters' Salt & Lumber Co. v. Vogel*, Mich., Mch., 1902, 89 N. W. Rep. 560; *Cedar Valley Mfg. Co. v. Starbard*, Iowa, Feb., 1902, 89 N. W. Rep. 14. In *Gale v. Harp*, 64 Ark. 462, 43 S. W. Rep. 144, Gale bought from Cornell, who was insolvent, certain machinery and gave his note in payment therefor to Harp,

to whom Cornell was indebted, and, in consideration thereof, Harp guaranteed that the machinery was in good running order and that Cornell would furnish a boat to remove it to Gale's farm and otherwise perform his agreement with Gale. Cornell failed utterly to perform his contract. Held, that the foregoing facts formed a sufficient defense in a suit by Harp against Gale on the note and that Gale need not aver or prove that Harp's promise was in writing. Following *Chapline v. Atkinson*, 45 Ark. 67, where it is held that "a parol promise to pay the debt of another is not within the statute of frauds when it arises from some new and original consideration of benefit or harm moving between the newly contracting parties."

promisor might avoid performing his own obligations, because in so doing he incidentally discharged the obligation of another. The mere fact alone, that the leading object of the promisor is a benefit to himself, affords a very unsatisfactory test for determining whether, or not, the statute applies to any case, because it is often difficult to distinguish the leading object from other objects, and the object a person has in entering into a contract is usually immaterial, as he is bound by his contract as made. Neither is the nature of the consideration a sufficient test. The true test is, what is the substance of the transaction between the promisor and promisee? If it is a mere promise to answer for another, it is within the statute. If it is a promise to pay the promisor's own debt in a particular way, it is not within the statute.

**§ 82. Promise of del credere agent not within statute.—**

The agreement of a del credere agent to pay for the goods sold through his agency is not within the Statute of Frauds. Such an agent agrees to be responsible for the goods so sold. By some courts he has been said to be a surety or guarantor, and by others an original and principal debtor. Whatever may be the technical position he occupies, it is settled that his promise is not within the statute.<sup>47</sup> The reason given by one court<sup>48</sup> was as follows: "The other and only remaining point is, whether the defendants are responsible by reason of their charging a del credere commission, though they have not guarantied by writing, signed by themselves. We think they are. Doubtless if they had for a percentage guarantied the debt owing, or performance of the contract by the vendee, being totally unconnected with the sale, they would not be liable without a note in writing signed by them, but being the agents to negotiate the sale, the commission is paid in respect of that employment; a higher reward is paid in con-

<sup>47</sup> *Swan v. Nesmith*, 7 Pick. 220; *Wickham*, 2 Kay & Johns. 478, remarks of Wood, V. C.; and *Morris v. Cleasby*, 4 Maule & Sel. 566.  
<sup>48</sup> *Per Parke, B.*, in *Couturier v. Hastie*, 8 Wels., Hurl. & Gor. 40, reversed on appeal to Exch. Ch., *Hastie v. Couturier*, 9 Wels., Hurl. & Gor. 102; but affirmed by the House of Lords, *Couturier v. Hastie*, 5 H. of L. Cas. 673.

sideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than other agents, namely, responsibility for the solvency and performance of their contracts by their vendees. This is the main object of the reward being given to them, and though it may terminate in a liability to pay the debt of another, that is not the immediate object for which the consideration is given." In determining this same question another court <sup>49</sup> said: "A guaranty, though by parol, is not always within the statute. Perhaps, after all, it may not be strictly correct to call the contract of the factor a guaranty in the ordinary sense of that word. The implied promise of the factor is merely that he will sell to persons in good credit at the time; and in order to charge him the negligence must be shown. He takes an additional commission, however, and adds to his obligation that he will make no sales unless to persons absolutely solvent; in legal effect, that he will be liable for the loss which his conduct may bring upon the plaintiff, without the onus of proving negligence. The merchant holds the goods, and will not part with them to the factor without this extraordinary stipulation, and a commission is paid to him for entering into it. What is this, after all, but another form of selling the goods? Its consequences are the same in substance. Instead of paying cash, the factor prefers to contract a debt, or duty, which obliges him to see the money paid. This debt or duty is his own, and arises from an adequate consideration. \* \* Suppose a factor agrees by parol to sell for cash, but gives a credit. His promise is virtually that he will pay the amount of the debt he thus makes. Yet who would say his promise is within the statute? The amount of the argument for the defendant would seem to be that an agent for making sales, or, indeed, a collecting agent, cannot by parol undertake for extraordinary diligence, because he may thus have the debt of another thrown upon him. But the answer is, that all such contracts have an immediate respect to his own duty or obligation. The debt of another comes in incidentally as a measure of damages."

<sup>49</sup> *Wolff v. Koppel*, 5 Hill, 458, errors, and same doctrine enunciated per Cowen, J., affirmed by court of ed, *Wolff v. Koppel*, 2 Denio, 368.



§ 83. **Promise not within statute unless made to party to whom principal is liable.**—In order to bring the promise to answer for another within the Statute of Frauds, the promise must be made to the person to whom the other is already, or is thereafter to become, liable. A verbal promise to a debtor himself to pay or furnish him the means of paying his debt is not within the statute.<sup>50</sup> In a leading case on this subject the plaintiff was liable to one Blackburn on a note, and the defendant, upon sufficient consideration, promised the plaintiff to pay the note to Blackburn. Held, the promise was not within the statute.<sup>51</sup> The court said: "If the promise had been made to Blackburn, doubtless the statute would have applied. It would then have been strictly a promise to answer for the debt of another; and the argument on the part of the defendant is, that it is not less the debt of another because the promise is made to that other, viz.; the debtor, and not to the creditor, the statute not having, in terms, stated to whom the promise contemplated by it is to be made. But upon consideration, we are of opinion that the statute applies only to promises made to the person to whom another is answerable." A owned a threshing machine, upon which he owed a balance to B. One C purchased the machine of A, and paid him a certain sum, and verbally promised A to pay B the amount A owed him on the machine, as part of the purchase money to be paid by C to A. Held, the promise was not within the statute.<sup>52</sup> A, having a judgment against B, placed a warrant for his arrest in the hands of a bailiff, with instructions that he might take half the amount in satisfaction of the judgment. The bailiff being about to arrest B, one C

<sup>50</sup> *Colt v. Root*, 17 Mass. 229; *Thomas v. Cook*, 8 Barn. & Cress. 728; *Morin v. Martz*, 13 Minn. 191; *Love's Case*, 1 Salk. 28; *Mersereau v. Lewis*, 25 Wend. 243; *Howard v. Coshaw*, 33 Mo. 118; *Weld v. Nichols*, 17 Pick. 538; *Pratt v. Humphrey*, 22 Conn. 317; *Barber v. Bucklin*, 2 Denio, 45; *North v. Robinson*, 1 Duvall (Ky.), 71; *Jones v. Hardesty*, 10 Gill & Johns. 404; *Aldrich v. Ames*, 9 Gray, 76; *Prible v. Baldwin*, 6 Cush. 549; *Fiske*

*v. McGregory*, 34 N. H. 414; *Pike v. Brown*, 7 Cush. 133; *Soule v. Albee*, 31 Vt. 142; *Alger v. Scoville*, 1 Gray, 391; *Gregory v. Williams*, 3 Meriv. 582; *Botkin v. Middleborough Town & Land Co.*, Ky., Feb., 1902, no official report, 66 S. W. Rep. 747, 23 Ky. Law Rep. 1964.

<sup>51</sup> Per Lord Denman, in *Eastwood v. Kenyon*, 11 Adol. & Ell. 438; *Id.*, 3 Perry & Dav. 276.

<sup>52</sup> *Crim v. Fitch*, 53 Ind. 214.



verbally promised the bailiff to pay him half the judgment, or surrender B by the next Saturday, but did neither. Held, the promise was not within the statute. The court said: "It has been distinctly settled, that, to bring the promise within the statute, the promisee must be the original creditor. \* \* The debts are totally distinct debts, as well as the debtors."<sup>53</sup> In another case, deciding the same thing as those already stated, the court said: "The statute applies only to promises made to the persons to whom another is already, or is to become, answerable. It must be a promise to be answerable for a debt of, or a default in, some duty by that other person towards the promisee."<sup>54</sup>

**§ 84. False representations of another's credit not within statute.**—False and deceitful verbal representations as to the standing and responsibility of a third person are not within the Statute of Frauds.<sup>55</sup> Such representations cannot, with any regard for the ordinary meaning of language, be held a "special promise" to answer for another. However much they may be within the mischief of the statute, they are clearly not within its language. In the leading case on this subject, one Freeman "falsely, deceitfully and fraudulently" asserted and affirmed, orally, that one Falch "was a person safely to be trusted and given credit to." The court held, upon great consideration, that Freeman was liable to an action in consequence of these representations.<sup>56</sup> In discussing and approving this case another court said:<sup>57</sup> "The case went not upon

<sup>53</sup> Reader v. Kingham, 13 Com. B. (J. Scott) N. S. 344, per Earle, C. J.

<sup>54</sup> Parke, B., in Hargreaves v. Parsons, 13 Mees. & Wels. 561.

<sup>55</sup> Eyre v. Dunsford, 1 East, 318; Allen v. Adington, 7 Wend. 9; Haycraft v. Creasy, 2 East, 92; Warren v. Barker, 2 Duvall (Ky.), 155; Benton v. Pratt, 2 Wend. 385; Tapp v. Lee, 3 Bos. & Pul. 367; Wise v. Wilcox, 1 Day (Conn.), 22; Foster v. Charles, 6 Bing. 396; Hart v. Tallmadge, 2 Day (Conn.), 381; Patten v. Gurney, 17 Mass. 182; Russell v. Clark, 7 Cranch, 69; Gallagher v. Brunel, 6 Cowen,

347; Ewins v. Calhoun, 7 Vt. 79; Weeks v. Burton, 7 Vt. 67. Lord Eldon was strongly opposed to this doctrine, and thought it not good law. See Evans v. Bicknell, 6 Vesey, Jr. 174.

<sup>56</sup> Pasley v. Freeman, 3 Term R. 51. ~

<sup>57</sup> Upton v. Vail, 6 Johns. 181, per Kent, C. J. In Kemp v. National Bank of Republic (Va.), 109 Fed. Rep. 48, 48 C. C. A. 213, it was held that under the statute of frauds a false representation as to the financial condition of a bank by its president, need not be in writing in order to charge the

any new ground, but upon the application of a principle of natural justice long recognized in the law, that fraud or deceit, accompanied with damage, is a good cause of action. This is as just and permanent a principle as any in our whole jurisprudence. The only plausible objection to it is, that in its application to this case it comes within the mischiefs which gave rise to the Statute of Frauds, and that therefore the representation ought to be in writing. But this, I apprehend, is an objection arising from policy and expediency, for it is certain that the Statute of Frauds, as it now stands, has nothing to do with the case." A statute has been passed in England, providing that no action shall be brought to charge any person by reason of any representations concerning the credit, ability, etc., of another, unless the representations are in writing,<sup>58</sup> and a similar statute has been enacted in several of the United States. When the verbal representation was also accompanied by a verbal promise to pay the debt of the third party, concerning whom the representation was made, the party making the representation has still been held liable. Thus, the representation and promise were "that one Leo was a good man and might be trusted to any amount; that the defendant durst be bound to pay for the said Leo; and that if Leo did not pay for the goods he would." It was objected that the injury might have arisen from a violation of the promise to pay, and that the action could not be maintained because of the Statute of Frauds, but the defendant was held liable.<sup>59</sup> The court said: "There never was a time in the English law when an action might not have been maintained against the defendant for this gross fraud. \* \* There is no proof that the plaintiff ever considered the defendant as his debtor, or ever called upon him for the money, or relied upon his promise in the least degree. In the next place we must suppose every man to know the law, and if the

maker thereof with personal liability for a loss resulting to a depositor from his reliance thereon.

<sup>58</sup> Geo. IV., ch. 14, § 6. For decisions on this subject, see *Lyde v. Barnard*, Tyrwh. & Gr. 250; *Tattan v. Wade*, 18 Com. B. 370; *Haslock v. Fergusson*, 7 Ad. & Ell. 86; *Norton v. Huxley*, 13 Gray, 285;

*Kimball v. Comstock*, 14 Gray, 508; *Mann v. Blanchard*, 2 Allen, 386; *McKinney v. Whitney*, 8 Allen, 207; *Huntington v. Wellington*, 12 Mich. 11.

<sup>59</sup> *Hamar v. Alexander*, 5 Bos. & Pul. 241, per Sir James Mansfield. See, also, *Thompson v. Bond*, 1 Camp. 4.

plaintiff was acquainted with the law, he must have known that the defendant's promise was worth nothing, and could have given no credit to him upon it. He cannot have considered it in any other light than as a mode of expression by which the defendant intended more strongly to express his opinion of Leo's circumstances."

**§ 85. Promise in substance to pay debt of another, no matter what its form, is within statute.**—When the promise is not in form, but is in substance, to pay the debt of another, it is within the statute. Thus, the defendant requested the plaintiff to sell a third person goods, and promised to indorse his note at six months for the price. Held, the promise was within the statute and could not be enforced.<sup>60</sup> The court, after saying that the promise was to become the third person's surety, proceeded: "To say, then, that this is not in effect to answer for their debt would be a sacrifice of substance to sound. It would be devising a formulary by which, through the aid of a perjured witness, a creditor might get round and defraud the statute. He may say, 'You did not promise to answer the debt due to me from A, but only to put yourself in such a position that I could compel you to pay it.' Pray where is the difference except in words? According to such reasoning, unless you recite the words of the statute in your undertaking, it will not reach the case. No legislative provision would be worth anything upon such a construction." In another case the plaintiff had contracted to supply goods to A, to be paid for in cash on each delivery. A being desirous of obtaining the goods on credit, the defendant, who had an interest in the performance of the work upon which the goods were to be used, promised the plaintiff that if he would supply the goods to A upon a month's credit, and allow him, the defendant, a certain per cent upon the amount of the invoice, he would pay him, the plaintiff, cash, and take A's bill without recourse. Held, the promise was within the statute.<sup>61</sup> The court said: "A contract to give a

<sup>60</sup> Per Cowen, J., in *Carville v.* 82; *Wakefield v. Greenhood*, 29 Cal. Crane, 5 Hill, 483. See, also, Gal- 597. But see *D'Wolf v. Raband*, *lagher v. Brunel*, 6 Cowen, 346 1 Pet. 476.

*Taylor v. Drake*, 4 Strobb. (S. C.) <sup>61</sup> Per Pollock, C. B., in *Mallet v. Bateman*, Law Rep. 1 C. P. 163; *Pike v. Irwin*, 1 Sandf. (N. Y.) 14; *Quin v. Hanford*, 1 Hill, S. C. 16 *J. Scott* (N. S.), 530. To

guaranty is required to be in writing as much as a guaranty itself. \* \* This is in substance an engagement by which the buyers of goods are not to be exonerated, but the defendant is to indemnify the seller against their default.' A verbal promise to procure some one else to sign a guaranty for a certain freight has been held not to be within the statute.<sup>62</sup> There the promise was that the creditor should have, not the promisor's, but a third person's guaranty for the debt. It has also been held that a promise by one who owes a party about to be sued by another that he will not pay without giving notice to the party about to sue, so that he may have an opportunity to attach the debt, is not within the statute.<sup>63</sup> The same thing has been held where one who receipted for attached property promised that it should be returned upon demand.<sup>64</sup> In these two last cases the promise was in effect to turn over to the creditor the debtor's own property, and not that of the promisor; and in none of the three last-mentioned cases was the promise to pay the debt, and in case of a breach the debt would not have been the measure of damages.

**§ 86. Promise to answer for future liability of third party is within the statute.**—If the future primary liability of a third person to the promisee is contemplated as the foundation of the promise, then the promise is within the statute, precisely the same as if the liability had existed when the promise was made. The distinction was at one time made, that, if there was no existing liability on the part of the third person when the promise was made, it was not within the statute, because there was nothing to which it was collateral.<sup>65</sup> This distinction has, however, long been overruled, and the law settled as above stated.<sup>66</sup> Thus, the defendant and A came

similar effect, see *Martin v. England*, 5 Yerg. (Tenn.), 313. *Thomas v. Welles*, 1 Root (Conn.), 57. In *Fitch v. Gardiner*, 2 Abbott's Rep. Omitted Cas. 153, a suit was pending, which one of the parties wished to compromise, but his attorney promised, if he would go on, to make no charges for his services unless he was successful. Held, this was not a collateral undertaking or guaranty of collection,

and need not be in writing to bind the attorney making it.

<sup>62</sup> *Bushnell v. Beavan*, 1 Bing N. C. 103; *Id.*, 4 Moore & Scott, 622.

<sup>63</sup> *Towne v. Grover*, 9 Pick. 306.

<sup>64</sup> *Marion v. Faxon*, 20 Conn. 486.

<sup>65</sup> Per Lord Mansfield, in *Mowbray v. Cunningham*, Hilary Term, 1773, cited in *Jones v. Cooper*, 227.

<sup>66</sup> *Jones v. Cooper*, 1 Cowp. 227; *Matson v. Wharam*, 2 Term B. 80;

to the plaintiff's warehouse and agreed upon a parcel of goods for A, and the defendant said he would guaranty the payment. A afterwards came alone and ordered other goods, when the plaintiff sent to the defendant and asked him whether he would engage for A. The defendant replied: "You may not only ship that parcel, but one, two or three thousand pounds more, and I will pay you if he does not." The plaintiff, relying on this promise, afterwards delivered the goods to A. Held, the promise was within the statute.<sup>67</sup> The court said: "Before the case of *Jones v. Cooper*, I thought there was a solid distinction between an undertaking after credit given and an original undertaking to pay, and that in the latter case, the surety, being the object of the confidence, was not within the statute; but in *Jones v. Cooper* the court was of opinion that, wherever a man is to be called upon only in the second instance, he is within the statute; otherwise, where he is to be called upon in the first instance." In another case the defendant verbally authorized the plaintiffs, who were merchants, to let a third person have a certain amount of goods, and promised that he would guaranty the payment. The plaintiffs afterwards delivered the goods to the third person, and charged them on their books to the defendant for the third person. Held, the promise was to answer for the debt of another, and that it could not be enforced for want of writing.<sup>68</sup>

**§ 87. Promise within statute if any credit given to third person.**—If the party to whom goods are delivered, or for whose benefit a service is performed, incur thereby a debt, so that he is liable at all, then the undertaking of another, in aid of his liability and collateral to it, must be in writing to

*Mallet v. Bateman*, Law Rep. 1 C. P. 163.

<sup>67</sup> *Peckham v. Faria*, 3 Doug. 13, per Lord Mansfield. But see *Whitman v. Bryant*, 49 Vt. 512.

<sup>68</sup> *Kinloch v. Brown*, 2 Spear's Law (S. C.), 284. See, to same effect as text, *Cahill v. Bigelow*, 18 Pick. 369; *Caperton v. Gray*, 4 Yerg. (Tenn.) 563; *Ware v. Stephenson*, 10 Leigh (Va.), 155; *Ex parte Williams*, 4 Yerg. (Tenn.)

579; *Noyes v. Humphreys*, 11 Gratt. (Va.) 636; *Tilleston v. Nettleton*, 6 Pick. 509; *Taylor v. Drake*, 4 Strobb. (S. C.) 431; *Newell v. Ingraham*, 15 Vt. 422; *Huntington v. Harvey*, 4 Conn. 124; *Leland v. Creyon*, 1 McCord (S. C.), 100; *Puckett v. Bates*, 4 Ala. 390; *Peabody v. Harvey*, 4 Conn. 119; *Williams v. Auten*, 62 Neb. 832, 87 N. W. Rep. 1061.

be binding, although the collateral undertaking may have been the principal inducement to the delivery of the goods or the performance of the service.<sup>69</sup> A landlord to whom rent was due gave a warrant to A to distrain upon the tenant. The defendant, who was a creditor of the landlord, paid the broker that valued the goods, and put the plaintiff on the premises to keep possession of the goods, and promised to pay him his charges, and also to repay him certain sums to be advanced to another. Held, the promise was within the statute, on the ground that the landlord was responsible as principal for the necessary expenses of the distress, and consequently the promise was to pay the debt of another.<sup>70</sup> It makes no difference that the promisee relied principally upon the promisor; if the third party is at all liable to him, to do the same thing, the promise is within the statute. A contractor who was building a house for the defendant employed the plaintiff to furnish the stone, but failed to pay him. The defendant promised the plaintiff that, if he would go on and finish the work, he would pay him; but the contractor was not discharged from his liability to the plaintiff. Held, the promise was within the statute.<sup>71</sup> So where the plaintiff had contracted to deliver a quantity of rock to a third person at an agreed price, and before the delivery of the same the plaintiff made known to the defendant his determination not to deliver the rock upon the credit of such third person, and the defendant thereupon said to the plaintiff: "You bring the rock, and I will see you paid for it," the court held the promise was within the statute.<sup>72</sup> In these cases, and indeed in most of the cases

<sup>69</sup> Walker v. Richards, 39 N. H. 259; Matson v. Wharam, 2 Term R. 80; Cahill v. Bigelow, 18 Pick. 369; Anderson v. Hayman, 1 H. Black. 120; Chase v. Day, 17 Johns. 114; Brunton v. Dullens, 1 Foster & Fin. 45; Bresler v. Pendell, 12 Mich. 224; Brady v. Sackrider, 1 Sandf. (N. Y.) 514; Hill v. Raymond, 3 Allen 540; Larson v. Wyman, 14 Wend. 246; Elder v. Warfield, 7 Harr. & Johns. (Md.) 391; Darlington v. McCunn, 2 E. D. Smith, (N. Y.), 411; Conolly v. Kettlewell, 1 Gill (Md.), 260; Han-

ford v. Higgins, 1 Bosw. (N. Y.) 441; Bushee v. Allen, 31 Vt. 631; Allen v. Scarff, 1 Hilton (N. Y.), 209; Steele v. Towne, 28 Vt. 771; Dixon v. Frazee, 1 E. D. Smith (N. Y.), 32; Boykin v. Dohlonde, 1 Sel. Cas. Ala. 502; Studley v. Barth, 54 Mich. 6. See, also, as to collateral promise, Glidden v. Child, 122 Mass. 433.

<sup>70</sup> Colman v. Eyles, 2 Stark, 62.

<sup>71</sup> Gill v. Herrick, 11 Mass. 501.

<sup>72</sup> Doyle v. White, 26 Me. 341.

But where a father whose son desired to purchase certain goods

on this subject, the promise of the proposed surety or guarantor was principally relied upon by the promisee, and formed the inducement upon which he acted. When, by reason of the statute, the promisor does not become liable, no relief can be granted against him in equity, although he is proceeding against the promisee at law, in direct violation of his promise.<sup>73</sup> When credit is given to two jointly, and they are both principals, the statute does not apply to their engagement.<sup>74</sup>

§ 88. When promise is original or collateral, cases holding it original.—It is apparent that the question “To whom was the credit given?” often becomes highly important. If the credit is given to the promisor alone, his promise need not be in writing. But if credit is given to a third person, to any extent, and the promise is collateral to the liability of such third person, it must be in writing. The solution of this question is frequently a matter of great difficulty, and no general rule which will serve as a test can be given. In each case, the “expression used, the situation of the parties, and all the circumstances of the case, should be taken into consideration.”<sup>75</sup> It has been held that a promise “to be the paymaster” of one who should render service to another was an original promise, and not within the statute, but that if the words were, “to see him paid,” it was collateral, and within the statute.<sup>76</sup> Where the defendant inquired of the plaintiff the terms on which he would let C, his nephew, have newspapers to sell, and, on being told the terms, said: “If my nephew calls for

agreed with the owner that if he would let the son have such goods, he (the father) would see the debt paid or would pay it, this was held to be an original and not a collateral undertaking; though had the father promised to pay the debt if the son did not, then such undertaking would have been to answer for the debt, default or miscarriage of another, and should have been in writing. *Baldwin v. Hiers*, 73 Ga. 739; and see *Cruse v. Foster*, 76 Ga. 723.

<sup>73</sup> *Phelps v. Garrow*, 8 Paige, Ch. 322.

<sup>74</sup> *Gibbs v. Blanchard*, 15 Mich.

292; *Wainwright v. Straw*, 15 Vt. 215; *Hetfield v. Dow*, 3 Dutch. (N. J.) 440; *Ex parte Williams*, 4 Yerg. (Tenn.), 579; *Boyce et al. v. Murphy et al.*, 94 Ind. 1.

<sup>75</sup> *Elder v. Warfield*, 7 Harr. & Johns. (Md.) 391. See note 82 to § 88.

<sup>76</sup> *Watkins v. Perkins*, 1 Ld. Raym. 224. See, also, *Skinner v. Conant*, 2 Vt. 453; *Thwaits v. Curl*, 6 B. Mon. (Ky.) 472; *Briggs v. Evans*, 1 E. D. Smith (N. Y.), 192; *Jones v. Cooper*, 1 Cowp. 227; *Bates v. Starr*, 6 Ala. 697; *Matson v. Wharam*, 2 Term R. 80.



the papers, I will be responsible for the papers he shall take," it was held that this was an original and absolute contract on the part of the defendant and not within the statute.<sup>77</sup> An order was: Please give the bearer, Henry Fink, the goods which he will select, not exceeding over five hundred and fifty dollars, on my account." Goods having been delivered to Fink on the order, it was held that the writer of the order was liable as principal, and not as guarantor.<sup>78</sup> If goods are sold on the credit of the promisor alone, his promise to pay for them need not be in writing, even though they are delivered to a third person.<sup>79</sup> In an important case on this subject, the plaintiff had been employed by a local board of health to construct a main sewer. Notice had been given to the owners of certain private houses to connect their house drains with this sewer within a certain time. The plaintiff, having been requested by the overseer to make these connections, asked who would pay him for it, when the defendant, who was chairman of the board, said: "Go on, Mountstephen, and do the work, and I will see you paid." It was held that, taking all the circumstances into consideration, the defendant was liable as principal, and his promise was not within the statute.<sup>80</sup> The court said: "In this case, seeing that the parties knew that the board was not liable, and that the plaintiff would not go on unless he had the board or the defendant liable, and did not care to have the defendant liable if the board was liable, the facts seem to exclude, and the jury might well find that they excluded, the notion of the defendant becoming surety for a liability, either past, present or future, upon the part

<sup>77</sup> Chase v. Day, 17 Johns. 114. Where defendant requested a firm "to sell him (Connolly) any goods he wanted, and he (defendant) would be responsible," it was held, though not without doubt, that the promise of defendant was an original one. Post v. Geoghegan, 5 Daly (N. Y. Com. Pleas), 216.

<sup>78</sup> Neberroth v. Riegel, 71 Pa. St. 280. In Hackfield v. Wilson, 13 Hawaii Rep. 212, plaintiff took Hiashi to defendant's store and said in substance, "Sell him goods and I will see that you are paid."

Held, an original promise and not within the statute of frauds.

<sup>79</sup> McCaffil v. Radcliff, 3 Rob. (N. Y.) 445.

<sup>80</sup> Mountstephen v. Lakeman, Law Rep. 7 Q. B. 196, per Willes, J. See, also, Smith v. Rudhall, 3 Foster & Fin. 143; Jefferson County v. Slagee, 66 Pa. St. 202; Edge v. Frost, 4 Dow. & Ry. 243; Hiltz v. Scully, 1 Cinc. 554; Whitelaw v. Taylor, 45 Up. Can. (Q. B.) 446; Black v. Doherty, 22 New Brunswick Rep. (Pugsley & Trueman), 215.

of the board; and they might look upon the defendant's contract as a contract to pay, whether the board have been, or shall be, liable or not. Do that work now, and you shall be paid for that work; so that it is a case of principal liability." In another case, the promisor introduced a third person to an upholsterer, and asked him if he had any objection to supplying such third person with some furniture, and that if he would, he, the promisor, "would be answerable," and that "he would see it paid at the end of six months." Held, this was an original undertaking, as principal, on the part of the promisor. The court said: "Whether the contract was original or collateral, viz.: whether it was binding on the parties to pay in the first instance and at all events, or only binding in case the other does not, will depend on the contract between the parties. I think that the expressions, 'I'll be answerable,' and 'I'll see you paid,' are equivocal expressions. And then we ought to look to the circumstances, to see what the contract between the parties was. \* \* It was left to the jury to say whether he was the original debtor, and they found that he was. I think the jury warranted in that finding. My opinion is founded substantially on the facts of the case, and not on the equivocal expressions, as I consider the words capable of being explained by other circumstances."<sup>81</sup> Other cases in which the promise was held to be an original undertaking are cited in a note.<sup>82</sup>

<sup>81</sup> *Simpson v. Penton*, 2 Crompt. & Mees, 430, per Bayley, B. See further, on this subject, *Payne v. Baldwin*, 14 Barb. (N. Y.) 570; *Dixon v. Hatfield*, 2 Bing. 439; *Smith v. Hyde*, 19 Vt. 54; *Clancy v. Piggott*, 4 Nev. & Mann. 496; *Sinclair v. Richardson*, 12 Vt. 33; *Birkmyr v. Darnell*, 1 Salk. 27; *Id.*, 2 Ld. Raym. 1085; *Turton v. Burke*, 4 Wis. 119; *Austen v. Baker*, 12 Modern, 250; *Hazen v. Bearden*, 4 Sneed (Tenn.) 48; *Hetfield v. Dow*, 3 Dutch. (N. J.) 440; *Gordon v. Martin*, Fitzgibbon, 302; *Baldwin v. Hiers*, 73 Ga. 739; *Cruse v. Foster & Estes*, 76 Ga. 732. As to when guaranty is sufficiently ambiguous to admit of parol evidence

to explain it, see *Goldshede v. Swan*, 1 Wels. Hurl. & Gor. 154; *Ward v. Hosbrouck*, N. Y. 62 N. E. Rep. 434, affirming 65 N. Y. Supp. 200.

<sup>82</sup> In *Meldrum v. Kenefick*, S. D. March, 1902, 89 N. W. Rep. 863, speaking of the building of his brother's house defendant said to plaintiff: "I will see that you get your money." Held, an original promise. In *Turner v. Stewart Mercantile Co.*, 94 Ga. 468, 19 S. E. Rep. 241, defendant told plaintiff to let Hood have goods and he (defendant) "would see it paid," and later on told plaintiff not to let Hood go too far, not to let him have more than he was obliged

**§ 89. Whether promise original or collateral is question of fact—Evidence—Cases holding promise collateral.**—The manner in which the transaction is entered in the creditor's books often has a controlling influence in determining the question,

to have. A judgment against defendant was affirmed. In *Ambrose v. Ambrose*, 94 Ga. 655, 19 S. E. Rep. 980, defendant got plaintiff to buy certain land by giving his notes for \$900, the purchase price, defendant agreeing to pay him \$100 of that amount so that the land would cost him only \$800. Held, that the case was not within the statute of frauds. Citing *Little v. McCarter*, 89 N. Car. 233, which was decided the same way on substantially the same facts. In *King v. Cox*, 63 Ark. 204, 210, 37 S. W. Rep. 877, it was held that the verbal contract of an insurance agent to renew a fire insurance policy was not within the Statute of Frauds and was enforceable. In *Milliken v. Warner*, 62 Conn. 51, 25 Atl. Rep. 450, defendants, who were about to send a theatrical company out on the road, promised the plaintiffs who were theatrical agents, to pay them the usual commissions paid by actors if plaintiff would procure the necessary actors. Held, that this was an original undertaking and not a promise to pay the debt of another and need not be in writing. The client, without the knowledge or consent of his attorneys settled his suit with his adversary who agreed with him verbally to pay the fees of his attorney. Held, that the promise was not within the statute and was supported by sufficient consideration, the discontinuance of the suit, and that the attorney had a right of action against the promisor to recover thereon: *Weilage v. Abbott*, Neb., June, 1902, 90 N. W. Rep.

1128, citing *Fitzgerald v. Morrissey*, 14 Neb., 198, 15 N. W. Rep. 233; *Palmer v. Witcherly*, 15 Neb. 98, 17 N. W. Rep. 364; *Swayne v. Hill*, 59 Neb. 652, 81 N. W. Rep. 855. In *Hegeman v. Moon*, 131 N. Y. 462, 30 N. E. Rep. 487, defendant's testator gave to plaintiff a writing as follows: "One year after my death I hereby direct my executors to pay to Joseph Hegeman, his heirs, executors or assigns, the sum of \$1,976.90, being the balance due him for cash advanced at various times by him to Adrian Hegeman, my son." Held, that this was a promissory note and not a promise to answer for the default of another, and as a note void for want of consideration. In *Mulvaney v. Gross*, 1 Colo. App. 112, 27 Pac. Rep. 878, it was held that the promise of the purchaser of a crop to pay a chattel mortgage upon it need not be in writing. In *Smith v. Delaney*, 64 Conn. 264, 29 Atl. Rep. 496, defendant requested plaintiff to sign the liquor license bond of one McGee, saying, "I will see you all right," and that he, defendant, intended to go into the liquor business with McGee himself and therefore could not himself sign McGee's bond. Plaintiff, having been compelled to pay the bond, sued defendant on his promise of indemnity. It was held that defendant's promise was an original undertaking. In *Crowders v. Keys*, 91 Ga. 180, 16 S. E. Rep. 986, defendant said to plaintiff, a physician, "Give Jim good attention. If he lives you will get your pay. If he dies

“To whom was the credit given?” The fact that the charge on the creditor’s books was to a third party has been held to control an absolute promise to pay, and to show that the liability of the promisor was only collateral.<sup>83</sup> If the creditor makes out a bill to the third party, and presents it to him in the first instance, this is strong evidence to show that the

I will see you paid. In any event I will see that you get your pay. I have plenty of property to pay all my debts.” Held, an original promise and not within the statute of frauds. A promise to refund money paid for certain stock in a corporation if it becomes worthless is an original promise and not a guaranty. *Kirkbridge v. Moss*, 113 Calif. 432, 45 Pac. Rep. 812. Defendant’s promise to pay the rent of a house occupied by his mother-in-law, held, an original promise, need not be in writing. *Shafer v. Cherry*, 5 Colo. App. 513, 39 Pac. Rep. 345. An agreement to sell goods on commission and guarantee payment is an original undertaking and need not be in writing. *Bullowa v. Orgo*, 57 N. J. Eq. 428, 41 Atl. Rep. 494. The husband’s promise to his wife’s lawyer to pay him for his services in a separate maintenance suit by the wife need not be in writing, because, by statute, the husband may be compelled, by order of court, to pay such fees. *Stein v. Blake*, 56 Ill. App. 525. In *Craft v. Kendrick*, 39 Fla. 90, 21 So. Rep. 803, the owner promised a sub-contractor, who had stopped work before his job was finished, that she would pay him herself, whereupon he resumed and finished his work. Held, that the promise was not within the statute of frauds and need not be in writing. Same facts and same ruling in *Buchanan v. Moran*, 62 Conn. 83, 25 Atl. Rep.

396. A promise to boarding-house keepers, for boarding hands in the employ of promisor’s sub-contractors, “to see them paid,” is an original and not a collateral agreement, and not within the statute. *Grant v. Wolf*, 34 Minn. 32. In *Baldwin Coal Co. v. Davis*, 15 Colo. App. 371, defendant company verbally promised plaintiff to pay the board of its employees by deducting the amount from their wages. Held, that this promise was not within the statute of frauds and that the company was liable. Citing and following *Chicago and Wilmington Coal Co. v. Liddell*, 69 Ill. 639. To same effect, *Wortham v. Sinclair*, 98 Ga. 173, 25 S. E. Rep. 414; *Lusk v. Throop*, 189 Ill. 127, where on conflicting evidence the question was left to the jury whether the principal’s promise to pay for supplies furnished by plaintiff to a sub-contractor was original or not, and judgment on their verdict that the promise was original was sustained.

<sup>83</sup> *Anderson v. Hyman*, 1 H. Black. 120; *Matson v. Wharam*, 2 Term, 80. On same subject, see *Conolly v. Kettlewell*, 1 Gill (Md.), 260; *Leland v. Creyon*, 1 McCord (S. C.), 100; *Dixon v. Frazee*, 1 E. D. Smith (N. Y.), 32. The fact that a certain person is charged on the plaintiff’s book with goods is not conclusive evidence that the credit was given to him. *Swift v. Pierce*, 13 Allen, 136.

credit was given to him, and that the promisor was only collaterally liable.<sup>84</sup> But it is not conclusive evidence of that fact, and may be controlled by other circumstances.<sup>85</sup> These various facts are matters of evidence, tending more or less to show to whom the credit was given, and will be received against the plaintiff to establish that the credit was given to a third person; but they are not evidence in favor of the plaintiff to charge the defendant, for that would be to permit the plaintiff to manufacture evidence for himself.<sup>86</sup> An instance where the promisor was held only collaterally liable, and not bound without writing, was as follows: A first lieutenant in the navy, serving on board a ship, requested the plaintiff, a tailor and slopseller, to supply the crew of the ship with clothing, and at the same time said: "I will see you paid at the pay-table; are you satisfied?" The plaintiff replied, "Perfectly so." The clothing was delivered on board the ship, and the lieutenant compelled several of the sailors who did not want clothes to take them. The court thought the slopseller relied upon the power of the lieutenant to stop the money out of the sailors' pay, and not upon his personal liability, and viewed as a controlling circumstance that the amount due for the clothing was so large that it could not have been expected that the lieutenant would be able to liquidate it out of his pay.<sup>87</sup> So where the promisor, upon being asked to become responsible for goods to be furnished a third person, replied: "You may send them, and I'll take care that they are paid for at the time," it was held that under the circumstances he was only collaterally liable, and not bound unless his promise was in writing.<sup>88</sup> In another case, the plaintiff, an innkeeper, had furnished a dinner for a public celebration, under the direction of a committee of which the defendant was a mem-

<sup>84</sup> *Storr v. Scott*, 6 Car. & Payne, 241; *Pennell v. Pentz*, 4 E. D. Smith (N. Y.), 639; *Larson v. Wyman*, 14 Wend. 246.

<sup>85</sup> *Mountstephen v. Lakeman*, Law Rep. 7 Q. B. 196.

<sup>86</sup> *Cutler v. Hinton*, 5 Rand. (Va.) 509; *Walker v. Richards*, 41 N. H. 388; *Noyes v. Humphreys*, 11 Gratt. (Va.) 636; *Kinloch v. Brown*, 1 Rich. (S. C.) 223. In *Cheseborough*

*v. Tirrill*, 61 N. J. Law 628, 41 Atl. Rep. 215, it was held to be a question of fact for the jury to determine whether the promise in question was original or came within the statute.

<sup>87</sup> *Keate v. Temple*, 1 Bos. & Pul. 158.

<sup>88</sup> *Rains v. Story*, 3 Car. & Payne,

ber. It was the understanding that every person should pay for his own dinner. The defendant was captain of a military company which took dinner upon that occasion. While the servants of the plaintiff were collecting the pay, the defendant told them they need not call upon the members of the military company, as he would be responsible for them. Held, the promise was collateral, and within the Statute of Frauds.<sup>89</sup> From the examples which have been given, it is clear that the words made use of by the parties cannot alone be relied upon to show to whom the credit was given. It is a question of fact to be found by the jury in each particular case, and in its determination, not only the language made use of, but also the situation and surroundings of the parties, and every other fact and circumstance bearing upon the question, should be taken into consideration. Further cases in which the promise has been held within the statute are cited in a note.<sup>90</sup>

<sup>89</sup> *Tileston v. Nettleton*, 6 Pick. 509.

<sup>90</sup> In *Parker v. Dillingham*, 129 Ind. 542, 29 N. E. Rep. 23, it was held that the owner's verbal promise to pay materialmen for goods furnished the contractor was within the statute and not enforceable. *Greene v. Latham*, 2 Colo. App. 416, 31 Pac. Rep. 233. In *Bulmen-thal v. Moore*, 111 Ga. 297, 36 S. E. Rep. 689, Watkins bought a stock of goods from Hart against which Blumenthal was foreclosing a chattel mortgage and assumed Hart's debt, giving his own notes therefor, which Moore, his partner, verbally guaranteed would be promptly paid at maturity. Held, that there could be no recovery against Moore even though in reliance on Moore's promise Blumenthal had released the lien of Watkins' mortgage and canceled his notes. Agreement by new firm to pay debts of old firm is an agreement (as to new partners) to pay the debt of another and must be in writing to be enforceable. *Freeman*

*v. Badgley*, 105 Calif. 372, 38 Pac. Rep. 955. In *O'Connell v. Mt. Holyoke College*, 174 Mass. 511, 55 N. E. Rep. 460, Valadier, having contracted with plaintiff O'Connell for brick to be delivered to him and used in buildings for defendant, gave O'Connell an order upon defendant directing defendant to pay O'Connell on the 10th of each month "such sums of money as may become due for all the brick delivered during the preceding month," which order defendant's treasurer accepted verbally, but refused to accept in writing. Held, that being a verbal promise to answer for the debt of another, the acceptance was not binding. Promise by a mother that money advanced by her daughter to her father should be repaid by the father, held, not binding upon the mother unless in writing. *Cochrane v. McEntee*, N. J. Ch. (1896), 51 Atl. Rep. 279. A married woman's promise to pay the debts of her deceased husband if his cred-



§ 90. If original promise in writing, verbal subsequent promise takes case out of Statute of Limitations—Verbal guaranty sufficient to support verbal account stated.—If the Statute of Frauds has once been satisfied by writing, a new verbal promise will be sufficient to take the case out of the Statute of Limitations. Thus the defendant, having entered into a guaranty in writing, and become liable upon it more than six years before the commencement of the suit, verbally promised, within six years, that the matter should be arranged. Held, he was liable. The Statute of Frauds was satisfied by the guaranty having been originally in writing. In order to take a case out of the Statute of Limitations, the new promise need not be in writing. The two statutes, the one requiring a writing, and the other not, should not be confounded.<sup>91</sup> It has been held that if a person who has verbally guaranteed the price of goods sold, afterwards verbally promise to pay for them, he is liable on an account stated. Thus the defendant verbally undertook to see the plaintiff paid for goods supplied by him to A at the defendant's request. After the goods had been supplied, and A had made default in payment, the defendant verbally acknowledged his liability under the guaranty, and promised to pay the plaintiff the price of the goods. The court said, that while the statement of an account and promise to pay could give no cause of action if the obligation on which it was founded never could have been enforced at law, yet here there was a clear legal liability under the guaranty which the Statute of Frauds did not vacate or annul, but rendered incapable of being enforced for want of legal evidence, and it was sufficient, under the authorities, to support a statement of account.<sup>92</sup> It has been held sufficient if a verbal contemporaneous guaranty is afterwards acknowledged in writing by the party making it.<sup>93</sup>

itors would forbear taking out letters of administration on his estate, held, within the statute. *Keadle v. Siddens*, 5 Ind. App. 8, 31 N. E. Rep. 529. A promise to "stand security" for goods sold to another must be in writing. *Fambrough v. State*, 113 Ga. 934, 39 S. E. Rep. 324.

<sup>91</sup> *Gibbons v. McCasland*, 1 Barn. & Ald. 690.

<sup>92</sup> *Wilson v. Marshall*, 15 Irish Com. Law Rep. 466.

<sup>93</sup> In *Dunlap v. Hopkins*, 95 Fed. Rep. 231, 37 C. C. A. 52, defendant verbally promised plaintiff to see that defendant's husband repaid a loan he had requested plaintiff to



**§ 91. The form of the writing.**—The statute proceeds, “unless the agreement for some memorandum or note thereof shall be in writing.” From the use of the words “some memorandum or note thereof,” the design seems to have been to dispense with formalities in the writing required. The agreement, memorandum or note must substantially express the real transaction, but the form in which it is expressed is wholly immaterial. It may be in the form of a letter<sup>1</sup> of a receipt,<sup>2</sup> of an order,<sup>3</sup> of the return of a sheriff upon an execution,<sup>4</sup> of a vote of a corporation entered on its books,<sup>5</sup> or in any other form, provided it expresses the substance of the transaction. It is not necessary that it should consist of a single paper. Several letters or papers which on their face refer to each other may be taken together to make a com-

make, and in reliance upon that promise plaintiff made the loan. Seven months later defendant wrote to plaintiff, “When you loaned this, I said, in the enthusiasm of the moment, that I would see that papa paid it. \* \* Matters were very much worse than I knew. \* \* I cannot therefore see that you are paid any more than to live economically as possible to enable papa to save money to pay all his debts.” Held, that this was a sufficient memorandum in writing to charge the defendant under the Illinois statute which does not, like some states, require the writing to express the consideration and that it was competent for plaintiff to prove by the dates of letters she had written, when the oral promise was made, and to show the consideration by parol evidence.

<sup>1</sup> Sanderson v. Jackson, 2 Bos. & Pul. 238; Foster v. Hale, 3 Vesey, Jr. 696; Western v. Russell, 3 Vesey & Bea. 187; Allen v. Bennet, 3 Taunt. 169; Brettel v. Williams, 4 Wels., Hurl. & Gor. 623; Dunlap v. Hopkins, 95 Fed. Rep. 231, 37 C. C. A. 52, cited in note 93, § 90,

supra. In Choate v. Hoogstraet (Wis.), 105 Fed. Rep. 713, 46 C. C. A. 174, a letter stating that the writer would be responsible for the amount due plaintiffs if they would ship to a certain lumber company lumber to enable it to perform its contracts was held a sufficient expression of the promise and consideration.

<sup>2</sup> Barickman v. Kuykendall, 6 Blackf. (Ind.) 21; Ellis v. Deadman, 4 Bibb (Ky.), 466.

<sup>3</sup> Lerner v. Wannemacher, 9 Allen, 412.

<sup>4</sup> Nichol v. Ridley, 5 Yerg. (Tenn.) 63; Barney v. Patterson, 6 Harr. & Johns. (Md.) 182; Elfe v. Gadsden, 2 Rich. (S. C.) 373; Hanson v. Barnes, 3 Gill & Johns. (Md.) 359.

<sup>5</sup> Tufts v. Plymouth Gold Mining Co., 14 Allen 407; Chase v. Lowell, 7 Gray 33. In Lamkin v. Baldwin & Lamkin Mfg. Co., 72 Conn. 58, 43 Atl. Rep. 593, 1042, it was held that the record kept by the secretary of a corporation of the vote of the directors assuming the debts of a corporation that it succeeded, was a sufficient memorandum.

plete agreement, note or memorandum.<sup>6</sup> But it is well settled that, in order that the several papers may be read together, they must on their face refer to each other, and that their mutual relation cannot be shown by parol evidence.<sup>7</sup> There are, however, a few cases which seem to countenance a contrary doctrine.<sup>8</sup> A writing which is signed by the party to be charged may be read together with one which is not signed.<sup>9</sup> If, when all the papers which refer to each other are read together, the terms of the contract are doubtful, they are not sufficient to satisfy the statute.<sup>10</sup> The agreement, note or memorandum may be written with ink or pencil, or may be printed or stamped.<sup>11</sup> and it may be executed at the time the contract is made, or at any subsequent time before the suit is brought.<sup>12</sup>

<sup>6</sup> Jackson v. Lowe, 1 Bing. 9; Allen v. Bennet, 3 Taunt. 169; Jones v. Post, 6 Cal. 102; Owen v. Thomas, 3 Myl. & Keen, 353; Simons v. Steele, 36 N. H. 73; Huddleston v. Briscoe, 11 Vesey, 583; Salmon Falls Manuf. Co. v. Goddard, 14 How. (U. S.) 446; Wilson Sewing Machine Co. v. Schnell, 20 Minn. 40; Learned v. Wannemacher, 9 Allen 412; Tallman v. Franklin, 14 N. Y. 584; Chapman v. Bluck, 5 Scott 515; Parkhurst v. Van Cortland, 14 Johns. 15.

<sup>7</sup> Jacob v. Kirk, 2 Moody & Rob. 221; Clinan v. Cooke, 1 Schoales & Lefroy 22; Moale v. Buchanan, 11 Gill & Johns. (Md.) 314; Wiley v. Roberts, 27 Mo. 388; Morton v. Dean, 13 Met. (Mass.) 385; Boardman v. Spooner, 13 Allen 353; Freeport v. Bartol, 3 Greenl. (Me.) 340; Nichols v. Johnson, 10 Conn. 192; Abeel v. Radcliff, 13 Johns. 297; Ide v. Stanton, 15 Vt. 685; O'Donnell v. Leeman, 43 Me. 158; Adams v. McMillan, 7 Port. (Ala.) 73; Blair v. Snodgrass, 1 Sneed (Tenn.) 1; Boydell v. Drummond, 11 East 142; Wilkinson v. Evans, Law Rep. 1 C. P. 407.

<sup>8</sup> Allen v. Bennet, 3 Taunt. 169;

Salmon Falls Manuf. Co. v. Goddard, 14 How. (U. S.) 446. See, also, Bird v. Blossee, 2 Vent. 361; Johnson v. Dodgson, 2 Mees. & Wels. 653; Powell v. Dunwoodie, 69 Vt. 111, 37 Atl. Rep. 227; Ide v. Stanton, 15 Vt. 685.

<sup>9</sup> De Beil v. Thomson, 3 Beav. 469; Gale v. Nixon, 6 Cow. (N. Y.) 445; Coles v. Trecothick, 9 Vesey 234; Dodge v. Van Lear, 5 Cranch, C. C. 278; Western v. Russell, 3 Vesey & Bea. 187; Toomer v. Dawson, Cheves (S. C.) 68; Saunderson v. Jackson, 3 Esp. 180.

<sup>10</sup> Brodie v. St. Paul, 1 Vesey, Jr. 326; Boydell v. Drummond, 11 East 142.

<sup>11</sup> Draper v. Pattani, 2 Spears (S. C.) 292; Schneider v. Norris, 2 Maule & Sel. 286; Vielie v. Osgood, 8 Barb. (N. Y.) 130; Saunderson v. Jackson, 2 Bos. & Pul. 238; Jacob v. Kirk, 2 Moody & Rob. 221; M'Dowell v. Chambers, 1 Strobb. Eq. (S. C.) 347; Geary v. Physic, 5 Barn. & Cres. 234; Clason v. Bailey, 14 Johns. 484; Pitts v. Beckett, 13 Mees. & Wels. 743.

<sup>12</sup> Williams v. Bacon, 2 Gray 387; Sievewright v. Archibald, 17 Ad. & Ell. (N. S.) 103. As to the mat-

**§ 92. The whole promise must appear from the writing.**—Whatever the form of the writing may be, and whether it consist of one or more parts, all the essential terms of the contract (unless, perhaps, the consideration) must appear from it, and parol evidence cannot be introduced to aid it.<sup>13</sup> Thus, in a letter written by the defendant to the plaintiff, relating to a proposed mortgage, but which did not itself say anything about the mortgage, the following words were used: “I will take any responsibility myself respecting it, should there be any.” Held, the defendant was not bound.<sup>14</sup> The court said the whole promise must appear from the writing, and proceeded: “The letter, if read by itself, without reference to any previous conversations, would be a promise to be responsible for any sum of money, however large, at any rate of interest, secured by any kind of mortgage, on any land, with any title. That, however, would be an unreasonable construction, and is not its true meaning; it evidently refers to previous conversations in which these particulars are supplied. The whole promise, therefore, is not in writing, as the statute requires that it should be.” So where, under certain shipping

ters treated of in this section, see, at greater length, Browne on Frauds, ch. 17. Note 93 to § 90.

<sup>13</sup> *Stearns v. Hall*, 9 Cush. 31; *Hall v. Soule*, 11 Mich. 494; *Bryan v. Hunt*, 4 Sneed 543; *Whittier v. Dana*, 10 Allen 326; *Cummings v. Arnold*, 3 Met. (Mass.) 486. In *Bohm v. Hofer*, 2 Colo. App. 146, 29 Pac. Rep. 905, a woman attending to her husband's business wrote to plaintiff with whom he had an open account: “Mr. Hofer, You will please find enclosed fifty dollars, all I can raise at present. I hope to be able to give you more very soon. Please give me credit and oblige. (Signed) Mary Bohm. Mr. Bohm is home sick.” Held, that this was not sufficient to charge the wife's estate with the husband's account, upon which credit was given after receipt of this note. “If they will give him time I will see that the bill is

paid with interest.” Held, a sufficient memorandum to satisfy the statute. *Haskell v. Tukesbury*, 92 Me. 551, 43 Atl. Rep. 500. In *Slater v. Demorest Spoke and Handle Co.*, 94 Ga. 687, 21 S. E. Rep. 715, where a letter of defendant was relied upon to take the case out of the statute of frauds, it was held error to permit the defendant to state what he meant by the letter. “In such case,” said the court, “ambiguity may be explained by surrounding facts, but not by undisclosed intention.”

<sup>14</sup> *Holmes v. Mitchell*, 7 J. Scott (N. S.) 361, per Williams, J. Neither was defendant held liable where he signed the following document: “I will guaranty that the security offered by Mr. John Fleming for the balance of your account will be executed and forwarded within ten days.” *Lightbound v. Warnock*, 4 Ont. Rep. 187.

articles of two seamen, and under the word "sureties," a party signed his name, it was held he was not liable; because, while it appeared that he was a surety, it did not appear what his agreement was, nor for what he became surety.<sup>15</sup> The court said: "The memorandum ought to state substantially what the undertaking of the surety is." The writing must identify, with reasonable certainty, both the contracting parties, but only the party sought to be charged need sign it.<sup>16</sup> Thus the defendant signed, and handed to T the following document: "Sir, I beg to inform you that I shall see you paid the sum of 800l. for the ensuing building which you undertake to build for T." He intended it to be handed by T as a guaranty to J, who was then negotiating with T to erect for him the building referred to. T having agreed with the plaintiff instead of J that the plaintiff should erect the building, delivered the document to him without the defendant's knowledge or authority. The defendant afterward heard of and ratified this delivery. Held, the defendant was not liable, because the writing did not contain the name of the person for whom it was intended. The court said: "It is essential to the validity of any such agreement, or memorandum thereof, that it should contain the names of both parties to the agreement. It is true that there is no necessity that both parties should sign it. \* \* But it must still contain all the essentials of an agreement, and therefore inter alia the names of both parties. \* \* In this very case, supposing the guaranty to be valid, it might have been put into the hands of some person for whom the defendant never intended it, and an attempt might have been made on the one hand to enforce, and on the other to resist, it by parol evidence as to who was the person really intended."<sup>17</sup> If it appears from the writing with reasonable certainty for whom it is intended, it is sufficient. The payee of a promissory note, payable to bearer, signed the following

<sup>15</sup> Dodge v. Lean, 13 Johns. 508.

<sup>16</sup> Champion v. Plummer, 1 Bos. & Pul. (N. R.) 252; Waterman v. Meigs, 4 Cush. 497; Jacob v. Kirk, 2 Moody & Rob. 221; Sherburne v. Shaw, 1 N. H. 157; Farwell v. Lowther, 18 Ill. 252; Nichols v. Johnson, 10 Conn. 192; Wheeler v. Collier, Moo. & Mal. 123; Webster

v. Ela, 5 N. H. 540; Allen v. Bennet, 3 Taunt. 169; Sheid v. Stamps, 2 Sneed (Tenn.) 172.

<sup>17</sup> Williams v. Lake, 2 Ell. & Ell. 349, per Cockburn, C. J. As to the matters treated of in this section, see more fully, Browne on Frauds, ch. 18.

guaranty on its back: "In consideration of \* \* I hereby guaranty the payment of the within note." The court said a guaranty must indicate the person for whom it was intended, either by name, or as one of a class, and as the guaranty referred to the note, it should be read with it, and it was therefore payable to the bearer, whoever he might be, and was valid.<sup>18</sup> With reference to a general letter of credit, it has been said that it "is addressed to any and every person, and therefore gives to any person to whom it may be shown, authority to advance upon its credit. A privity of contract springs up between him and the drawer of the letter, and it becomes, in legal effect, the same as if addressed to him by name."<sup>19</sup> In such case the writer of the letter is liable to the party making the advances. It has also been held that the mere fact that the name of the plaintiff appears in the writing is not sufficient, unless such name also appears from the writing to be that of the promisee, or party to whom the defendant is liable.<sup>20</sup> The subject-matter of the contract must appear from the writing, but it may be expressed in general terms, and parol evidence is admissible to identify it.<sup>21</sup>

<sup>18</sup> *Palmer v. Baker*, 23 Up. Can. C. P. 302. To the same general effect, see *Thomas v. Dodge*, 8 Mich. 51; *Nevius v. Bank of Lansingburgh*, 10 Mich. 547.

<sup>19</sup> *Union Bank v. Coster's Ex'rs*, 3 N. Y. 203, per Pratt, J. And so where certain persons guarantied that they would become individually responsible for the malt and hops which their manager should purchase for the use of their brewery during the year, not to exceed \$2,500, it was held that "this contract of guaranty \* \* is analogous to a general letter of credit which authorizes any person to whom it is presented to act upon the proposition therein contained," and that "any person, being a dealer in malt, was authorized to act on the faith of it, and being general, addressed to no particular person, several persons in

succession could well contract in reference to it, and all be entitled to recover, provided no more be recovered in the aggregate than the amount specified in the contract." *Boyd v. Snyder*, 49 Md. 325. Holding to same effect, see *Laurason v. Mason*, 3 Cranch 492; *Russell v. Wiggins*, 2 Story 214; *Adams v. Jones*, 12 Pet. 207; *Duval v. Trask*, 12 Mass. 154; *Birckhead v. Brown*, 5 Hill 634; *Carnegie v. Morrison*, 2 Met. (Mass.) 381; *Lafargue v. Harrison*, 70 Cal. 380.

<sup>20</sup> *Bailey v. Ogden*, 3 Johns. 399; *Vanderbergh v. Vanderbergh*, Law Rep. 1 Exch. 316.

<sup>21</sup> *Bateman v. Phillips*, 15 East 272; *Sale v. Darragh*, 2 Hilton (N. Y.) 184; *Hall v. Soule*, 11 Mich. 494; *Nichols v. Johnson*, 10 Conn. 198; *Atwood v. Cobb*, 16 Pick. 227; *Hurley v. Brown*, 98 Mass. 545; *McMurray v. Spicer*, Law

**§ 93. Whether the consideration must appear from the writing.**—The common law required, as necessary to the validity of every contract not under seal, that it be supported by a sufficient consideration. It was just as necessary that there should be a consideration for the contract to pay the debt of another, after, as before, the passage of the Statute of Frauds.<sup>22</sup> The statute did not dispense with anything which was before essential to the validity of a contract; on the contrary, it added something in the case of a promise to pay the debt of another, by requiring it to be in writing, when before no writing was necessary. Under the portion of the statute now under consideration, an important question has arisen, which has been the occasion of great contrariety of decision; the question being, whether or not it is necessary that the agreement, or memorandum, or note thereof, need express the consideration for the promise as well as the promise itself. It was firmly settled by the English courts that the writing must express the consideration for the promise,<sup>23</sup> when the Mercantile Law Amendment Act was passed.<sup>24</sup> Among other things this act provides that “no special promise to be made by any person after the passing of this act, to be answerable for the debt, default or miscarriage of another person, being

Rep. 5 Eq. 527; *Baumann v. James*, Law Rep. 3 Ch. App. 508; *Horsey v. Graham*, Law Rep. 5 Com. P. 9.

<sup>22</sup> *Barrell v. Trussell*, 4 Taunt. 117; *Leonard v. Vredenburg*, 8 Johns. 29; *Saunders v. Wakefield*, 4 Barn. & Ald. 595; *Aldridge v. Turner*, 1 Gill & Johns. (Md.) 427; *Tenny v. Prince*, 4 Pick. 385; *Pillan v. Van Mierop*, 3 Burr. 1663; *Clark v. Small*, 6 Yerg. (Tenn.) 418. See on this subject, *Kurtz v. Stewart*, 54 Ind. 178; *Dunlap v. Hopkins*, 95 Fed. Rep. 231, 37 C. C. A. 52.

<sup>23</sup> The leading case holding this doctrine is *Wain v. Warlters*, 5 East 10, decided in 1804. The correctness of this decision was denied by Lord Eldon in *Ex parte Minet*, 14 Vesey 189, and *Ex parte Gordon*, 15 Vesey 286, and was

doubted in other cases. See *Phillips v. Bateman*, 16 East 356; *Goodman v. Chase*, 1 Barn. & Ald. 297. The question was again directly presented in *Saunders v. Wakefield*, 4 Barn. & Ald. 595, and the court unanimously held that the consideration must appear from the writing. After that decision the question was considered settled. See *Jenkins v. Reynolds*, 6 Moore 86; *Id.*, 3 Brod. & Bing. 14; *Raikes v. Todd*, 8 Adol. & Ell. 846; *Sweet v. Lee*, 3 Man. & Gr. 452; *Morley v. Boothly*, 3 Bing. 107; *Bainbridge v. Wade*, 16 Ad. & Ell. (N. S.) 89; *Hawes v. Armstrong*, 1 Bing. N. C. 761; *James v. Williams*, 3 Nev. & Man. 196; *Cole v. Dyer*, 1 Cro. & Jer. 461; *Clancy v. Piggott*, 4 Nev. & Man. 496.

<sup>24</sup> 19 and 20 Vict., ch. 97, § 3.



in writing and signed by the party to be charged therewith, or by some other person by him thereunto lawfully authorized, shall be deemed invalid to support an action, suit or other proceeding to charge the person by whom such promise shall have been made, by reason only that the consideration for such promise does not appear in writing or by necessary inference from a written instrument." While the Statute of Frauds has been generally re-enacted in the United States, it has not, in all cases, been done in the words of the original statute. In those states where the original wording is retained, some have decided that the consideration must, and others that it need not, be expressed in the writing. In the states where the word "promise" has been coupled with the word "agreement," it is generally held that the writing need not express the consideration.<sup>25</sup> In several of the states the

<sup>25</sup> Of the states where the word "agreement" is retained, as in the original statute, it has been held that the consideration must appear from the writing. In Georgia: *Henderson v. Johnson*, 6 Ga. 390; *Hargroves v. Cooke*, 15 Ga. 321. In Indiana: *Gregory v. Logan*, 7 Blackf. 112 (since changed by statute). In Maryland: *Sloan v. Wilson*, 4 Harr. & Johns. 322; *Hutton v. Padgett*, 26 Md. 228; *Elliott v. Giese*, 7 Harr. & Johns. 457; *Edelen v. Gough*, 5 Gill 103; *Ordeman v. Lawson & Bro.*, 49 Md. 135; *Culbertson v. Smith*, 52 Md. 628; *Emerson v. Aultman & Co.*, 69 Md. 125. In Michigan: *Jones v. Palmer*, 1 Doug. 379. In New Hampshire: *Underwood v. Campbell*, 14 N. H. 393; *Neelson v. Sanborn*, 2 N. H. 413. But now, in New Hampshire, the consideration need not appear in the writing. *McDonald v. Fernald*, 68 N. H. 171, 38 Atl. Rep. 729; *Britton v. Angier*, 48 N. H. 20; *Lang v. Henry*, 54 N. H. 57, 59. In New Jersey: *Buckley v. Beardslee*, 2 South. 572; *Laing v. Lee, Spencer* 337. In New York:

*Sears v. Brink*, 3 Johns. 210; *Kerr v. Shaw*, 13 Johns. 236; *Castle v. Beardsley*, 10 Hun 343. In South Carolina: *Stephens v. Winn*, 2 Nott & McC. 372. But see *Lecat v. Tavel*, 3 McCord 158. And in Wisconsin: *Taylor v. Pratt*, 3 Wis. 674; *Parry v. Spikes*, 49 Wis. 384. On the other hand, it has been held that the consideration need not appear from the writing. In Connecticut: *Sage v. Wilcox*, 6 Conn. 81. In Maine: *Levy v. Merrill*, 4 Greenl. 180; *Gilligan v. Boardman*, 29 Me. 81. In Massachusetts: *Packard v. Richardson*, 17 Mass. 122 (since changed by statute). In Missouri: *Bean v. Valle*, 2 Mo. 103; *Halsa v. Halsa*, 8 Mo. 303; *Little v. Nabb*, 10 Mo. 3. In North Carolina: *Miller v. Irvine*, 1 Dev. & Bat. 103; *Ashford v. Robinson*, 8 Ired. 114. In Ohio: *Reed v. Evans*, 17 Ohio 128. And in Vermont: *Smith v. Ide*, 3 Vt. 290; *Patchin v. Swift*, 21 Vt. 292; *Gregory v. Gleed*, 33 Vt. 405. Where the word "promise" is coupled with the word "agreement," it has been held that the consideration need not be ex-



follows: "I guaranty the payment of any goods which J. Stadt delivers to J. Nichols." Held, it sufficiently appeared that the delivery of the goods was the consideration for the promise.<sup>28</sup> The same thing was held when the words were as follows: "Sir, I will be accountable to you for the payment, within six months, of the seed order forwarded by my son" (naming him).<sup>29</sup> The same thing was held when the guaranty was in these words: "Mr. Clark, of this place, will purchase a small stock of cloths and clothing of you, which I hope you will sell to him cheap, and I have no doubt he will make you a valuable customer. I hereby guaranty the collection of any amount which you may credit him with not exceeding \$2,000."<sup>30</sup> In another case the writing was as follows: "I do hereby agree to become surety for R G, now your traveler, in the sum of £500 for all money he may receive on your account." Held, it sufficiently appeared that the consideration for the undertaking was the continuation of the traveler in

Com. Law Rep. 221; *Bainbridge v. Wade*, 16 Adol. & Ell. (N. S.) 89; *Hoad v. Grace*, 7 Hurl. & Nor. 494; *Lysaght v. Walker*, 5 Bligh (N. R.) 1; *Id.*, 2 Dow & Clark 211; *Broom v. Batchelor*, 1 Hurl. & Nor. 255; *Oldershaw v. King*, 2 Hurl. & Nor. 517; *Staats v. Howlett*, 4 Denio 559; *Boehm v. Campbell*, 3 Moore 15; *Jarvis v. Wilkins*, 7 Mees. & Wels. 410; *White v. Woodward*, 5 Man., Gr. & Scott 810; *Caballero v. Slater*, 14 Com. B. (5 J. Scott) 300; *Edwards v. Jevons*, 8 Man., Gr. & Scott 436; *Pace v. Marsh*, 1 Bing. 216; *Id.*, 8 Moore 59; *Johnston v. Nicholls*, 1 Man., Gr. & Scott 251; *Church v. Brown*, 21 N. Y. 315; *Williams v. Ketchum*, 19 Wis. 231; *Stead v. Liddard*, 8 Moore 2; *Russell v. Moseley*, 3 Brod. & Bing. 211; *Dutchman v. Tooth*, 5 Bing. N. C. 577; *Id.*, 7 Scott 710; *Emmott v. Kearns*, 5 Bing. N. C. 559; *Gottsberger v. Radway*, 2 Hilton (N. Y.) 342; *Dunlap v. Hopkins* (Ill.), 95 Fed. Rep. 231, 37 C. C. A. 52, cited fully

in note 93, § 90, *supra*. In *McDonald v. Wood*, 118 Ala. 589, 24 So. Rep. 86, the following endorsements on plaintiff's declaration in an election contest were held sufficient against a plea that they were special promises to answer for the debt, default or miscarriage of plaintiff and failed to express any consideration: "We hereby acknowledge ourselves security for costs of this contest." (Signatures.) "I am security for this cost to the amount of \$250 and no more." (Signature.) "The sureties themselves executed the obligation," said the court. "It shows the consideration was the institution of the contest, and bound the sureties for the cost thereof."

<sup>28</sup> *Stadt v. Lill*, 9 East 348.

<sup>29</sup> *Nash v. Hartland*, 2 Irish Law Rep. 190.

<sup>30</sup> *Eastman v. Bennett*, 6 Wis. 232, followed and approved in *Young v. Brown*, 53 Wis. 333.

the service of his employers.<sup>31</sup> The same thing was held for the same reason when the words were: "I hereby guaranty to you the sum of £250 in case Mr. P. should make default in the capacity of agent and traveler to you."<sup>32</sup> Where the writing was: "I hold myself responsible to \* \* (plaintiffs) to the amount of \$2,000, for any drafts they have accepted or may hereafter accept for John Latouche," it was held that it sufficiently appeared that, in consideration that the plaintiffs would accept for Latouche, the defendant agreed to be responsible.<sup>33</sup> In another case the words were: "I agree to be security to you for J. C., late in the employ of J. P., for whatever you may intrust him with while in your employ, to the amount of £50." Held, the consideration sufficiently appeared. It might fairly be implied that J. C. had left one service, and that the guaranty was given in consideration of his being taken into another.<sup>34</sup> The insertion of the words "for value received," in the writing, are a sufficient expression of the consideration to satisfy the statute.<sup>35</sup> When a guaranty under seal expressed a consideration of one dollar in hand paid to the guarantor, it was held that the guaranty was valid and binding, even though the dollar had never been paid. The court said that, in order to invalidate the guaranty, it must be shown, not only that the dollar had not been paid, but also that there was no agreement to pay it.<sup>36</sup>

**§ 96. When consideration does not sufficiently appear, or, consideration appearing, is insufficient—Instances.**—In a case where the writing was as follows: "Inclosed I forward you

<sup>31</sup> *Byde v. Curtis*, 8 Dow. & Ry. 62.

<sup>32</sup> *Kennaway v. Treleavan*, 5 Mees. & Wels. 498.

<sup>33</sup> *Hutton v. Padgett*, 26 Md. 228.

<sup>34</sup> *Newbury v. Armstrong*, 6 Bing. 201; *Id.*, 3 Moore & Payne 509; *Id.*, *Moody & Malkin* 389.

<sup>35</sup> *Day v. Elmore*, 4 Wis. 190; *Mosher v. Hotchkiss*, 3 Abb. Rep. Omitted Cas. (N. Y.) 326; *Id.*, 2 Keyes 589; *Cheeney v. Cook*, 7 Wis. 413; *Miller v. Cook*, 23 N. Y. 495; *Douglass v. Howland*, 24 Wend. 35; *Whitney v. Stearns*, 16

*Me.* 394; *Cooper v. Dedrick*, 22 Barb. (N. Y.) 516; *Howard v. Holbrook*, 9 Bosw. (N. Y.) 237; *Lapham v. Barrett*, 1 Vt. 247; *Connecticut, etc. Ins. Co. v. Cleveland R. R. Co.*, 41 Barb. (N. Y.) 9; *Brewster v. Silence*, 8 N. Y. 207; *Martin v. Hazard Powder Co.*, 2 Col. 596; *Osborne & Co. v. Baker*, 34 Minn. 307; *Dahlman v. Hammel*, 45 Wis. 466.

<sup>36</sup> *Childs v. Barnum*, 11 Barb. (N. Y.) 14. It has been held that if the consideration expressed was a fictitious one, it was sufficient. *Happe v. Stout*, 2 Cal. 460.

the bills drawn per J. A. upon and accepted by L. D., which I doubt not will meet due honor, but in default thereof, I will see the same paid," it was held the consideration did not sufficiently appear.<sup>37</sup> The same thing was held when the words were: "I hereby guaranty to pay W. H., etc., \$10 per month until the sum of \$300, due by Messrs. B. & H., etc., shall be paid."<sup>38</sup> When the undertaking was: "I hereby undertake to secure to you the payment of any sums of money you have advanced or may hereafter advance to \* \* or on their account with you, commencing the 1st November, 1831, not exceeding £2,000," it was held that the consideration for the guaranty of the past advances did not sufficiently appear. The court said: "The consideration must either appear on the face of them (guaranties) or by necessary inference from them, for unless this is the case parol evidence is not excluded. The terms of the instrument do not lead to any clear inference that the future advances were, as the declaration alleges, the consideration for guarantying the bygone advances."<sup>39</sup> A guaranty was: "Bill Oct. 2d, 1844, \$1,306.29. I hereby agree to guaranty the payment of U. & Co.'s note for the above amount, in favor of \* \* payable nine mos. after date thereof." Held, it plainly expressed a past consideration, and was void for that reason.<sup>40</sup>

**§ 97. When writing ambiguous, it may be explained by parol evidence.**—When the words of the writing are ambiguous, and

<sup>37</sup> Hawes v. Armstrong, 1 Bing. N. C. 761; Id., 1 Scott 661.

<sup>38</sup> Palsgrave v. Murphy, 14 Up. Can. C. P. 153. So a guaranty upon a separate piece of paper from a note to which it was said to refer, in the following language, to wit: "We guaranty the payment of a note indorsed by \* \* the amount being five hundred dollars, date of note April 19th, 1875," was held void for want of a sufficient consideration appearing on its face. Ordeman v. Lawson & Bro., 49 Md. 135.

<sup>39</sup> Raikes v. Todd, 1 Perry & Dav. 138; Id., 8 Adol. & Ell. 846.

<sup>40</sup> Weed v. Clark, 4 Sandf. (N.

Y. Sup. Ct.) 31. For cases holding that the consideration is not sufficiently expressed, or that an insufficient consideration is expressed, and illustrating this point, see Morley v. Boothby, 3 Bing. 107; Id., 10 Moore 395; James v. Williams, 5 Barn. & Adol. 1109; Church v. Brown, 29 Barb. (N. Y.) 486; Bushell v. Beavan, 1 Bing. N. C. 103; Allnutt v. Ashenden, 5 Man. & Gr. 392; Id., 6 Scott (N. R.) 127; Spicer v. Norton, 13 Barb. (N. Y.) 542; Bell v. Welch, 9 Man., Gr. & Scott 154; Bewley v. Whiteford, Hayes (Irish Rep.) 356; Wain v. Warlters, 5 East 10; Lees v. Whitcomb, 5 Bing. 34; James v.

may be construed to express a past or a future consideration, parol evidence of the situation and surroundings of the parties at the time the contract was made may be given, in order to arrive at a true interpretation of the language employed by them. Thus a writing was: "As there was no time set for the payment of your account, and Mr. J. thought it would be an accommodation to him to have you wait until \* \* if that will answer your purpose, I will be surety for the payment," etc. Held, the words "your account" were ambiguous, and might as well mean your "account to be made," as "your account already made;" that parol evidence was admissible to show it was for an account to be made, and that the writing sufficiently expressed the consideration.<sup>41</sup> So, where the words were: "In consideration of E. R. & Co. giving credit to D. G., I hereby engage to be responsible to, and pay any sum not exceeding £120, due to E. R. & Co. by D. J.," parol evidence of extrinsic circumstances was admitted to show that the words "giving credit," were intended to apply to a certain credit which had been agreed upon, and it was held that the writing disclosed a sufficient consideration.<sup>42</sup> When the words were: "In consideration of your being in advance" to the third party, parol evidence was admitted to show that at the time the writing was executed, no advance had been made.<sup>43</sup> The same thing was held when the words were: "In consideration of your having advanced,"<sup>44</sup> and in both cases the consideration was held to be sufficiently expressed. Where the words were: "I hereby guaranty B.'s account with A.," and it was shown by parol that there was a pre-existing account to which the words could apply, it was held that the guaranty was void for want of a sufficient consideration.<sup>45</sup>

Williams, 3 Nev. & Man. 196; Sykes v. Dixon, 9 Adol. & Ell. 693; Bentham v. Cooper, 5 Mees. & Wels. 621; Price v. Richardson, 15 Mees. & Wels. 539; Cole v. Dyer, 1 Crompt. & Jer. 461; Jenkins v. Reynolds, 3 Brod. & Bing. 14.

<sup>41</sup> Walrath v. Thompson, 4 Hill 200.

<sup>42</sup> Edwards v. Jevons, 8 Man., Gr. & Scott 436.

<sup>43</sup> Haigh v. Brooks, 10 Adol. & Ell. 309.

<sup>44</sup> Goldshede v. Swan, 1 Wels., Hurl. & Gor. 154.

<sup>45</sup> Allnut v. Ashenden, 5 Man. & G. 392. For cases further illustrating this subject, see Butcher v. Steuart, 11 Mees. & Wels. 857; Lysaght v. Walker, 5 Bligh (N. R.) 1; Singley v. Cutter, 7 Conn. 291; Shortrede v. Cheek, 1 Adol. & Ell. 57; Arms v. Ashley, 4 Pick. 71; Thornton v. Jenyns, 1 Man. & Gr. 166; Wood v. Beach, 7 Vt. 522; Steele v. Hoe, 14 Adol. & Ell. (N.

§ 98. When several papers may be read together to express consideration for promise.—It is not necessary that the consideration should be expressed in the writing which contains the promise. If it appears from any other writing which is so referred to in that which contains the promise as to become a part of it, this is sufficient. Thus, the plaintiff having pressed W for payment of a debt, the defendant, who was W's attorney, sent to the plaintiff a bill accepted by W, at two months, inclosed in a letter in which the defendant said: "W, being disappointed in receiving remittances, and you expressing yourself inconvenienced for money, I send you his acceptance at two months." The plaintiffs refused to take the bill unless the defendant put his name to it. Whereupon the defendant wrote upon the back of the letter: "I will see this bill paid for W." The court said that, reading all the papers together, the promise was that, "in consideration of your forbearing to sue W for two months, I will pay the bill if he fails to do so," and the defendant was held liable.<sup>46</sup> Certain parties executed a contract as agents for another, and at the same time executed a guaranty of the contract, but the guaranty did not express a consideration. Held, that the guaranty and contract, being contemporaneous, were all one transaction, and should be read together; and a sufficient consideration was expressed in the contract to sustain the guaranty.<sup>47</sup> A, by letter, in which the consideration sufficiently appeared, entered into an agreement with B, and B became a party to the engagement by writing a few lines at the bottom of a copy of A's letter. C became guarantor for B to A by an indorsement on the back of this copy of A's letter, in which indorsement reference was made to the terms of the agreement on the other side. In an action on the guaranty it was held that the reference in the indorsement to the terms of the agreement was a sufficient memorandum of the consideration to satisfy the Statute of Frauds.<sup>48</sup> But where a valid written

S.) 431; *Smith v. Ide*, 3 Vt. 290; *Bainbridge v. Wade*, 16 Adol. & Ell. (N. S.) 89; *D'Wolf v. Raband*, 1 Pet. 476; *Singer Mfg. Co. v. Forsyth et al.*, 108 Ind. 334.

<sup>46</sup> *Emmott v. Kearns*, 5 Bing. N. C. 559; *Id.*, 7 Scott 687.

<sup>47</sup> *Jones v. Post*, 6 Cal. 102.

<sup>48</sup> *Stead v. Liddard*, 1 Bing. 196.

So where a contract of guaranty is entered into contemporaneously with the principal contract, such as a written lease, and is either incorporated in the latter, or so distinctly refers to it as to show that both agreements are parts of

contract to pay for stock deliverable at a future day was signed by the buyer, and at the same time, and as an express condition of the seller's making the bargain, the defendant indorsed on the same paper: "I guaranty the within contract," the guaranty was held void because it did not express a consideration. The court said the contracts could not be read together because they were not executed by the same parties. The one was a promise to pay absolutely, the other only in case of the default of the principal, etc.<sup>49</sup>

**§ 99. Whether guaranty of note, judgment, certificate of deposit, or assigned mortgage must express consideration.—**

Whether the guaranty of a promissory note must, in order to be valid, express a consideration, has been differently decided by different courts, and sometimes by the same court. Thus, at the time a note was made, and on the same piece of paper, a guarantor wrote under the note: "I hereby guaranty the payment of the above note." Held, the guaranty was void, because it expressed no consideration.<sup>50</sup> The court said the two contracts were entirely different in their nature, and between different parties, and could not be read together. A

an entire transaction, the statute does not require a consideration to be expressed in the guaranty distinct from that expressed in the principal contract. *Highland v. Dresser*, 35 Minn. 345. For further cases to similar effect, see *Simons v. Steele*, 36 N. H. 73; *Wilson Sewing Machine Co. v. Schnell*, 20 Minn. 40; *Coldham v. Showler*, 3 Man., Gr. & Scott 312; *Hanford v. Rogers*, 11 Barb. (N. Y.) 18; *Adams v. Bean*, 12 Mass. 139; *Brettel v. Williams*, 4 Wels., Hurl. & Gor. 623; *Bailey v. Freeman*, 11 Johns. 221; *Coe v. Duffield*, 7 Moore 252; *Lecat v. Tavel*, 3 McCord (S. C.) 158; *Union Bank v. Coster's Ex'r*, 3 N. Y. 203; *Dorman v. Bigelow*, 1 Fla. 281; *Colbourn v. Dawson*, 10 Com. B. (1 J. Scott) 765; *Roberts et al. v. Woven Wire Mattress Co.*, 46 Md. 374.

To similar effect, see *Hutson v. Field*, 6 Wis. 407; *Otis v. Haseltine*, 27 Cal. 80.

<sup>50</sup> *Brewster v. Silence*, 8 N. Y. 207. This case overruled *Manrow v. Durham*, 3 Hill 584, which held to the contrary. *Brewster v. Silence* was followed and approved in *Glen Cove Mut. Ins. Co. v. Harold*, 20 Barb. (N. Y.) 298. To similar effect, see *Hunt v. Brown*, 5 Hill 145; *Hall v. Farmer*, 5 Denio 484. In *Anderson v. Norvill*, 10 Brad. (Ill. App.) 240, and *Osborne & Co. v. Lawson et al.*, 26 Mo. App. 549, it is held that a guaranty of the payment of a note is an independent contract and therefore must be supported by an independent consideration. As to the sufficiency of the consideration, see *Anderson v. Norvill*, and *Osborne v. Lawson*, *supra*.

<sup>49</sup> *Draper v. Snow*, 20 N. Y. 331.



party agreed to become surety on an overdue promissory note, under seal, and because there was no room at the bottom of the note for his signature, indorsed his name in blank on its back. He was held not liable.<sup>51</sup> The court said: "The indorsement in blank of a note not negotiable is not such written evidence of a promise to pay as the Statute [of Frauds] requires." A guaranty indorsed on a promissory note at the time of its execution, as follows: "We guaranty the payment of the within note," was held void, because it did not express a consideration.<sup>52</sup> Where a stranger to a note before its delivery indorsed it in blank, it was held that he was a guarantor, and his guaranty was void, because it did not express a consideration.<sup>53</sup> On the other hand, when a party was paid a money consideration for guarantying a note already executed by the principals, and in execution of his contract to guaranty indorsed his name in blank on the back of the note, it was held that it sufficiently expressed the consideration.<sup>54</sup> The court said that under the circumstances a guaranty of a note might have properly been written over the indorsement, and further: "It is in the nature of a note or bill, and equally so of an indorsement, even in blank, that it imports a consideration the same as a specialty." Where a party indorsed a promissory note as follows: "I agree to stand security for the payment of the within amount," it was held that the note and indorsement should be taken together as one instrument, and that they sufficiently expressed the consideration.<sup>55</sup> A married woman executed a promissory note, which contained the words "for value received," and at the same time a stranger wrote below the note, "I hereby guaranty the payment of the above note on maturity." The court said that both instruments, having been executed at the same time, should be considered together, and showed a sufficient consideration; but it would have been otherwise if they had been executed at different times.<sup>56</sup> Where a guaranty is made

<sup>51</sup> Wilson v. Martin, 74 Pa. St. 159.

<sup>52</sup> Lock v. Reid, 6 Up. Can. Q. B. (O. S.) 295.

<sup>53</sup> Van Doren v. Tjader, 1 Nev. 380.

<sup>54</sup> Oakley v. Boorman, 21 Wend. 588. This case was subsequently

disapproved by the same court. See Brewster v. Silence, 8 N. Y.

207. To same effect as Oakley v. Boorman, see Fuller v. Scott, 8 Kan. 25.

<sup>55</sup> Dorman v. Bigelow, 1 Fla. 281.

<sup>56</sup> Nabb v. Koontz, 17 Md. 283.



contemporaneously with a certificate of deposit, on which it is indorsed, it is unnecessary that there should be a separate and distinct consideration to uphold the guaranty. The consideration upon which the certificate of deposit is executed is sufficient to sustain the guaranty.<sup>57</sup> Where a mortgagee assigned a bond and mortgage, and into the assignment was incorporated a guaranty of the mortgage "by due foreclosure and sale," it was held that inasmuch as the guaranty was not essential to the assignment, and was, so far as its legal effect was concerned, a separate instrument, it was not supported by a sufficient consideration, and was void.<sup>58</sup> Where a person assigned a judgment for the purpose of raising money thereon, and guaranteed its payment, held, the object of the guarantor being to subserve a purpose of his own and not to answer for the default of another, was not within the statute and need not express a consideration.<sup>59</sup>

§ 100. **Signature by party to be charged.**—The statute requires that the writing shall be "signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." Even though the document is all written by the party to be charged, it must still be signed by him,<sup>1</sup> but need not be sealed.<sup>2</sup> Whether sealing alone is sufficient is an open question, but the better opinion seems to be that it is.<sup>3</sup> A mark by a marksman is a sufficient signature.<sup>4</sup> A printed signature is sufficient. especially when it is subse-

<sup>57</sup> Jones & Bro. v. Kuhn, 34 Kan. 414.

<sup>58</sup> Vanderbilt v. Schreyer, 91 N. Y. 392, reversing 21 Hun 537.

<sup>59</sup> Little v. Edwards, 69 Md. 499.

<sup>1</sup> Hawkins v. Holmes, 1 P. Wms. 770; Barry v. Law, 1 Cranch (C. C.) 77; Selby v. Selby, 3 Meriv. 2; Bailey v. Ogden, 3 Johns. 399; Hubert v. Turner, 4 Scott (N. R.) 486; Anderson v. Harold, 10 Ohio 399.

<sup>2</sup> Worrall v. Munn, 5 N. Y. 229; Farris v. Martin, 10 Humph. (Tenn.) 495; Wheeler v. Newton, 2 Eq. Cas. 44, ch. 5.

<sup>3</sup> Lemayne v. Stanley, 3 Levinz

1; Worneford v. Worneford, Strange 764; Gryle v. Gryle, 2 Atkyns 177; Grayson v. Atkinson, 2 Ves. Sr. 454; Smith v. Evans, 1 Wils. 313; Wright v. Wakeford, 17 Vesey 454; Cherry v. Heming, 4 Wels., Hurl. & Gor. 631.

<sup>4</sup> Selby v. Selby, 3 Meriv. 2; Jackson v. Van Dusen, 5 Johns. 144; Hubert v. Moreau, 12 Moore 216; Echnneider v. Norris, 2 Maule & Sel. 286; Baker v. Dering, 8 Adol. & Ell. 94; Taylor v. Dening, 3 Nev. & Per. 228; Morris v. Kniffin, 37 Barb. (N. Y.) 336; Barnard v. Heydrick, 49 Barb. (N. Y.) 62.

quently recognized by the party, or where part of the instrument is in his handwriting.<sup>5</sup> A signature by initials is sufficient,<sup>6</sup> and the christian name may be denoted by an initial or left out altogether.<sup>7</sup> It is doubtful whether the signature of a person mentioned in the writing as a contracting party, but who on the paper professes to sign as a witness, is sufficient.<sup>8</sup> The signature of a party to instructions for a telegraphic message accepting a written offer is sufficient.<sup>9</sup> The signature may be at the top, in the body or at the foot of the writing. There is no restriction in this regard, except that the signature must be so placed as to authenticate the instrument as the act of the person executing it.<sup>10</sup> The rule has been thus well stated: "Although the signature be in the beginning or middle of the instrument, it is as binding as if at the foot of it; the question being always open to the jury, whether the party, not having signed it regularly at the foot; meant to be bound by it as it then stood, or whether he left it so unsigned

<sup>5</sup> *Saunderson v. Jackson*, 3 Esp. 180; *Lerned v. Wannemacher*, 9 Allen 412; *Schneider v. Norris*, 2 Maule & Sel. 286; *Merritt v. Clason*, 12 Johns. 102; *Commonwealth v. Ray*, 3 Gray 441; *Vielie v. Osgood*, 8 Barb. (N. Y.) 130; *Davis v. Shields*, 26 Wend. 341; *Pitts v. Beckett*, 13 Mees. & Wels. 743.

<sup>6</sup> *Salmon Falls Man. Co. v. Goddard*, 14 How. (U. S.) 447; *Gorrie v. Woodley*, 17 Irish Com. Law R. 221; *Palmer v. Stephens*, 1 Denio 471; *Jacob v. Kirk*, 2 Moody & Rob. 221; *Sanborn v. Flagler*, 9 Allen 474; *Sweet v. Lee*, 3 Man. & Gr. 452.

<sup>7</sup> *Lobb v. Stanley*, 5 Q. B. 574.

<sup>8</sup> *Welford v. Beezeley*, 1 Ves. Sr. 6; *Gosbell v. Archer*, 2 Adol. & Ell. 500; *Blore v. Sutton*, 3 Meriv. 237; *Coles v. Trecothick*, 9 Vesey 234; *Hill v. Johnston*, 3 Ired. Eq. (N. C.) 432.

<sup>9</sup> *Godwin v. Francis*, Law Rep. 5 Com. P. 295; *Dunning v. Roberts*, 35 Barb. (N. Y.) 463. As to whether the name of the party must

actually appear, or whether a designation by which he may be identified is sufficient, see *Selby v. Selby*, 3 Meriv. 2; *Hubert v. Moreau*, 12 Moore 216; *Baker v. Dering*, 8 Adol. & Ell. 94.

<sup>10</sup> *Lemayne v. Stanley*, 3 Levinz 1; *Id.*, *Freeman* 538; *Fessenden v. Mussey*, 11 Cush. 127; *Holmes v. Mackrell*, 3 Com. B. (N. S.) 789; *Wise v. Ray*, 3 Greene (Iowa) 430; *Knight v. Crockford*, 1 Esp. 190; *McConnell v. Brillhart*, 17 Ill. 354; *Ogilvie v. Foljambe*, 3 Meriv. 53; *James v. Patten*, 8 Barb. (N. Y.) 344; *Morrison v. Turnour*, 18 Vesey 175; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Bleakley v. Smith*, 11 Simons, 150; *Davis v. Shields*, 24 Wend. 322; *Propert v. Parker*, 1 Russ. & My. 625; *Draper v. Patani*, 2 Spear (S. C.) 292; *Western v. Russell*, 3 Ves. & Bea. 187; *Merritt v. Clason*, 12 Johns. 102; *Peniman v. Hartshorn*, 13 Mass. 87; *Williams v. Wood*, 16 Md. 220; *Hawkins v. Chace*, 19 Pick. 502; 2 *Smith's Lead. Cas.* 249.

because he refused to complete it.<sup>11</sup> The statute provides that the writing shall be signed by the "party to be charged therewith." If it is signed by the party to be charged, it is not necessary that it be signed by the other party to the contract, although, as already shown, such other party must be designated by it.<sup>12</sup> A corporation is charged by the signature of its duly authorized agent.<sup>13</sup>

§ 101. **Signature by agent.**—The writing may be signed by the party to be charged, or by "some other person thereunto by him lawfully authorized." Generally, any one who may be an agent for any other purpose may be an agent for signing the writing required by the statute, but neither party can be the agent of the other for this purpose.<sup>14</sup> The same person may act as the agent of both parties. This is illustrated by the familiar case of an auctioneer, who, being the agent of the owner of property, sells it to the highest bidder. He thereupon becomes the agent of such bidder to complete the contract, and, by entering his name in the usual place as purchaser, binds him as such.<sup>15</sup> The same is true of public of-

<sup>11</sup> *Johnson v. Dodgson*, 2 Mees. & Wels. 653, per Lord Abinger, C. B.; *Saunderson v. Jackson*, 2 Bos. & Pul. 238.

<sup>12</sup> *Reuss v. Picksley*, Law Rep. 1 Exch. 342; *Clason v. Bailey*, 14 Johns. 484; *Laythoarp v. Bryant*, 2 Bing. N. C. 755; *Morin v. Martz*, 13 Minn. 191; *Huddleston v. Biscoe*, 11 Vesey 583; *McCrea v. Purmont*, 16 Wend. 460; *Martin v. Mitchell*, 2 Jacob & Walk. 413; *Douglass v. Spears*, 2 Nott & McC. (S. C.) 207; *Hatton v. Gray*, 2 Ch. Cas. 164; *Barstow v. Gay*, 3 Greenl. (Me.) 409; *Seton v. Slade*, 7 Vesey 265; *Shirley v. Shirley*, 7 Blackf. (Ind.) 452; *Fowle v. Freeman*, 9 Vesey 351; *Allen v. Bennett*, 3 Taunt. 169; *Penniman v. Harts-horn*, 13 Mass. 87.

<sup>13</sup> In *Nevada Bank v. Portland Nat'l Bank* (C. C., Ore.), 59 Fed. Rep. 338, it was held on demurrer that when a letter was sent to plaintiff bank on the letterhead of

defendant bank, signed by its assistant cashier with the name of his office after his signature and containing representations as to the credit of a party dealing with the bank, the signature was the signature of the bank within the meaning of the Oregon statute requiring representations as to credit to be signed by the "party to be charged" in order to charge him therewith.

<sup>14</sup> *Wright v. Dannah*, 2 Camp. 203; *Rayner v. Linthorne*, 2 Car. & P. 124; *Sharman v. Brandt*, 40 Law Jour. (N. S.) 312; *Farebrother v. Simmons*, 5 Barn. & Ald. 333; *Boardman v. Spooner*, 13 Allen 353; *Robinson v. Garth*, 6 Ala. 204; *Bent v. Cobb*, 9 Gray 397. See also on this subject, *Bird v. Boulter*, 4 Barn. & Adol. 443; *Ennis v. Waller*, 3 Blackf. (Ind.) 472; *Brant v. Green*, 6 Leigh (Va.) 16.

<sup>15</sup> *Morton v. Dean*, 13 Met. (Mass.) 385; *Kenworthy v. Scho-*

ficers, who sell property at auction, such as sheriffs and deputy-sheriffs,<sup>16</sup> administrators,<sup>17</sup> commissioners of court,<sup>18</sup> etc. The authority of the agent may be conferred in the same manner as the authority of any other agent, and even if he have no authority when he sign, his act may be afterwards ratified by the principal by parol.<sup>19</sup> It is not necessary that the agent who signs should be appointed by writing,<sup>20</sup> unless the writing he executes is under seal, when his authority must also be under seal.<sup>21</sup> It is not necessary that the agent should sign the name of the principal to the writing. If he signs his own name, parol evidence will be admitted to prove the agency and charge the principal.<sup>22</sup> Where a person's name has been

field, 2 Barn. & Cress. 945; *MeComb v. Wright*, 4 Johns. Ch. 659; *White v. Proctor*, 4 Taunt. 209; *Gill v. Bicknell*, 2 Cush. 355; *Simon v. Motivos*, 1 W. Black. 599; *Id.*, 3 Burr. 1921; *Cleaves v. Foss*, 4 Greenl. (Me.) 1; *Hinde v. Whitehouse*, 7 East 558; *Anderson v. Chick, Bailey*, Ch. (S. C.) 118; *Emmerson v. Heelis*, 2 Taunt. 38; *Endicott v. Penny*, 14 Sm. & Mar. (Miss.) 144; *Walker v. Constable*, 1 Bos. & Pul. 306; *Gordon v. Sims*, 2 McCord, Ch. (S. C.) 151; *Coles v. Trecothick*, 9 Vesey 234; *Singstack v. Harding*, 4 Harr. & Johns. 186; *Buckmaster v. Harrop*, 7 Vesey 341; *Smith v. Jones*, 5 Leigh (Va.) 165; *Stansfield v. Johnson*, 1 Esp. 101; *Adams v. McMillan*, 7 Port. (Ala.) 73; *Blagden v. Bradbear*, 12 Vesey 466; *Browne on Frauds*, p. 386.

<sup>16</sup> *Robinson v. Garth*, 6 Ala. 204; *Christie v. Simpson*, 1 Rich. Law (S. C.) 401; *Ennis v. Waller*, 3 Blackf. (Ind.) 472; *Carrington v. Anderson*, 5 Munf. (Va.) 32; *Brant v. Green*, 6 Leigh (Va.) 16.

<sup>17</sup> *Smith v. Arnold*, 5 Mason (C. C.) 414.

<sup>18</sup> *Gordon v. Sims*, 2 McCord, Ch. (S. C.) 151; *Hutton v. Williams*, 35 Ala. 503; *Hart v. Woods*, 7 Blackf.

(Ind.) 568. But the power of an auctioneer, in this regard, is confined to those who act in that capacity. See *Anderson v. Chick, Bailey Eq. (S. C.)* 118; *Batturs v. Sellers*, 5 Harr. & Johns. (Md.) 117; *Sewall v. Fitch*, 8 Cowen 215.

<sup>19</sup> *Gosbell v. Archer*, 2 Adol. & Ell. 500; *Holland v. Hoyt*, 14 Mich. 238; *Maclean v. Dunn*, 4 Bing. 722. *Contra*, *Ragan v. Chenault*, 78 Ky. 545. But a subsequent ratification in writing is valid. *Riggan v. Crain*, 86 Ky. 249.

<sup>20</sup> *Mortlock v. Buller*, 10 Vesey 292; *Inhabitants of Alna v. Plummer*, 4 Greenl. (Me.) 258; *Rucker v. Cammeyer*, 1 Esp. 105; *McWhorter v. McMahan*, 10 Paige 386; *Wright v. Dannah*, 2 Camp. 203; *Lawrence v. Taylor*, 5 Hill 107; *Greene v. Cramer*, 2 Connor & Law. 54; *Hawkins v. Chace*, 19 Pick. 502; *Clinan v. Cook*, 1 Schoales & Lef. 22; *Ulen v. Kittedge*, 7 Mass. 233; *Graham v. Musson*, 7 Scott 769; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Coleman v. Bailey*, 4 Bibb (Ky.) 297; *Johnson v. McGruder*, 15 Mo. 365; *Johnson v. Dodge*, 17 Ill. 433.

<sup>21</sup> *Blood v. Hardy*, 15 Me. 61.

<sup>22</sup> *Wilson v. Hart*, 7 Taunt. 295; *Dykers v. Townsend*, 24 N. Y. 57;

signed to a note as surety without authority, a subsequent promise to pay the note is not binding.<sup>23</sup>

§ 102. **Pleading.**—In a declaration in a suit against a surety or guarantor, it is not necessary to state that the promise was in writing.<sup>24</sup> This is founded on the general principle that where a statute makes a writing necessary to a common-law matter where it was not so before, in declaring on that matter it is not necessary to state that it is in writing, although it must be proved in evidence; but when the matter is created by statute, and a writing is required, then the pleading must allege the existence of the writing. When it is pleaded that there was no writing, it may be replied generally that there was a writing, without setting it out.<sup>25</sup> The fact that there was no writing need not be specially pleaded, but may be taken advantage of under the general issue.<sup>26</sup> In case of an ordinary guaranty, the contract of guaranty must be declared on specially, and it cannot be given in evidence under the common counts in assumpsit.<sup>27</sup> But where the guarantor of the payment of a note has, by the form of his guaranty indorsed thereon, waived compliance with every condition, the non-observance of which by the payee would ordinarily release a guarantor or surety, the guaranty will be admissible against him under the common counts in assumpsit brought by the payee.<sup>28</sup> If a guaranty contains a promise to pay the debt of A., an averment that A. was a minor when he con-

*Salmon Falls Ins. Co. v. Goddard*, 14 How. (U. S.) 447; *Curtis v. Blair*, 26 Miss. 309; *Yerby v. Grigsby*, 9 Leigh (Va.) 387; *Williams v. Woods*, 16 Md. 220; *Merritt v. Clason*, 12 Johns. 102; *McConnell v. Brillhart*, 17 Ill. 354; *Williams v. Bacon*, 2 Gray 387; *Pinckney v. Hagadorn*, 1 Duer (N. Y.) 89.

<sup>23</sup> *Garrott v. Ratliff & Williams*, 83 Ky. 384.

<sup>24</sup> *Walker v. Richards*, 39 N. H. 259; *Lilley v. Hewitt*, 11 Price 494; *Ecker v. McAllister*, 45 Md. 290; *Macey v. Childress*, 2 Tenn. Ch. (Cooper) 438; *Marston v. Sweet*, 66 N. Y. 207; *Porter v. Drennan*, 13 Brad. (Ill. App.) 362; *Wilkin-*

*son, Gaddis Co. v. Van Riper*, 63 N. J. Law 394, 43 Atl. Rep. 675; *Draper v. Macon Dry Goods Co.*, 103 Ga. 661, 663, 30 S. E. Rep. 566, where the court say: "As an illegal act is not to be presumed, it is not to be presumed that the contract was not in writing."

<sup>25</sup> *Wakeman v. Sutton*, 2 Adol. & Ell. 78.

<sup>26</sup> *Mines v. Sculthorpe*, 2 Camp. 215; *Eastwood v. Kenyon*, 3 Perry & Dav. 276.

<sup>27</sup> *Emerson v. Aultman & Co.*, 69 Md. 125.

<sup>28</sup> *Emerson v. Aultman & Co.*, 69 Md. 125.

tracted the debt will take the case out of the Statute of Frauds.<sup>29</sup> In an action on a guaranty, a plea by defendant of "never was indebted as alleged" puts the consideration as well as the promise in issue, and a further plea denying the consideration is bad on demurrer.<sup>30</sup> An answer by a surety that he became such without consideration moving either to the principal or himself has been held to set up a good defense.<sup>31</sup>

<sup>29</sup> King v. Summit, 73 Ind. 312.

<sup>31</sup> Hartman v. Redman, 21 Mo.

<sup>30</sup> Little v. Edwards, 69 Md. 499. App. 124.

# CHAPTER III.

## OF THE LIABILITY OF THE SURETY OR GUARANTOR GENERALLY.

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| <p>§ 103. Construction of the contract.</p> <p>104. Construction of the contract continued.</p> <p>105. Construction continued—Instances—Effect of statutes.</p> <p>106. Surety and guarantor favorites in law, and are not chargeable beyond strict terms of their engagement.</p> <p>107. Rule that surety is favorite in law, and rules for construing contract must not be confounded — Parties may practically construe contract.</p> <p>108. Contract of suretyship and guaranty prospective in its operation.</p> <p>109. When consideration paid to guarantor not usurious—Measure of damages on guaranty of note.</p> <p>110. Guaranty of payment—When surety may be sued before principal—Property of surety may be first taken on execution against principal and surety.</p> <p>111. When guarantor of collection liable—When mortgage on property of principal must be foreclosed before guarantor liable.</p> <p>112. General and special guaranties—Measure of diligence due from the creditor in pursuing the principal debtor.</p> | <p>§ 113. The same continued—What will excuse want of diligence by the creditor.</p> <p>114. What is due diligence.</p> <p>115. What is due diligence, continued.</p> <p>116. When neither previous proceedings against principle nor his insolvency necessary to change guarantor.</p> <p>117. When a writing does not amount to a guaranty—Instances.</p> <p>118. Same continued.</p> <p>119. When a writing does amount to a guaranty—Instances.</p> <p>120. Same continued.</p> <p>121. Guaranty of payment “when due” of overdue note and of void certificate of deposit, valid.</p> <p>122. When surety for rent liable if tenant holds over—Burning of house, and landlord getting insurance, does not discharge surety for rent.</p> <p>123. Liability of surety for rent continued.</p> <p>124. When surety concluded by result of litigation between other properties.</p> <p>125. When surety or guarantor liable for attorney’s fees, costs, expense, additional damages.</p> <p>126. Whether surety liable beyond penalty of his bond—Interest, court costs, government building bonds.</p> |
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## LIABILITY OF SURETY OR GUARANTOR.

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| <p>§ 127. Whether surety liable beyond penalty of bond, continued.</p> <p>128. When surety on note liable if it is not discounted by party to whom it is payable.</p> <p>129. Note used for purpose different from that intended, surety remains liable—Continued.</p> <p>130. When surety on note not liable if it is discounted by party other than payee.</p> <p>131. When surety on note not liable if it is discounted by party other than payee.</p> <p>132. When guarantor on general guaranty, or on guaranty addressed to another, liable to person acting on it.</p> <p>133. When guarantor not liable to any one except party to whom guaranty is addressed.</p> <p>134. Surety for several not liable for one—Surety for one not liable for several.</p> <p>135. The same continued—Effect of changes in partnership.</p> <p>136. Surety to or for firm not liable if partners changed—Surety for performance of award not liable if arbitrators changed.</p> <p>137. When surety for the acts of one person liable if such acts performed by him and a partner—Exceptional cases.</p> <p>138. When obligation given by surety to firm binds him after change in firm—Effect of railroad consolidation—Receivership.</p> <p>139. Surety not liable beyond scope of his obligation—Instances.</p> | <p>§ 140. Liability of surety or guarantor—Special cases.</p> <p>141. When surety cannot set up illegal acts of creditor or principal as a defense.</p> <p>142. When surety not liable for specific performance—Surety not charged to exonerate estate of principal—Other cases.</p> <p>143. What payment by person indemnified will charge surety—When surety liable for costs—Other cases.</p> <p>144. Surety not liable for greater sum than principal—Other cases—Usury.</p> <p>145. Sureties on assignee's bond not liable to those who defeat the assignment—Principal cannot allege for error that surety is discharged—Other cases.</p> <p>146. When surety released if creditor and principal intermarry—Surety not liable to party who pays debt at principal's request—Other cases.</p> <p>147. When agreement to pay in good notes not guaranty that notes in which payment is made are good—Guaranties of interest and dividends on stock.</p> <p>148. Surety for return of slave liable, if death of slave caused by principal—Other cases.</p> <p>149. Surety for balance which may remain due after sale of property not liable till completed sale made—Other cases.</p> <p>150. When guaranty not revoked by death of guarantor—When surety cannot relieve himself from future liability by notice.</p> |
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| <p>§ 151. When death of guarantor revokes guaranty—When surety may terminate his liability by notice.</p> <p>152. Same continued.</p> <p>153. When notice revoking guaranty takes effect.</p> <p>154. Who may sue.</p> <p>155. When surety may be sued jointly with principal.</p> <p>156. When recovery on common money counts cannot be had against surety—Surety for alimony cannot be compelled by motion to pay it—Other cases.</p> <p>157. When surety who is not liable at law will not be charged in equity.</p> | <p>§ 158. When surety's estate held liable.</p> <p>159. When equity will charge surety who is not liable at law—Lost bond—Misdescription—Mistake—Reading Statute into statutory bond—Reformation.</p> <p>160. When new promise revives liability of surety or guarantor.</p> <p>161. Statute of limitations—When new promise or partial payment by principal takes case out of statute as to surety.</p> <p>162. Contract of suretyship, by what law governed.</p> |
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§ 103. Construction of the contract.—The first step towards ascertaining the liability of a surety or guarantor is to determine the meaning of his contract. The rules which should govern in the construction of such contracts are therefore of great importance. It has been said by several courts that a strict construction in favor of the surety or guarantor should be adopted and all doubts resolved in his favor.<sup>32</sup> The better and generally received opinion, however, is that this contract should be construed the same as any other contract, and that the same rules should be applied to ascertain the true intention of the parties.<sup>33</sup> Thus a contract of suretyship and an instrument

<sup>32</sup> *Nicholson v. Paget*, 1 Crompt. & Mees. 48; *Id.*, 3 Tyr. 164.

<sup>33</sup> *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. Rep. 630, action on an appeal bond. *Westervelt v. Mohrenstecher*, 76 Fed. Rep. 118, 22 C. C. A. 93, 40 U. S. App. 221, action on the official bond of a national bank cashier. *Creamer v. Mitchell*, 162 N. Y. 477, 56 N. E. Rep. 977, affirming 42 N. Y. Supp. 207, on guaranty of payment of royalties. *Hernly v. Brannum*, 23 Ind. App. 388, 55 N. E. Rep. 512, in which case a note reduced by payments to about \$1,000, was held to be sufficiently de-

scribed in the contract of guaranty as a note for \$1,000. *Dobell & Co. v. Green & Co.*, 1 L. R. Queens Bench 1900, 526; *Kastner v. Winstanley*, 20 Up. Can. Com. P. 101; *White v. Reed*, 15 Conn. 457; *Locke v. McVean*, 33 Mich. 473; *Crist v. Burlingame*, 62 Barb. (N. Y.) 351; *First Nat. Bank of Baltimore v. Gerke*, 68 Md. 449; *Weiler v. Henarie*, 15 Oreg. 28. Rule applied that error in grammar and composition will not affect the validity of a bond: *First National Bank v. Wallace*, Tex. Civ. App., June, 1901, 65 S. W. Rep. 392. In *N. K. Fairbank Co. v. American*

Bonding & Trust Co., Mo. App., Dec., 1902, 70 S. W. Rep. 1096, the Hogan Printing Co., in order to obtain the job of printing wrappers for the Fairbank Co., gave to the Fairbank Co. its bond with the American Bonding & Trust Co. as surety, reciting that the Fairbank Co. was to furnish the Hogan Co. the paper for such wrappers and conditioned that "if the said James Hogan Printing Company shall in any manner or by any means misuse, misappropriate, or misapply said paper or plates, or in any manner dispose of same, or convert them to their own use, amounting to a larceny or embezzlement of said paper and plates, then this bond to be of full force and effect; otherwise to be void, conditioned that said N. K. Fairbank Company shall not hold the said James Hogan Printing Company for any loss that may be occasioned by them owing to destruction by fire, cyclone, or other act of God." The Hogan Co. having used 320 reams of the Fairbank Co.'s paper in doing work for other persons, it was held that the surety was liable, even though the taking did not amount to the crime of larceny or embezzlement. Construing the language quoted the court, Goode, J., said: "Its effect was to raise a liability in two contingencies: If the Hogan Company should in any manner, or by any means, misuse, misappropriate, or misapply the paper, or should in any manner amounting to larceny or embezzlement dispose of the same, or convert it to its own use. We think the intention of the instrument was to make any misuse a misappropriation of the paper turned over to the printing company by the Fairbank Company a breach of the bond, and to protect

the bailor against all wrongful acts of the bailee in using the former's property, whether such acts constituted a crime or not. This interpretation is enforced by the last clause of the condition which exempts the printing company, and, of course, its surety, from any loss occasioned by fire, cyclone, or other act of God, thus specifying losses which the bond was not to cover." Citing *Beers v. Wolf*, 116 Mo. 179, 22 S. W. Rep. 620, action on a building contract; *State v. Tittman*, 134 Mo. 162, 35 S. W. Rep. 579, action on the bond of a curator of property conditioned for the faithful discharge of his duties, holding the sureties liable for attorneys' fees and expenses of setting aside an incumbrance fraudulently put on the property by their principal, and *Harburg v. Kumpf*, 151 Mo. 16, 52 S. W. Rep. 19. Note 69, § 107, post. In *Guaranty Co. of North America v. Mechanics Savings Bank & Trust Co.*, 100 Fed. Rep. 559, 40 C. C. A. 542, the surety on the bond of a bank cashier conditioned for the payment of losses that might result from his fraudulent acts equivalent to larceny or embezzlement, was held not to be liable for losses to the bank caused by his permitting depositors to overdraw their accounts. In *Lamb v. Ewing*, 54 Fed. Rep. 269, 4 C. C. A. 320, the clerk of the U. S. C. C., in Nebraska, was ordered to distribute the proceeds of the sale of certain real estate, taking from each payee a bond conditioned for the refunding of the money paid if the order of confirmation of the sale should be reversed by the U. S. Supreme Court. The order of confirmation was never taken to the supreme court, either by appeal or writ of error, but in an inde-

pendent ejectment suit by the purchaser of the land sold, the U. S. Supreme Court decided that the state statute under which the sale was made was not applicable and that the sale was therefore void. The sureties insisted that they might stand on the very letter of their bond and that since no appeal had been taken from the order of confirmation there was no breach and therefore no liability. But the court held that it made no difference how the question reaches the supreme court. The whole proceeding leading up to the sale had been declared void and that was a most effectual reversal of the order of confirmation. There was a breach of the bond from the time of the supreme court's decision, and the sureties were liable. In *Tolleson v. Jennings*, 60 Ark. 190, 29 S. W. Rep. 276, all the stockholders in a canning company executed a bond conditioned that they would, in proportion to the par value of their stock, contribute to pay to certain of their number who had endorsed the company's note for \$5,000 enough money to reimburse them for any money which they, as endorsers, might be compelled to pay, in the event that the company did not meet its note. The company having failed to pay its note at maturity, all but three of the stockholders contributed to the secretary, in proportion to their stock, and with the money so raised the note was paid. Held, that the non-paying stockholders could not be forced to contribute, since the others had not been compelled to pay as endorsers. In *United States v. McAleer* (S. Dak.), 68 Fed. Rep. 146, 15 C. C. A. 326, defendant McAleer proposed to furnish the United States at Ft. Meade, Dakota, specified

quantities of corn, oats and hay at specified prices and gave a bond reciting such proposal and conditioned that, if the award should be made to him within 60 days, he would "duly and formally enter into such contract agreeably to the terms of said proposal and into such bond for its due performance as shall be required of him." The contract for hay alone was awarded to him and he refused to enter into contract to furnish it. Held, that his sureties were not liable. "The proposal of McAleer was never accepted," said the court. "The fact that a third or some like proposition of it was accepted, and two-thirds of its was rejected constitutes no acceptance of it. \* \* The acceptance of part and the rejection of another part of a proposal is no more an acceptance of it than the rejection of the whole." In *Fairbanks v. Owensboro Wagon Co.*, 72 Ill. App. 530, Garver had signed an order on appellee for wagons, agreeing to give his notes in part payment. Appellant, who was cashier of a local bank, replying to appellee's letter, wrote: "We have no hesitancy in saying to you we will see to the prompt payment of his notes to you." Thereupon the wagons were shipped by appellee. It was held that appellant Fairbanks was liable for the unpaid balance of Garver's account, though no notes were in fact given by Garver. In *Hartman v. Ruby*, 16 App. Cas. (D. C.) 45, a party exchanging three pieces of city property, all mortgaged to the aggregate amount of \$14,000, for an unencumbered farm guaranteed that he would sell the city property for not less than \$17,000 for the party trading the farm. Held, that he became bound thereby to sell the city property

therein referred to or executed as part of the same general transaction are read together and considered with all the surrounding circumstances.<sup>34</sup> The presumption is that the guar-

for \$17,000, over and above the amount of the incumbrances. See also *Barnes v. Cushing*, 61 N. E. Rep. 902; note 74, § 108.

<sup>34</sup>In *People v. Clough*, 2 Colo. Dec. 639, Colo. App., Feb., 1901, 63 Pac. Rep. 1066, it was held that a bond given by a purchaser of state lands conditioned that he would well and faithfully comply with all the terms of the certificate of purchase issued to him by the Register of the State Board of Land Commissioners, made such certificate a part of the bond and that inasmuch as it did not appear, in a suit on the bond, that the purchaser had not surrendered the land to the state and so escaped all further liability, as he might have done under the terms of the certificate, there could be no recovery on the bond, or a recovery of only nominal damages. In *Meriwether v. Lowndes County*, 89 Ala. 362, 7 So. Rep. 198, it was held that a bond conditioned that a certain bridge built by the principal should be "kept in good repair" by him and "remain safe" for 5 years from its acceptance bound the obligors to rebuild it though it was washed away by an unprecedented flood. In *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. Rep. 381, an assignee for the benefit of creditors gave a bond in the penal sum of \$250,000, reciting that, by the deed of assignment, the principal had been appointed "trustee for the purposes therein expressed," and conditioned for the performance by the principal of "all his duties as such trustee according to law." Held, that the bond must be construed as if the word assignee had been

used in place of trustee. Quoting from *Knisely v. Shenberger*, 7 Watts (Pa.) 193, the court said that "where the meaning and intention of the parties are perfectly plain, no grammatical inaccuracy or want of the most appropriate words shall render the instrument unavailing." In *McDonald v. Harris*, 75 Ill. App. 111, a guaranty upon a lease running five years at \$600 per month read as follows: "For value received I guarantee the payment of the above lease as specified. (Signed) M. C. McDonald." After quoting the text (§ 103) the court says (p. 118): "Upon examination of the lease it is seen that the only payment provided for is of rent, taxes, assessments and water rates, and it is covenanted that these payments are to be made by the lessee. Evidently it was the intent of the guarantor to guarantee the payment of rent by lessee." A bond for the release of an attachment was conditioned for the payment of any judgment that might be obtained against the principal. The principal died. Held, the surety was liable for a judgment obtained against his administrator. *Sharpe v. W. J. Morgan Co.*, 144 Ill. 382, 33 N. E. Rep. 22. In *Tolman Co. v. Rice*, 164 Ill. 255, 45 N. E. Rep. 496, Rice, the defendant, guaranteed "the payment to John A. Tolman Co. of any and all moneys collected by Edward W. Otstott for account of John A. Tolman Co. and of all moneys which they may from time advance to said Edward W. Otstott and any and all indebtedness now due, or which may

hereafter become due John A. Tolman Company in excess of the amount due said Edward W. Otstott as per the present or any future agreement between said John A. Tolman Company and said Edward W. Otstott." The only agreement shown in evidence between Otstott and the Tolman Co. provided that Otstott should, as traveling salesman, receive 50 per cent of the profits less certain losses, and "pay his own expenses and furnish his own sample cases." The only default in evidence was his failure to repay \$516.81 "advanced." The court held that the contract of employment must be construed as a limitation on the guaranty and that there could be no advances under that contract because it provided that the salesman should pay his own expenses. Therefore any advances made to him must be considered as a loan for which the guarantors did not assume responsibility. See also *Bartlett v. Wheeler*, 195 Ill. 445, 63 N. E. Rep. 169, affirming 96 Ill. App. 342; *Brown v. Markland*, 22 Ind. App. 652, 53 N. E. Rep. 295; *Kurtz v. Forquer*, 94 Calif. 91, 29 Pac. Rep. 413; *Jenkins v. Phillips*, 18 Ind. App. 562, 48 N. E. Rep. 651; *Tyrer v. Chew*, 7 App. Cas., D. C., 175; *John A. Tolman Co. v. McClure*, 10 Ind. App. 28, 37 N. E. Rep. 289; *Lee v. Butler*, 167 Mass. 426, 46 N. E. Rep. 52. Limitations as to time are enforced as in other contracts. In *Mayor and Council of Brunswick v. Harvey*, 114 Ga. 733, 46 S. E. Rep. 754, a city treasurer, instead of the statutory bond, gave the fidelity bond of a surety company. "It limited the term for which it should continue to the year intervening between Feb. 1, 1898 and Feb. 1, 1899. It ex-

pressly limited the liability of the company to such losses as should occur 'during the continuance of this bond, or any renewal thereof, and discovered during said continuance or within six months thereafter or within six months from the death or dismissal or retirement of the employee from the service of the said employer.' It further provided that any claim should be sent to the president of the company 'immediately after the discovery of any loss for which the company is responsible hereunder, and within six months after the expiration or cancellation of this bond as aforesaid,' and that 'the company upon the execution of this bond shall not hereafter be responsible to the employer under any bond previously issued to the employer on behalf of said employee, and upon the issuance of any bond subsequent hereto upon said employee in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at any one time unless otherwise stipulated between the employer and the company.' Under these conditions and limitations," said the court, "it is clear that the city authorities cannot recover under the original bond. It expired by its own limitations at noon on Feb. 1, 1899. According to the allegations of the petition, the defalcation or fraud of the city treasurer was not discovered until some time in August, 1900. Under our construction of the conditions of the bond, the city authorities had the whole of the year from Feb. 1, 1898, to Feb. 1, 1899, within which to discover any loss for which the company might be liable; and they were also by the contract given



anty was made at the same date as the instrument on which it is indorsed.<sup>35</sup> When specific terms are followed by a general term, the general term is restricted to things of the same kind or class and general terms are controlled by recitals as to the purpose of the parties.<sup>36</sup> The rule that in construing a

the next ensuing six months to discover any loss which had occurred during that year and to inform the company of the discovery. The loss, as matter of fact, was not discovered until Aug. 21, 1900, after much more than six months had elapsed from the expiration of the original bond. For this reason the company is not liable to the city on that bond." That surrounding circumstances may be taken into consideration where the contract is not clear, see *Donnelly v. Newbold*, Md., Dec., 1901, 50 Atl. Rep. 513; *Hooper v. Hooper*, 81 Md. 169, 31 Atl. Rep. 510, 48 Am. St. Rep. 500; *Lee v. Butler*, 167 Mass. 426, 46 N. E. Rep. 52, and cases there cited. But where the writing is perfectly clear and unambiguous, parol evidence of surrounding circumstances as an aid to construction, is held not admissible. *Henry McShane Co. v. Padian*, 142 N. Y. 207, 36 N. E. Rep. 880. The circumstance that another bond is required by law for certain acts of the principal that fall within the general language of a bond already provided for is often of great importance in determining the liability of the sureties on the first bond. In *United States v. National Surety Co.*, 112 Fed. Rep. 336, defendant was sued as surety on the "annual" bond of a distiller, required by § 3260, Rev. Stat. U. S., conditioned that the principal "shall in all respects faithfully comply with all the provisions of law in relation to the duty and business of distillers and shall pay all penalties incurred or fines imposed on him for

a violation of any of the said provisions." Breach: that certain spirits produced by the principal, after he had deposited them in the warehouse, were removed therefrom by him without the payment of the taxes due thereon to the United States. Defence: that failure to pay said taxes was covered by the "warehouse bond" given by the principal, and that the annual bond was not liable for failure to pay them and that plaintiff had recovered on the warehouse bond. Reply: that principal on the warehouse bond was dead and his estate insolvent and that the surety thereon was hopelessly insolvent. Held, on demurrer to the reply, that the annual bond was not liable for non-payment of the taxes, that the distiller had fulfilled his "duty" within the meaning of the annual bond when he placed the spirits in the warehouse and that the United States, like an individual, must stand the consequences of accepting an insufficient surety on the warehouse bond, the chief purpose of which bond was to insure collection of the taxes.

<sup>35</sup> *Fidelity & Casualty Co. v. Van Dyke*, 99 Ga. 542, 27 S. E. Rep. 709; *McDonald v. Harris*, 75 Ill. App. 111, at 119.

<sup>36</sup> In *Foerderer v. Moors* (Pa.), 91 Fed. Rep. 476, 33 C. C. A. 641, appellant, in guaranteeing the contract of the Keen Sutterle Co. to repay moneys advanced to buy goods, wrote, "And I consent that you may, in your discretion, afford said Keen Sutterle Co. such favors, by way of extension, re-



written contract words are to be taken most strongly against the party using them applies to the contract of a surety or guarantor as well as to other contracts. And where the instrument is fairly susceptible of two constructions, one of which would leave the obligee without remedy and the other of which would carry out the evident purpose for which the contract was required and entered into, the latter will be adopted rather than the former.<sup>37</sup> Questions of construction

newal and otherwise, as you may deem expedient." Held, Acheson, J., "according to the accepted rules of construction, the favors to be afforded under the word otherwise would be of like kind with extensions and renewals," and that a complete surrender of all safeguards provided by the contract of guaranty was not thereby consented to. In *Guaranty Savings & Loan Assn. v. Rutan*, 6 Ind. App. 83, 33 N. E. Rep. 210, defendant having borrowed money with which to build on a certain lot, gave to plaintiff, the lender, a bond with sureties, reciting the loan and its purpose and conditioned that the borrower "shall pay all just claims for all work done and to be done, and all material furnished and to be furnished, in the erection or repair of said building, as such claims shall become due, and shall save the said \* \* association harmless from all claims against the premises, of whatever kind or nature, that may affect its interests as mortgagee." The borrower, in fact, had no title to the land upon which the money was borrowed. Held, that the sureties on the bond were not liable for loss resulting from that fact. The intent of the bond was to protect the lender against mechanics' liens and the general words must be read with reference to that intent. See also *Spencer v.*

*Holman*, Wis., Feb., 1902, 89 N. W. Rep. 132. In *Canton Institution for Savings v. Murphy*, 156 Mass. 305, 31 N. E. Rep. 285, an executor gave a bond to plaintiff bank reciting that his testator had a deposit of \$578 in plaintiff bank, and that he desired to withdraw it, but could not find decedent's bank book and conditioned to save the bank harmless "from and against any and all claims of any other person or persons to said deposit." It turned out that the deposit belonged to another person of the same name as plaintiff's testator. Held, that the general words in the bond were controlled by the recitals, and that the sureties were not liable. "It may even be doubted also," said Morton, J., "whether the bond is not void on account of the mistake under which the parties to it labored as to the existence of the deposit to which it related," citing to this point *Conant v. Newton*, 126 Mass. 105. But see *Australian Joint Stock Bank v. Bailey*, L. R., 1899, App. Cas. 396, cited more fully in note to § 108. That the condition prevails over recitals which are mere matters of inducement, see *Miner v. Rodgers*, 65 Mich. 225; *Adler v. Potter*, 57 Ala. 571.

<sup>37</sup> *Shine's, Admr., v. Central Savings Bank*, 70 Mo. 524, cited and followed in *Hurley v. Fidel-*

are for the court; questions of performance or not are for the jury.<sup>38</sup> It has been held that a guaranty of a specified portion of a debt is satisfied out of the first payments upon the debt unless there is something to show an intention to apply the payments otherwise.<sup>39</sup>

ity and Deposit Co., Mo. App., June, 1902, 68 S. W. Rep. 958, in which case a bond to secure payment by a street railway company of twenty-four monthly instalments to a street paving contractor contained a provision "that said surety shall be notified in writing of any act on the part of said principal or its agents or employes which may involve a loss for which the said surety is responsible hereunder immediately after the occurrence of such act \* \* ." The contractor allowed four instalments to become in arrears before he notified the surety. Held, that the surety was liable, nevertheless. The court said that the words quoted should be considered as referring to the railway's agreement with the contractor to prepare the foundation for the paving one block in advance of the pavers and not to its failure to pay the agreed instalments. Citing also the leading case of American Surety Co. v. Pauly, 170 U. S. 160, 18 Sup. Ct. Rep. 563, 42 L. Ed. 987. See also City Trust etc. Co. v. Lee, 204 Ill. 69, 68 N. E. Rep. 485.

<sup>38</sup> In McCormick Harvesting Machine Co. v. Laster, 81 Ill. App. 316, debt on the bond of a selling agent, it was held that "it was the duty of the court, and of the court alone, to construe the contract and the bond, and give meaning to the words and terms used in them. \* \* The question of performance of a contract should not be left to the jury

without a construction of the contract by the court." Citing Keeler v. Herr, 157 Ill. 57. "Where the contract is in writing it is for the court to state its meaning, and it is only where there is a doubt as to the proper meaning of the contract arising from the ambiguity of the words or phrases used, that the acts of the parties are looked to for construction." Davis v. Sexton, 35 Ill. App. 407.

<sup>39</sup> In Fidelity and Casualty Co. v. Van Dyke, 99 Ga. 542, 27 S. E. Rep. 709, Van Dyke, without date, signed the following writing on the back of Raymond's note to the order of plaintiff company for \$360.10: "I agree to see that \$150 of the within note is paid." The declaration showed that three payments aggregating \$155.82 had been made on the note before its maturity. Held, that Van Dyke's demurrer to the declaration was properly sustained. "Whether Van Dyke be treated as a surety or guarantor," said the court, "his agreement amounted to nothing more than an engagement upon his part that the maker of the note should pay at least \$150 upon the sum for which it was given. When that sum was paid by the maker, Van Dyke was discharged. This sum was paid before the institution of the suit, and it was urged in reply to the demurrer, that it did not appear that the indorsement under which Van Dyke bound himself was made before the payment of that sum. The presumption would be, inasmuch

**§ 104. Construction of the contract continued.**—It has been said that letters of credit and commercial guaranties should not be construed the same as bonds, which are usually entered into with deliberation.<sup>40</sup> but that they “ought to receive a liberal interpretation. By a liberal interpretation we do not mean that the words should be forced out of their natural meaning, but simply that the words should receive a fair and liberal interpretation, so as to attain the object for which the instrument is designed and the purposes to which it is applied. We should never forget that letters of guaranty are commercial instruments generally drawn up by merchants in brief language; sometimes inartificial, and often loose in their structure and form; and to construe the words of such instruments with a nice and technical care would not only defeat the intentions of the parties, but render them too unsafe a basis to rely on for extensive credits, so often sought in the present active business of commerce throughout the world.”<sup>41</sup> This whole subject has been thus ably summarized: “In guaranties, letters of credit and other obligations of sureties, the terms used and language employed are to have a reasonable interpretation, according to the intent of the parties, as disclosed by the instru-

as he undertook to guarantee a specific portion of the debt, that his engagement was entered into at the time of the execution of the note. \* \* There being no allegation in the declaration that the indorsement was made after the payment of the sums credited upon the note, and its appearing that the sum guaranteed by the defendant has been paid by the maker, the declaration as against the guarantor, sets forth no cause of action, and was properly dismissed on demurrer.”

<sup>40</sup> Bell v. Bruen, 1 How. (U. S.) 169, per Catron, J.

<sup>41</sup> Lawrence v. McColmont, 2 How. (U. S.) 426, per Story, J. “No far-fetched equities nor overstrained constructions are allowable as against sureties.” Ryan v. Williams, Adm’r, 29 Kan. 487, 497; McCasland v. O’Brien, Green

& Co., 57 Ill. App. 636. In Graham v. Farmers and Merchants’ Bank, 116 Calif. 463, 48 Pac. Rep. 384, plaintiff guaranteed three drafts of \$150 each on the consignee of three specified car loads of oranges. Held, that he was not bound to honor drafts on the same consignee covering other carloads which were shipped to Ruhlman instead of those specified, and that defendant bank cashed the latter at its own risk. In Aultman, Miller & Co. v. Roemer, 112 Iowa, 651, 84 N. W. Rep. 668, defendant guaranteed payment of certain notes if “at any time” his obligee should find that the makers were not good. Held, that “at any time” meant within a reasonable time, and question of fact for the jury whether delay of 3, 4 and 5 years relieved the guarantor.

ment read in the light of the surrounding circumstances and the purposes for which it was made. If the terms are ambiguous, the ambiguity may be explained by reference to the circumstances surrounding the parties, and by such aids as are allowable in other cases, and if an ambiguity still remains, I know of no reason why the same rule which holds in regard to other instruments should not apply; and if the surety has left anything ambiguous in his expressions, the ambiguity be taken most strongly against him.<sup>42</sup> This certainly should be the rule to the extent that the creditor has in good faith acted upon and given credit to the supposed intent of the surety. He is not liable on an implied engagement, and his obligation cannot be extended by construction or implication beyond the precise terms of the instrument by which he has become surety. But in such instruments the meaning of written language is to be ascertained in the same manner and by the same rules as in other instruments, and, when the meaning is ascertained, effect is to be given to it.<sup>43</sup> It has been held that a bond conditioned

<sup>42</sup> To this effect see, also, *Bailey v. Larehar*, 5 R. I. 530; *Mayer v. Isaac*, 6 Mees. & Wels. 605; *Mason v. Pritchard*, 12 East, 227; *Hargreave v. Smee*, 6 Bing. 244; *Wood v. Priestner*, Law Rep. 2 Exch. 66; *Hoey v. Jarman*, 39 N. J. Law (10 Vroom), 523.

<sup>43</sup> *Belloni v. Freeborn*, 63 N. Y. 383, per Allen, J. On same subject, and to same effect, see *Douglass v. Reynolds*, 7 Pet. (U. S.) 113; *Russell v. Clark's Ex'r*, 7 Cranch, 69; *Wills v. Ross et al.*, 77 Ind. 1; *Victor Sewing Machine Co. v. Crockwell*, 3 Utah Ter. 152; *Allen v. Central Savings Bank*, 4 Mo. App. 66. See also cases cited in notes to preceding section. In *Cameron v. Borcas*, Tex. Civ. App. Dec., 1902, 71 S. W. Rep. 423, an indemnity bond given to a life insurance company upon its payment of the amount of a certain policy was conditioned for the payment of "any and all damages, costs, charges or expenses" resulting in

consequence thereof; held, that the obligors were liable for \$200 attorney's fees in defending a suit which was brought to recover upon the policy, and 12 per cent damages allowed therein in addition to the face of the policy. In *Barclay v. Warne*, 143 Ill. 19, 32 N. E. Rep. 175, appellants had guaranteed that Gould & Hugg, in operating a cheese factory on the dividend plan would pay their patrons "the just and full sum of the monthly dividends declared by the said Gould & Hugg to their blackberry patrons for the milk delivered thereat and shown by their books to be such patrons due." After the execution of this contract Gould & Hugg took milk from their patrons on a different plan, paying specified amounts instead of a portion of the proceeds. It was held that the sureties were not bound by the new arrangement, even though it might be within the strict literal terms of their

for the faithful performance of an employee's duties guarantees not only his honesty but also a reasonable degree of skill.<sup>44</sup> A bond conditioned to pay damages includes exemplary damages.<sup>45</sup> It has been held that a guaranty of interest binds the guarantor for interest accruing after the principal debt has

contract of suretyship. "The rule that a security has a right to stand upon the literal terms of his contract," said Baker, J., speaking for the court, "is one that prevails for his benefit, and to adopt a literal interpretation when it would work him an injury would be to work a perversion of the rule. A technical construction is never adopted for the purpose of imposing a burden on his shoulders. The general rule that governs in the interpretation of contracts, that the object is to ascertain the real intention and meaning of the parties, is the rule that is to be applied against these appellants." Compare *City Trust Co. v. Lee*, note 69, § 107, post. In *United States v. Lipkis* (U. S. D. C., N. Y.), 56 Fed. Rep. 427, defendant, who had given a bond conditioned that a certain immigrant should not become a public charge within five years, was held liable upon the immigrant's becoming insane and helpless, though neither party had thought of insanity. See also *Maine Red Granite Co. v. York*, 89 Me. 54, 35 Atl. Rep. 1014.

<sup>44</sup> In *Fiala v. Ainsworth*, Neb., Nov., 1901, 88 N. W. Rep. 135, it was held that the condition in the bond of an assistant cashier in a bank that he would "honestly, faithfully and efficiently discharge the duties of such position" made the sureties thereon guarantors not only of his honesty, but also his "competency, efficiency and diligence in the discharge of his duties." Citing *Minor v. Meehan-*

*ics' Bank of Alexandria*, 1 Peters, U. S. 46, annotated in 7 L. Ed. 47, in which case the words "well and truly" in a bank cashier's bond were held (p. 67) to import an engagement by the sureties that their principal would not only do his work honestly, but also with "competent skill and reasonable diligence," and *President &c. American Bank v. Adams*, 12 Pick. (29 Mass.), 303, in which case the court said that the condition in a bank teller's bond that "he shall faithfully perform" the duties of his office "binds the obligors to a responsibility for reasonable and competent skill and due and ordinary diligence in the performance of his office." In *Dorsey v. Fidelity & Casualty Co.*, 98 Ga. 456, 25 S. E. Rep. 521, it was held that a bond conditioned that certain employees of plaintiff as receiver of a railroad should "faithfully and honestly discharge their duties \* \* account for all moneys" subsequent to date, does not make the insurer liable for money due the receiver from one of such employees on account of a loss caused by his wrongful delivery of freight prior to the execution of the bond, which money remained due after its execution.

<sup>45</sup> In *Breeding v. Jordan*, 115 Iowa, 566, 88 N. W. Rep. 1090, the bond of a saloonkeeper was conditioned for the payment of damages "that may result from the sale of intoxicating liquors upon the premises." Held, that the sureties were liable to plain-

been barred by the statute of limitations.<sup>46</sup> Usually the surety is not liable for penalties incurred by the principal by breach of his obligation.<sup>47</sup> In the absence of statute provision otherwise, where several obligors join in executing a single bond, it is treated as their joint obligation.<sup>48</sup> Parol evidence is inadmissible to vary the terms of a written guaranty.<sup>49</sup> Whether time is of the essence of a contract of guaranty is determined on the same principles as apply to other contracts.<sup>50</sup>

tiff for damages resulting from the intoxication of her husband caused by the principal's selling him liquor after notice to desist, including exemplary damages.

<sup>46</sup> In *Parr's Banking Co., Lim., v. Yates*, L. R. 2, Q. B., 1898, 460, at 466, held, that a guaranty of payment of certain money "with interest" made the guarantors liable for interest accruing within the last six years, though the principal debt was barred by the statute of limitations. The court said that the interest was guaranteed not merely as accessory to the principal. Contra, in *Rector v. McCarthy*, 61 Ark. 420, 33 S. E. Rep. 633, 31 L. R. A. 121, 54 Am. St. Rep. 271, the defendants wrote upon a note: "We guaranty the payment of the interest on the above note (signed), McCarthy & Joyce." Held, they were liable for interest to maturity only. Citing and following *Hamilton v. Van Rensellaer*, 43 N. Y. 244, and *Melick v. Knox*, 44 N. Y. 676. See also *Hamilton v. Van Rensellaer*, 43 N. Y. 244, and *Bousquet v. Ward*, Iowa, Feb., 1902, 89 N. W. Rep. 196, to same effect.

<sup>47</sup> Thus, in *Salomon v. People*, 89 Ill. App. 374, the surety on an administrator's bond was held not liable for a 20 per cent penalty imposed by statute on the principal for failing to turn money of the estate over to his successor on de-

mand. Affirmed in 191 Ill. 290.

<sup>48</sup> In *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. Rep. 381, a bond reading, " \* \* Now, therefore, we, John B. Mannix, John Holland, George Hoadly, Charles Stewart and Michael Walsh, undertake and bind ourselves \* \* " was construed as a joint obligation, in which, at common law, the release of one surety operates to discharge all who did not consent thereto.

<sup>49</sup> So as to show, for instance, that the guarantors of a mortgage indebtedness agreed to pay only such deficiency as might remain after sale of the mortgaged property. *Adams v. Wallace*, 119 Calif. 67, 51 Pac. Rep. 14. It is held that a guaranty is unconditional unless by its terms a condition precedent to its taken effect appears. *Pierce v. Merrill*, 128 Calif. 464, 61 Pac. Rep. 61, guaranty of corporation's debt secured by second mortgage. Held, not conditional on foreclosure of the second mortgage. But parol evidence is admissible to show that the goods guaranteed were furnished. *Worcester Coal Co. v. Utley*, 167 Mass. 558, 46 N. E. Rep. 114.

<sup>50</sup> In *Cabot v. Kent*, 20 R. I. 197, 37 Atl. Rep. 945, defendant, upon selling stock, guaranteed 6 per cent dividends and agreed "also to take back said stock and pay par therefor upon January 1st,



**§ 105. Construction continued—Instances—Effect of statutes.**

—An Indiana statute provides that no official bond and no bond taken by any officer in the discharge of his duties “shall be void for want of form or substance or recital or condition nor the principal or surety be discharged; but the principal and surety shall be bound to the full extent contemplated by the law requiring the same, and the sureties to the amount specified in the bond or recognizance.” The plaintiff in a replevin suit gave a bond conditioned to return the property “if a return thereof be adjudged by the court” and then dismissed his suit. Held, that the effect of the statute was to read into the bond a condition that plaintiff would prosecute his suit with effect and that the sureties were liable upon his failure to do so.<sup>51</sup> It has been held that words will be read into a bond required by statute for the protection of the public whenever it is necessary to do so in order to give effect to the obvious intent of the parties.<sup>52</sup> It has been held that a guaranty of payment of dividends on stock in a corporation which is indefinite as to time will be limited by construction to a reason-

1895, should you so elect.” Held, that time was of the essence of the contract and that defendants were not bound to take back stock that was not presented on the specified date.

<sup>51</sup> *Rauh v. Waterman*, 29 Ind. App. 344, 61 N. E. Rep. 743; *State v. Fletcher*, 1 Ind. App. 581, 28 N. E. Rep. 111.

<sup>52</sup> *Dowiat v. People*, 193 Ill. 264, was debt on a bond given under the Illinois dram shop act to recover damages for the death of plaintiff's intestate, in consequence of defendant's sale to him of intoxicating liquors. The statute required that the bond should be conditioned to “pay to all persons all the damages they may sustain, either in person or property, or means of support by reason of the person so obtaining a license, selling or giving away intoxicating liquors.” The bond in question was conditioned that the licensee

“shall pay to all persons all damages that they may sustain, either in person or property or means of support, by reason of the above bounden Peter Dowiat, obtaining a license as aforesaid for selling or giving away intoxicating liquors.” The court, in affirming a judgment for \$3,000 against defendants, said (p. 267): “While the obligations of sureties are strictissimi juris, they are bound by the obvious import and intent of their contracts. Contracts should be so construed as to give effect to the intention of the parties, and not to defeat it, and where that intention is sufficiently apparent, ‘effect must be given to it in that sense, though violence be done thereby to its words for greater regard is to be had to the clear intent of the parties than to any particular words which may have been used in the expression of the intent.’” Citing *Walker v.*



able time.<sup>53</sup> It has been ruled that where the guaranty is that the debt of the principal shall be paid upon demand, the guarantor is liable the moment a demand is made and refused.<sup>54</sup> It is held also that the guarantor becomes liable the moment that his principal puts it out of his power to perform his engagement.<sup>55</sup> An agreement to "protect" the account of another is broken the moment that default occurs from any cause.<sup>56</sup> The guarantor of a purchase money note is not, where the principal's contract has been rescinded by the vendor for non-performance, liable in damages for the principal's breach of his contract.<sup>57</sup> Under a Minnesota statute a

Douglas, 70 Ill. 445; *Torrence v. Shedd*, 156 Ill. 194. See also *Ramsay v. People*, 97 Ill. App. 283. Statutory bonds differ from voluntary bonds in that the statute can be read into the former and not into the latter. *Mayor of Brunswick v. Harvey*, 114 Ga. 733, 40 S. E. Rep. 754.

<sup>53</sup> *Rotch v. French*, 176 Mass. 1, 56 N. E. Rep. 893.

<sup>54</sup> *Gardner v. Donnelly*, 86 Calif. 471, 25 Pac. Rep. 17.

<sup>55</sup> In *Bagley v. Cohen*, 121 Calif. 604, 53 Pac. Rep. 1117, Gould gave his note to plaintiff as follows: "On or before sixty days, I, E. H. Gould, do hereby agree to pay to F. S. Bagley, or order, out of the profits realized by me from my business of packing raisins at Malaga, during the present season, the sum of \$310 in gold coin of the United States of America. Dated Fresno, September 12, 1894 [Signed] E. H. Gould [seal]" and underneath was the following, "I, E. A. Cohen, do hereby guarantee the payment of the foregoing note in accordance with the conditions thereof. [signed] E. A. Cohen [seal], by L. L. Cary, Agent, Edgar A. Cohen, J. B. Cohen." Ten days after giving the note, Gould sold and conveyed all his right, title

and interest in his business of packing raisins at Malaga, so that he could not realize any profits therefrom. Held, that Gould's liability became fixed and absolute by said sale and that, upon his failure to pay, the Cohens became immediately liable as guarantors for the amount of the note. This was on appeal from an order refusing to open a default. As to the principle, see *Clark on Contracts*, 2d ed. (1904), § 241 and notes; *Bishop Contracts*, § 1426; *Wharton Contracts*, § 885a.

<sup>56</sup> In *Robbins v. Robinson*, 176 Pa. St. 341, 35 Atl. Rep. 357, in consideration that plaintiff would extend credit to the amount of \$40,000 to the Philadelphia Optical and Watch Co., defendant agreed to "protect any bill" it might buy of plaintiff. The court held that the words quoted were broad enough to cover any failure of the watch company to pay, no matter what the reason, unless it went to the merits of the plaintiff's claim.

<sup>57</sup> In *Glassell v. Coleman*, 94 Calif. 260, 29 Pac. Rep. 508, Coleman guaranteed the note of Wilson for part purchase price of certain land, given in pursuance of a written contract for the purchase thereof. The vendor forfeited the

liquor dealer before obtaining license must give a bond conditioned that he shall not sell liquor on Sunday or on election day or to minors, students or habitual drunkards, and shall observe all the terms and conditions of the local ordinances. It was held by a divided court that a breach of the bond authorized a recovery by the state, or by any individual, of any actual damages that might result therefrom, and did not work a forfeiture of the amount of the penalty. It was therefore held that when a saloonkeeper had been fined for selling liquor to minors and had paid his fine there could be no recovery upon the bond.<sup>58</sup> In Rhode Island it was held that the penalty of such a bond may be recovered, upon breach, by the officer to whom it ran as obligee or by his successor in office, and without any previous conviction of the principal.<sup>59</sup>

contract for non-payment of an instalment. Held, that by so doing he deprived himself of all right to recover on the purchase money note, which defendant had guaranteed, and had only a right of action to recover damages from the vendee for breach of his contract, and that defendant by guaranteeing the note did not make himself responsible for such damages.

<sup>58</sup> *State v. Larson*, 85 Minn. 124, 86 N. W. Rep. 3. The dissenting opinion of Brown and Start, JJ., maintains that the state alone can sue on the bond, and that the recovery for any breach must be the amount of the penalty that a bond required by a statute, running to the state and conditioned for the observance of the law by the principal is not an indemnifying but a penal bond unless the intent that it shall be treated as a bond of indemnity is clearly made to appear. To this effect see also: *Clark v. Barnard*, 108 U. S. 436, 2 Sup. Ct. Rep. 878, 27 L. Ed. 780, in which case a railroad, in compliance with a statute delivered to the state its bond in

the sum of \$100,000, conditioned that it would build its line to a certain point by a certain time and failed; held that, upon non-compliance with the condition, the state was entitled to the full amount of the penalty, and that a court of equity had no power to grant relief. *United States v. Montell*, Taney C. C. Rep. 47, Fed. Cas. No. 15798. *Sparks v. Proprietors of Liverpool Water Works*, 13 Ves. 433; *Peachy v. Duke of Somerset*, 1 Strange, 447; *Powell v. Redfield*, 4 Blatchf. C. C. 45, Fed. Cas. 11,359.

<sup>59</sup> *Granger v. Hayden*, 17 R. I. 179, 20 Atl. Rep. 833; *Tripp v. Norton*, 10 R. I. 525; *City of Providence v. Bligh*, 10 R. I. 208. To the same effect see *Quintard v. Corcoran*, 50 Conn. 34, holding in terms that the full amount of the penalty of a like bond is the measure of damages where the principal has broken his bond by keeping open on Sunday. *Daniels v. Grayson College*, 20 Tex. Civ. App. 562, 50 S. W. Rep. 205. In *People v. Eckman*, 63 Hun. (N. Y.), 209, 18 N. Y. Supp. 654, it was held that a college whose minor stu-

§ 106. **Surety and guarantor favorites in law, and are not chargeable beyond strict terms of their engagement.**—A rule never to be lost sight of in determining the liability of a surety or guarantor is, that he is a favorite of the law and has a right to stand upon the strict terms of his obligation, when such terms are ascertained.<sup>60</sup> This is a rule universally recognized by the courts, and is applicable to every variety of circumstances. Its existence has no doubt given rise to many of the expressions used by courts, when they have said that in construing the contract every intendment should be made in favor of the surety or guarantor, when in fact it should have no controlling influence at all on the construction of the contract. As illustrating the view of this rule, held by the courts, it has been said: “Where any act has been done by the obligee that may injure the surety, the court is very glad to lay hold of it in favor of the surety.”<sup>61</sup> Again: “No principle is more firmly settled in this state than this: that sureties may stand on the very terms of a statutory bond or undertaking. So clearly has this doctrine been announced and acted upon, that it may be regarded as entering into the condition of such an undertaking that it will not be extended by the courts beyond the necessary import of the words used. It will not be implied that the surety has undertaken to do more or other than that which is expressed in such obligation.”<sup>62</sup> Again: “It is now too well settled to admit of doubt that a guarantor, like a surety is bound only by the strict letter or precise terms of the contract

dents were made drunk may sue as a party aggrieved,—citing cases.

<sup>60</sup> *People v. Chalmers*, 60 N. Y. 154; *Chase v. McDonald*, 7 Harr. & Johns. (Md.) 160. “A surety is everywhere in law a favored debtor. He is, moreover, a necessity in many of the most important business transactions of life, both public and private, and the policy of the law is, that he should be favored more than other debtors, since he is, or may be, to a certain extent, powerless to protect himself.” *State v. Churchill et al.*, 48 Ark. 426, 442; *Bartlett v.*

*Wheeler*, 195 Ill. 445, 63 N. E. Rep. 169, per Magruder, J., affirming 96 Ill. App. 342; *Drake v. Sherman*, 179 Ill. 362, affirming 79 Ill. App. 413; *Graham v. Farmers & Merchants Bank of Los Angeles*, 116 Calif. 463, 48 Pac. Rep. 384; *Tolleston v. Jennings*, 60 Ark. 190, 29 S. W. Rep. 276.

<sup>61</sup> *Law v. The East India Company*, 4 Vesey, 824.

<sup>62</sup> *Lang v. Pike*, 27 Ohio St. 498, per Ashburn, J. No covenants that do not appear on the face of a bond can be implied as against the sureties thereon. *Bishop v. Freeman*, 42 Mich. 533.

of his principal, whose performance of it he has guarantied; that he is in this respect a favorite of the law, and that a claim against him is *strictissimi juris*.”<sup>63</sup> Again: “Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent and in the manner and under the circumstances pointed out in his obligation, he is bound, and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may be even for his benefit. He has a right to stand upon the very terms of his contract, and if he does not assent to any variation of it, and a variation is made, it is fatal.”<sup>64</sup> The principle is clearly stated and one of the reasons for it given as follows: “It is a well-settled rule, both at law and in equity, that a surety is not to be held beyond the precise terms of his contract; and except in certain cases of accident, mistake, or fraud, a court of equity will never lend its aid to fix a surety beyond what he is fairly bound to at law. . \* \* This rule is founded upon the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life the aid of one friend to another in the character of surety or bail becomes requisite at every step. Without these constant acts of mutual kindness and assistance the course of business and commerce would be prodigiously impeded and disturbed. It becomes, then, excessively important to have the rule established that a surety is never to be implicated beyond

<sup>63</sup> *Kingsbury v. Westfall*, 61 N. Y. 356, per Gray, C. To similar effect, see *The Markland Mining & Mfg. Co. v. Kimmel et al.*, 87 Ind. 560, 566. *Warrum v. Derry*, 14 Ind. App. 442, 42 N. E. Rep. 1123. *Schlarman v. Kelley*, Vt., Mch., 1902, 52 Atl. Rep. 425. In re *Neffs Estate*, 185 Pa. St. 98, 39 Atl. Rep. 830; *Union Sewer Pipe Co. v. Olson*, 82 Minn. 187, 84 N. W. Rep. 756, on demurrer to complaint on a building contractor's bond. *Byers & Hickman Grain Co.*, 112 Iowa 451, 84 N. W. Rep. 500;

*Schoonover v. Osborne*, 108 Iowa 453, 79 N. W. Rep. 263.

<sup>64</sup> *Miller v. Stewart*, 9 Wheat. 680, per Story, J.; *The Independent District of Mason City v. Reichart et al.*, 50 Iowa, 98; *Tomlinson v. Simpson*, 33 Minn. 443; *Jacksonville R. R. v. Hooper*, 89 Fed. Rep. 620, 29 C. C. A. 382, 52 U. S. App. 579, to the effect that a conditional contract of settlement, the conditions of which are not carried out, will not release the surety on a supersedeas bond.

his specific agreement.’’<sup>65</sup> The application of this rule to the facts of recent cases is shown in a footnote.<sup>66</sup>

<sup>65</sup> Per Kent, C. J. (afterwards Chancellor), in *Ludlow v. Simond*, 2 Caines’ Cas. in Error, 1. See also, remarks of Mr. Justice Swayne in *Magee et al. v. Manhattan Life Ins. Co.*, 92 U. S. 93, 98; and see to like effect, *State v. Churchill*, 48 Ark. 426, 442; opinions of Brickell, C. J., in *City Council of Montgomery v. Hughes*, 65 Ala. 201, 204, and *Blakewell, J.*, in *Fisse v. Einstein*, 5 Mo. App. 78, 86, 87. For miscellaneous cases illustrating the doctrine that the liability of sureties or guarantors cannot be extended by implication or construction beyond the precise terms of their contract, see the following: *Vinyard v. Barnes*, 124 Ill. 346; *People v. Toomey*, 122 Ill. 308; *Burlington Ins. Co. v. Johnson*, 120 Ill. 622; *Dodgson v. Henderson*, 113 Ill. 360; *Second Nat. Bank of Peoria v. Diefendorf*, 90 Ill. 396; *Mix v. Singleton*, 86 Ill. 194; *Burgett v. Paxton*, 15 Brad. (Ill. App.) 379; *Weir Plow Co. v. Walmsley*, 110 Ind. 242; *Irwin v. Kilburn*, 104 Ind. 113; *Noyes v. Granger*, 51 Ia. 227; *Henrie v. Buck*, 39 Kan. 381; *Ryan v. Williams*, 29 Kan. 487; *Edwards v. Ellis*, 27 Kan. 344; *Hays v. Closon*, 20 Kan. 120; *Nat. Bank of Baltimore v. Gerke*, 68 Md. 449; *Shine’s Adm’r v. Central Savings Bank*, 70 Mo. 524; *Sedalia, W. & S. R’y Co. v. Smith*, 27 Mo. App. 371; *Lee v. Hastings*, 13 Neb. 508; *Gunn v. Geary*, 44 Mich. 615; *Robinson v. Epping*, 24 Fla. 237; *Hutchinson v. Woodwell*, 107 Pa. St. 509; *Burson v. Andes*, 83 Va. 445; *Packard v. Herrington*, 41 Kan. 469; *Toombs v. Stockwell*, 127 Mich. 379, 86 N. W. Rep. 806;

*Hudson v. State*, 91 Ga. 553, 18 S. E. Rep. 432; *Hooper v. Hooper*, 81 Md. 155, 31 Atl. Rep. 508; *Tally v. Parsons*, 131 Calif. 516, 63 Pac. Rep. 833.

<sup>66</sup> In *Tate v. People*, 6 Colo. App. 202, 40 Pac. Rep. 471, a sheriff’s official bond was conditioned that he should “well and faithfully perform the duties and calling of said office, according to law and turn over all moneys, books and papers that may come into his hands as such officer to his successors in office.” One of his deputies received certain money, the proceeds of an execution sale, and permitted it to be taken in a garnishment proceeding. Held, that the sheriff was liable for not paying the money over to the judgment creditor, but that, inasmuch as the bond was conditioned to pay all money to his successor in office, who was not entitled to it under the law, the sureties could not be held. The court must take the bond as it is and not as it ought to be. In *City of Sterling v. Wolf*, 163 Ill. 467, 45 N. E. Rep. 218, affirming 61 Ill. App. 515, a sewer builder proposed to build certain sewers and to “furnish such sureties for the faithful performance of such contract, the payment of materials contracted for \* \* as may be approved by the city council.” A contract was entered into by which he agreed to do the work for a certain price, “to furnish all labor, materials and tools necessary to execute the entire work,” and his proposal above quoted was expressly made part of the contract. It was held that defendants, who were sureties

on his bond, conditioned "for the faithful performance of his contract," were not liable for his non-payment of one who furnished brick. The court said: "The rule has been re-announced by this court in almost numberless cases that the undertaking of a surety is strictly construed and may not be extended by implication or construction—that he cannot be held beyond the express terms of his undertaking. The liability is stricti juris. In case of doubt, the doubt is generally resolved in his favor. To hold that it was intended by the parties that the sureties for Real were to become responsible to third parties for all the material, labor and tools employed and used by him in the performance of his contract with the city would be to hold the sureties liable not only beyond the letter of their contract, but make them liable by a most liberal, and we think unjustifiable, construction of their contract." To the same effect: *Dunlop v. Eden*, 15 Ind. App. 575, 44 N. E. Rep. 560. In *Jack v. Sinsheimer*, 125 Calif. 563, 58 Pac. Rep. 130, defendant by a writing contemporaneous with a lease "for the purpose of securing the penalty of \$1,000 therein provided for," guaranteed the payment of that amount to the lessor in case the lessee should be legally evicted. Held, that, under the Code, the penalty clause in the lease was void, because the actual damages were not "impracticable or extremely difficult" to fix and that the guarantor was not bound. The court said (p. 568): "The defendant did not guarantee the rent nor agree that, under any circumstances, he would be responsible for it. He guaranteed the penalty of \$1,000 in case the lessee was le-

gally evicted for non-payment of rent. \* \* The penalty being void, the guarantor is not liable." In *Pittsburgh &c. Ry. Co. v. Keokuk & Hannibal Bridge Co.*, 109 Fed. Rep. 279, 48 C. C. A. 362, it was held that a railway company's guaranty that the earnings of a railroad bridge should amount to a certain sum net "after payment for repairs, maintenance and all the expenses connected therewith, including reasonable cost for operating the bridge and approaches thereto" would cover costs of litigation growing out of maintenance or operation of the bridge, but not litigation to compel the guarantors, severally, to perform their guaranty. In *Foerderer v. Moors*, 91 Fed. Rep. 476, 33 C. C. A. 641, 62 U. S. App. 538,—on Nov. 7, 1895, Foerderer, the defendant, guaranteed that the Keen Sutterle Co. would pay for certain wool "to be shipped to the port of" Philadelphia. Held, that he was not liable for the price of a cargo of wool that had been shipped to Philadelphia three weeks before the date of his guaranty. "These words," said Acheson, J., speaking for the court, "it seems to us, exclude merchandise which had been shipped already. Had the parties meant past as well as future shipments, nothing would have been easier than to say "merchandise shipped or to be shipped." Why the parties named one class of shipments and not the other we need not inquire. It is enough that they did so. The parties having stipulated in respect to "merchandise to be shipped," we must assume that they used the words in their ordinary sense. Having specified shipments to be made, we are not at liberty to read into their contract antecedent ship-



**§ 107. Rule that surety is favorite in law, and rules for construing contract must not be confounded—Parties may practically construe contract.**—The rules for construing the contract of a surety or a guarantor should by no means be confounded with the rule that sureties and guarantors are favorites of the law, and have a right to stand upon the strict terms

ments. Time of shipment was of the essence of the contract, and it is our duty to adhere to the terms the parties have used.” *Welke v. Pabst Brewing Co.*, 74 Ill. App. 152, was an action by the brewing company on a written instrument by which defendants agreed to indemnify it to the extent of \$1,000 for any loss or damage it might sustain by the default of one Normandin to perform an attached agreement in which the brewing company agreed to furnish beer to him at certain rates, “including the freight on beer from Milwaukee, Wis., to Seneca, Ill.” It was held that the sureties could not be held for any loss suffered by the brewery on beer shipped to Normandin at Morris, Carbon Hill or Braidwood. In *Bloomington Mining Co. v. Searles*, 63 N. J. Law, 47, 42 Atl. Rep. 840, defendant guaranteed payment provided that plaintiff would sell the Harrison Coal Co. “coal to an amount not exceeding in value \$900.” Defendant sold it more than that amount. Held, on demurrer, that the guarantor was not bound. The court said that the words quoted are restrictive. “They were intended as a limitation upon the quantity of sales to be made on the credit of the defendants, and the plaintiff lost the benefit of the guaranty by making sales in excess of the stipulated amount.” In *Crego v. People*, 36 Ill. App. 407, defend-

ants guaranteed that their principal, who was conducting a creamery on the monthly dividend plan, would promptly pay all dividends. Held, that one Urch, who had furnished milk by absolute sale without agreement to participate in the dividends, could not hold the sureties for money due him from the principal. *Brooks v. Buie*, Ark., Nov., 1902, 70 S. W. Rep. 464, holding the surety in a retention bond running to plaintiff in forcible detainer, released by the plaintiff’s conveying his interest in the property to another. In *Starr v. Mills*, 180 Ill. 458, in consideration of the conveyance of land to an infant vendee, defendant guaranteed that the infant when 21 years old would ratify his purchase money notes, “and in the event that said Murray J. Milliken shall repudiate or refuse to pay said notes,” defendant agreed to pay the same. The sureties were business men, a banker and a lawyer. It was held, reversing the trial court, that defendants guaranty was not to pay the notes, but only that the minor should ratify them. Same case, *Milliken v. Starr*, 79 Ill. App. 443. In *Hageman v. Holmes*, 179 Ill. 275, the vendor of certain city lots signed a writing, reciting the sale of said land “subject to a special assessment which is now pending on said property,” and agreeing “to pay said costs for the opening of Armour avenue in front of said



of their obligations.<sup>67</sup> There is no legal prohibition against entering into a contract of suretyship or guaranty. For any contract which it is legal to make, it is legal that a surety or guarantor shall become responsible. In the construction of the contract of a surety or guarantor, as well as of every other contract, the true question is: What was the intention of the parties, as disclosed by the instrument read in the light of the surrounding circumstances? The contract of the surety or guarantor being just as legal as that of the principal, there is no good reason for holding that in arriving at the intention of the parties, one set of rules shall govern when the principal, and another when the surety or guarantor, is concerned. To say that a certain set of words in a contract mean one thing when the principal is defendant, and that the same words in the same contract mean another thing simply because the defendant is a surety or guarantor, is absurd. The meaning of the words is not affected by the fact that the party sought to be charged is principal, surety or guarantor. On the other hand, a surety or guarantor usually derives no benefit from his contract. His object generally is to befriend the principal. In

above described property." The ordinance for the opening of Armour avenue was repealed after the execution of this contract and eighteen months later another ordinance was passed to the same effect under which Armour avenue was opened and a special assessment imposed on the property in question of \$2,600.96. The court declined to construe this as an agreement to pay for opening Armour avenue "whenever and however" it should be opened, and treated the repeal of the ordinance as a contingency that neither had taken into consideration, and held that the language of the writing did not bind the signers to pay any but the assessment pending at the time it was signed. Same case, *In re estate of Holmes*, 79 Ill. App. 59.

<sup>67</sup> In *Stevens v. Partridge*, 88 Ill. App. 665, 671, on demurrer to the

declaration in an action on the fidelity bond of a financial agent, Bigelow, J., said: "While the law undoubtedly is that a contract of suretyship is *strictissimi juris*, yet this rule relates to the application of the contract after it has been construed, and not to the construction itself. The contract is to be construed by the same rules as other contracts are. But when this has been done, no acts of the principal that might operate against him in an action on the contract can be put in evidence against the surety, unless he has done some act that helps to practically construe the contract." And in *Ramsay v. People*, 97 Ill. App. 283, the court said that the rule *strictissimi juris* is not applied where it is sought to determine the true meaning of words or terms used and not to enlarge their scope.

most cases the consideration moves to the principal, and he would be liable upon an implied contract, while the surety or guarantor is only liable because he has agreed to become so. He is bound by his agreement, and nothing else. No implied liability exists to charge him. It has been repeatedly decided that he is under no moral obligation to pay the debt of his principal.<sup>68</sup> Being then bound by his agreement alone, and deriving no benefit from the transaction, it is eminently just and proper that he should be a favorite of the law, and have a right to stand upon the strict terms of his obligation.<sup>69</sup> To

<sup>68</sup> *Winston v. Fenwick*, 4 Stew. & Port. (Ala.) 269; *Harrison v. Field*, 2 Wash. (Va.) 136; *Pickersgill v. Lahens*, 15 Wall. 140; *Pecke v. Julius*, 2 Browne (Pa.), 31; *Van Derveer v. Wright*, 6 Barb. (N. Y.) 547; *Hendricks v. Robinson*, 56 Miss. 694; *White v. Moore*, 23 S. C. 456. But in Vermont it is held that the moral obligation resting upon one whose debts have been discharged in bankruptcy is a sufficient consideration for a guaranty of their payment. *Robinson v. Larabee*, 58 Vt. 652. And see, on this subject, *Richardson v. Draper et al.*, 87 N. Y. 337. *Way v. Lewenberg*, 168 Mass. 472, 47 N. E. Rep. 500.

<sup>69</sup> This reasoning is not applicable to surety corporations who become sureties solely for profit, whose contracts are usually drawn by their own counsel and frequently take the form of insurance policies and are, in that case, construed as such. See § 15, *supra*, and notes. The presumption would seem to be that the surety company has received full consideration and has made ample provision for indemnity against loss. It is a well known fact that the indemnity contract often provides that the surety company must contest in court claims against it before the indemnitor becomes liable. The

modern surety company was practically unknown when Mr. Brandt wrote this section. The present tendency is illustrated by a recent case. In *City Trust Safe Deposit & Surety Co. v. Lee*, 204 Ill. 69, 68 N. E. Rep. 485, a fidelity bond prepared by a surety company insured the employer against "loss by reason of the dishonesty or fraud, amounting to embezzlement," of the employee, a collector of rents who was paid with \$10 a week salary, the use of a flat, and a commission of 2½ per cent of the amount collected. It was argued that the surety was not liable because the employee's default could not amount to embezzlement, since he had an interest, to the extent of his commission, in the money collected (*McElroy v. People*, 202 Ill. 473). The court held that the phrase "amounting to larceny or embezzlement" did not qualify the word "dishonesty," but only the word "fraud," and that the surety company was, therefore, liable for any financial loss to the employer through the dishonesty of the employee. The rule was applied that a qualifying phrase is to be confined to the last antecedent unless there is something in the instrument that requires a different construction. Citing, to this point, *Zimmerman v. Willard*, 114 Ill. 364; *Dearborn v. Inhabitants etc.*, 97 Mass. 466;

charge him beyond its terms, or to permit it to be altered without his consent, would be, not to enforce the contract made by him, but to make another for him. The parties themselves may give a practical construction to a guaranty, and that construction will be enforced. Where a guaranty was such that standing alone it would not have been held to be continuing, but the parties had for some time acted upon it as a continuing guaranty, it was held that it should be so construed. The court said: "We have found no case where the parties have been allowed to repudiate any such long standing and unequivocal practical construction of their contract."<sup>70</sup> Evidence by the clerks of a party to whom a letter of credit was addressed, showing that he understood it to be a continuing guaranty, and acted upon it as such, has been held competent in a suit against the writer of such letter. The court said the evidence was competent to show that advances had been made on the faith of the guaranty, if for no other purpose.<sup>71</sup>

**§ 108. Contract of suretyship and guaranty prospective in its operation.**—In conformity to the well-established rule that the liability of sureties on official bonds cannot cover delinquencies prior to the execution of the bond, unless the bond itself states that it shall have retroactive effect, it is held that the ordinary contract of guaranty shall be construed likewise. Thus, where a married woman, to obtain credit for her husband from a wholesale merchant, gave the latter the following guaranty, viz.: "In consideration of your having at my request agreed to supply and furnish goods to (my husband) C., I do hereby guaranty to you the sum of £500. This guar-

Cushing v. Worrick, 9 Gray 382, and State v. Jerrigan, 3 Murphey (N. C.) 18. Compare Barclay v. Warne, 143 Ill. 19, 32 N. E. Rep. 175; note 33, § 103; note 43, § 104.

<sup>70</sup> Per Redfield, C. J., in Michigan State Bank v. Pecks, 28 Vt. 200; St. Paul Title & Trust Co. v. Sabin, 112 Wis. 105, 87 N. W. Rep. 1109, action on a bond, given in a railroad reorganization proceeding for protection against claims, in which the subsequent acts of the parties were considered in determining what claims were

embraced within the general language used in the bond. A mere expression of opinion as to the legal effect of the contract cannot have the effect of extending the plain import of its written words. In re Neff's Estate, 185 Pa. St. 98, 39, Atl. Rep. 830. Where the terms of contract are clear and unambiguous there is no room for construction by conduct of parties. Pierce v. Merrill, 128 Calif. 464, 61 Pac. Rep. 64.

<sup>71</sup> Douglass v. Reynolds, 7 Pet. (U. S.) 113.

anty is to continue in force for the period of six years and no longer,"—held, the guaranty was limited to goods supplied to the husband after it was given<sup>72</sup> and not before. So a guaranty in the following language, viz.: "In consideration of your supplying my son with what goods he may from time to time require of you this season, on your usual terms of credit, I do hereby guaranty the payment of the same." Held, the guaranty applied only to the goods purchased after it was given, and not to those previously furnished.<sup>73</sup> Defendant executed a contract of guaranty that "F." would pay for all coal which might be delivered to him by plaintiff within a certain time, and at such price as may be agreed on between "F." and plaintiff. Held, the guaranty had reference to future contracts fixing terms of payment.<sup>74</sup> A surety for the performance of a contract to sell goods on commission is not liable for a default respecting goods purchased by the principal and in his possession prior to the execution of the contract.<sup>75</sup> Where a promissory note has been given by a principal and surety, secured by a deed of trust on the surety's property, showing that the surety's purpose was to obtain further advances for the principal, and the payee discounts the work and applies a part of the proceeds to the payment of a past indebtedness, held, not binding on the surety.<sup>76</sup> A guaranty of the payment of rent under a lease, given during the term created by the lease, and at a time when rent, which has become due, is in arrear, by which the guarantor "agrees to become security for an agreement of lease, \* \* \* whereby, should any default be made in the payment of said rent," the guarantor binds himself "to pay any deficiency which may be due," is a guar-

<sup>72</sup> *Morrell v. Cowan*, Law Rep. 7 Ch. Div. 151, reversing Law Rep. 6 Ch. Div. 166.

<sup>73</sup> *Weed et al. v. Chambers*, 40 Up. Can. (Q. B.) 1; *State v. Hunter*, 73 Conn. 435, 47 Atl. Rep. 665, action on the bond of an executor, who was also trustee, under the will. *Winslow v. Hase*, 108 Wis. 382, 84 N. W. Rep. 433.

<sup>74</sup> *Delaware, L. & W. R. R. Co. v. Burkhard et al.*, 114 N. Y. 197; *Spencer v. McLean*, 20 Ind. App. 626, 50 N. E. Rep. 769. Contra, in

*Barnes v. Cushing* (N. Y.), 61 N. E. Rep. 902, a bank's bond, conditioned for the payment of canal funds "now on deposit," was held to bind the sureties for \$73,001, afterwards found due from the bank at its date, though its language was otherwise prospective. Reversing 59 N. Y. Supp. 345.

<sup>75</sup> *Weir Plow Co. v. Walmsley et al.*, 110 Ind. 242.

<sup>76</sup> *Chaffe v. Taliaferro*, 56 Miss. 544.

anty for the payment of any rent that may thereafter become due and payable under the lease, and not for the payment of rent already due.<sup>77</sup> Other instances of the application of this rule are shown in a note.<sup>78</sup>

<sup>77</sup> *Brooks v. Baker*, 9 Daly (N. Y. Com. Pleas), 398. See, to the general effect, also, where a guaranty was held to be not of a past indebtedness, *Johnson v. Fisher*, 4 Col. 242.

<sup>78</sup> In *Australian Joint Stock Bank v. Bailey*, L. R., 1899, App. Cas. 396, in consideration of further advances to be made by A to B, C guaranteed payment of all moneys due by reason of such further advances "or otherwise." Held, that C's guaranty covered past advances, reversing Sup. Ct. New South Wales. In *Peoria Bank v. Elder*, 165 Ill. 55, defendants were sued on a guaranty dated January 17, 1893, to the amount of \$12,000, of notes and business paper that plaintiff bank might discount "from time to time from date hereof." Held, that the guaranty covered all paper issued after its date, even though the guaranty was not in fact delivered until after some of the discounts had been made and that it covered a judgment note for \$12,000 which was given by the company as "collateral security for the payment of any loans, advances, discounts or other liability" of said company to said bank. In *Drake v. Sherman*, 179 Ill. 362, McDermott and three sureties signed an agreement to pay D. H. & Son, bankers, "any loss they may sustain through and by virtue of overdrafts on said D. H. & Son's books of accounts or money advanced or paid out by them on the checks of demand or drafts of John McDermott for the purpose of buying

stock, grain, or any other purpose whatever." The sureties were ignorant of the fact that at the time McDermott owed the bank \$3,493.24. It was held that their guaranty did not apply to it. "The fair import of the language of the contract," said the court (p. 367), "is that appellees should be liable for transactions which should occur in the future after the contract was executed, and nothing more." In *Bartlett v. Wheeler*, 195 Ill. 445, 63 N. E. Rep. 169, it was likewise held that the guaranty of an attached contract will not be held to cover defaults of the principal occurring before the execution of the bond, affirming 96 Ill. App. 342. In *Cabot v. McMaster* (C. C. N. D. Ill.), 55 Fed. Rep. 722, it was held, sustaining demurrer to plaintiff's declaration that a guaranty of payment for goods must be construed prospectively and not retrospectively unless it contains words showing an intention on the part of the guarantor to be responsible for past delinquencies and in an action on the guaranty the declaration must aver that the breaches assigned occurred subsequent to the execution of the guaranty. In *J. L. Mott Iron Works v. Gunn*, June, 1902, N. J. Err. & App., 52 Atl. Rep. 354, a guaranty of payment for materials was construed to include goods already furnished and goods thereafter furnished, but not goods that were in process of construction and never finished. An Ohio statute provides that "if any executor or administrator shall

**§ 109. When consideration paid to guarantor not usurious—Measure of damages on guaranty of note.**—The bona fide sale of one's credit by way of guaranty, or by making a note for another's accommodation, though for a consideration exceeding the legal rate of interest, is not usurious if the transaction is not connected with a loan between the parties. "As the law now stands, a man has as good a right to sell his credit as he has to sell his goods or his lands, and if he deal fairly he may take as large a price as he can get for either of them."<sup>79</sup> However small the consideration may be which the guarantor receives, he is liable for the full amount of the debt guaranteed, however large, if such be the scope of his contract. Thus, after a note for \$7,868.80 had been executed and delivered by the principals, one Oakley, in consideration of \$190, agreed to guaranty the payment of the note, and in execution of the agreement indorsed it in blank. Held, he was liable for the full amount of the note. The court said: "It is not for us to hamper Mr. Oakley or any other citizen in such a way as to preclude his making money by insuring the debts of his neigh-

waste or unfaithfully administer the estate, the court granting the letters may, if it thinks fit, on the application of any surety on the administration bond, order such executor or administrator to render an account, and to execute to such surety a bond of indemnity \* \* and upon neglect or refusal to execute such bond of indemnity \* \* remove him. \* \* "

An indemnity bond executed under this statute was conditioned that the executor should save and keep his sureties "harmless from all loss or damage by reason of being sureties," &c. It was held, by a divided court, that the sureties on the indemnity bond were liable for defaults committed before as well as after its execution. *Buffington v. Bronson*, 61 Ohio St. 231, 56 N. E. Rep. 762. *Foster v. Wise*, 46 Ohio St. 21, 16 N. E. Rep. 687. In *Thomson v. American Surety Co.* (N. Y.), 62 N. E. Rep. 1073,

affirming 67 N. Y. Supp. 564, defendant in 1893 became surety on the bond of a trustee conditioned that he "shall faithfully execute the trust reposed in him as such trustee and shall faithfully pay over, distribute, divide and account for all the property and money which shall come to his hands," &c. In 1890 a judgment had been entered requiring the trustee to pay the sum of \$87,653.53, and in 1894, the trustee having died, his successor obtained a judgment against his executrix requiring her to pay \$13,176.42 of that amount apparently remaining in his hands unadministered at the time of his death. The court held that the last mentioned judgment was not admissible in evidence, and that the surety was not liable therefor, citing *Thompson v. MacGregor*, 81 N. Y. 592.

<sup>79</sup> *Moore v. Howland*, 4 Denio, 264, per Bronson C. J.



bors. It is enough that he has not been imposed upon.''<sup>80</sup> When the guaranty is that there is a certain sum due on a note, the measure of damages is the value of a judgment for that amount, if one had been obtained against the makers. And in such case, when the makers are solvent but the note has been paid, the measure of damages is the full amount guarantied to be due.<sup>81</sup>

**§ 110. Guaranty of payment—When surety may be sued before principal—Property of surety may be first taken on execution against principal and surety.**—Whether a surety or a guarantor becomes liable to suit immediately upon the default of, and before any steps are taken against, the principal, depends in every case upon the terms of his contract. When, by the terms of the contract, the obligation of the surety or guarantor is the same as that of the principal, then, as soon as the principal is in default, the surety or guarantor is likewise in default, and may be sued immediately and before any proceedings are had against the principal.<sup>1</sup> This results from the fact that he had a right to contract such a liability, and, having done so, he is bound by his engagement. In such case no demand on the principal is necessary.<sup>2</sup> Nor is any demand on the surety or guarantor necessary. The bringing of the suit is a sufficient demand.<sup>3</sup> Nor need unliquidated damages be

<sup>80</sup> *Oakley v. Boorman*, 21 Wend. 588, per Cowen, J. To same effect, see *Cooper v. Page*, 24 Me. 73.

<sup>81</sup> *Head v. Green*, 5 Bissell, 311.

<sup>1</sup> *Penny v. Crane Bros. Manuf. Co.*, 80 Ill. 244; *Wilson v. Campbell*, 1 Scam. (Ill.) 493; *Redfield v. Haight*, 27 Conn. 31; *Smith v. Rogers*, 14 Ind. 224; *Ranalaugh v. Hayes*, 1 Vernon, 189; *Abercrombie v. Knox*, 3 Ala. 728; *Garey v. Hignutt*, 32 Md. 552; *Geddis v. Hawk*, 1 Watts (Pa.), 280, overruling *Hawk v. Geddis*, 16 Serg. & Rawle, 23; *Hoey v. Jarman*, 39 N. J. Law (10 Vroom), 523. Surety not discharged by failure of creditor to probate claim against estate of deceased principal: *Darby v. Berney Nat'l Bank*, 97 Ala. 643, 11 So. Rep. 881.

<sup>2</sup> *Carr v. Card*, 34 Mo. 513; *Mitchell v. Williamson*, 6 Md. 210. Demand on new surety on forthcoming bond given to constable not necessary before bringing suit: *Mahaffey v. Gray*, 85 Ga. 460, 11 S. E. Rep. 774.

<sup>3</sup> *Byrne v. Aetna Ins. Co.*, 56 Ill. 321; *Hough v. Aetna Life Ins. Co.*, 57 Ill. 318, which were cases of sureties on bonds of insurance agents; *Wood v. Barstow*, 10 Pick. 368, which was a case of a surety on an executor's bond. *Dwyer v. United States* (N. Y.), 93 Fed. Rep. 616, 35 C. C. A. 488, action on government building contractor's bond; held, that service of summons was sufficient demand to start interest running.



liquidated by a previous suit against the principal.<sup>4</sup> Where the bond of a deputy treasurer to a treasurer provided that the treasurer should be "kept free from all incumbrances, blame, damage and loss" from any acts of the deputy, the deputy having made default, it was held that the treasurer had a right to recover on the bond against the sureties for such default, although he had not himself paid anything on account thereof.<sup>5</sup> When the surety or guarantor is in default, the creditor is not, before proceeding against him, obliged to exhaust a mortgage which he holds on the property of the principal for the payment of the same debt.<sup>6</sup> "It is clearly competent for a creditor to secure himself both by a lien on property and the engagement of a third person undertaking for the payment by the debtor. And the creditor is not obliged to proceed in equity upon his mortgage, but has the election either to seek a foreclosure or prosecute an action at law upon the promise of the debtor and his surety.<sup>7</sup> A suit against a surety on a note will not be delayed because the principal has been adjudged a bankrupt and the note has been filed by the payee in the bankruptcy proceedings, and a judgment rendered for his distributive share of the assets. The surety can himself pay the note, and prove his claim against the estate of the principal.<sup>8</sup> Upon an appropriation by the sheriff of the proceeds of a sale of A's real estate, a judgment against A as the surety of B must be paid in preference to subsequent judgments against A, although it appear that the same judgment is a lien upon the real estate of B, which is a sufficient

<sup>4</sup> *Janes v. Scott*, 59 Pa. St. 178.

<sup>5</sup> *Baby v. Baby*, 8 Up. Can. (Q. B.) 76. To same effect, see *Wilson v. Stilwell*, 9 Ohio St. 467; *Grant v. Hotchkiss*, 26 Barb. (N. Y.) 63.

<sup>6</sup> *Jones v. Tinch*, 15 Ind. 308; *New Orleans Canal & Banking Co. v. Escoffie*, 2 La. Ann. 830; *Day v. Elmore*, 4 Wis. 190; *Jones v. Ashford*, 79 N. C. 172; *Callaway County Savings Bank v. Terry*, 13 Mo. App. 99; *Ranlaugh v. Hayes*, 1 Vernon, 189. Upon default the payee may proceed against the guarantor immediately and without realizing upon other securities by going into equity to foreclose

his mortgage: *Adams v. Wallace*, 119 Calif. 67, 51 Pac. Rep. 14. But where a husband and wife mortgaged her separate estate to secure certain notes given by a partnership of which her husband was a member, and which were already secured by a mortgage of partnership property, it was held the wife was entitled to have the partnership mortgage exhausted before subjecting her separate estate to the payment of the firm debts. *Moffitt v. Roche*, 77 Ind. 48.

<sup>7</sup> *Cullum v. Gaines*, 1 Ala. 23, per *Collier*, C. J.

<sup>8</sup> *Gregg v. Wilson*, 50 Ind. 490.

security for its payment. The remedy of the subsequent creditors of A is by subrogation. The holder of the older judgment has a legal right to his money at once, and will not be delayed to benefit other creditors.<sup>9</sup> The state sold certain land to a party, who gave bond with surety for the purchase money. The certificate of purchase provided that in case of default in payment the premises should be "immediately forfeit and revert to the state." Held, the surety might be sued for the whole purchase money remaining unpaid. The state had an option to enforce the payment of the whole of the purchase money, or to resell the land and hold the surety for the balance, if any, which might remain unpaid after such resale.<sup>10</sup> After a joint judgment is rendered against principal and surety, the sheriff may collect all the money from the surety.<sup>11</sup> The holder of an execution issued on a judgment against a principal and two sureties may cause it to be levied on land of one of the sureties, and, there being no fraud or collusion, it is no objection to the validity of such levy that it was made at the request of the principal and the other surety and of the holder, who purchased the rights of the judgment creditor with money furnished by the principal and such other surety.<sup>12</sup> One of the "novels" of Justinian allowed sureties the right to require that before they were sued the principal debtor should, at their expense, be prosecuted to judgment and execution. This rule prevails in most of the countries which have adopted the civil law. According to the Roman law before the time of Justinian, the creditor could, as he can by the common law

<sup>9</sup> *Neff's Appeal*, 9 Watts & Serg. (Pa.) 36. See, also, on this subject, *Tynt v. Tynt*, 2 Peere Wms. 542.

<sup>10</sup> *Rush v. The State*, 20 Ind. 432.

<sup>11</sup> *Keaton v. Cox*, 26 Ga. 162; *Eason v. Petway*, 1 Dev. & Bat. Law (N. C.), 44. To similar effect, see *Northwestern Mut. Life Ins. Co. v. Allis*, 23 Minn. 337; *Winham v. Crutcher*, 2 Tenn. Ch. (Cooper), 535.

<sup>12</sup> *Taylor v. Van Dusen*, 3 Gray, 498. In *London, Paris & American Bank v. Smith*, 101 Calif. 415; 35 Pac. Rep. 1027, it was held that a

mortgage of land, in California, to secure advances that plaintiff might make to a firm of which the mortgagor in his lifetime was a member, might be foreclosed against the heirs and personal representatives of the deceased mortgagor without the creditor's first ascertaining, by law, the amount of the firm's indebtedness to such creditor, and without making the surviving partner a party to the foreclosure suit, he being a non-resident and there being no partnership assets in California. *Citing Story Eq. Pl., sec. 78.*

when the surety is in default, apply to the surety first.<sup>13</sup> The common-law rule, as above stated, prevails in England, in the United States where not changed by statute, and in other countries which have adopted the common law.

**§ 111. When guarantor of collection liable—When mortgage on property of principal must be foreclosed before guarantor liable.**—While it is established that a surety or guarantor<sup>14</sup>

<sup>13</sup> See opinion of Kent, C., in *Hayes v. Ward*, 4 Johns, Ch. 123, and authorities there cited.

<sup>14</sup> For the fundamental distinction between guaranties of payment and of collection, see *McMurray et al. v. Noyes*, 72 N. Y. 523; *Cowles v. Peck*, 55 Conn. 251; *Jones v. Ashford*, 79 N. C. 172; *Osborne & Co. v. Lawson*, 26 Mo. App. 549. In *McMurray et al. v. Noyes*, supra, at pp. 524, 525, Rapallo, J., thus states the distinction: "The fundamental distinction between a guaranty of payment and of collection is, that in the first case the guarantor undertakes unconditionally that the debtor will pay, and the creditor may, upon default, proceed directly against the guarantor, without taking any steps to collect of the principal debtor, and the omission or neglect to proceed against him is not (except under special circumstances) any defense to the guarantor; while in the second case the undertaking is that if the demand cannot be collected by legal proceedings, the guarantor will pay, and consequently legal proceedings against the principal debtor, and a failure to collect by those means are conditions precedent to the liability of the guarantor; and to these the law, as established by numerous decisions, attaches the further condition that due diligence be exercised by the creditor in enforcing his legal remedies against the debtor." See

also *Ralph v. Eldredge*, 137 N. Y. 525, 33 N. E. Rep. 559. In *Milwaukee Harvester Co. v. Newell*, 65 Ill. App. 612, Clark & Newell, selling farm machinery on credit, agreed to "guarantee the collection \* \* of any and all notes taken by" them. After the dissolution of the firm Clark indorsed on such note the firm's guaranty of their payment, claiming that he was carrying out said agreement. The court held that the words quoted gave him no such authority and said (p. 615): "It will be observed that the guaranty contained in this article is for the collection of certain notes, and not for the payment of them. A guaranty for the collection of a promissory note and a guaranty for the payment of it are distinct undertakings. A guaranty for the collection of a note simply obligates the guarantor to collect or pay if collection cannot be made from the maker and diligent prosecution of the maker by the usual remedies without effect, or showing his insolvency, is a condition precedent to a recovery against the guarantor." The declaration on a guaranty of collection should state facts showing "due diligence to recover the amount from the principal debtor or else, as an excuse for the want of such diligence, his insolvency." But no such averment is necessary in case of a guaranty of payment. Because "one who guaranties pay-

may be sued as soon as he is in default, it is often difficult to determine when such default has occurred. It has been held that a guaranty of the collection of the debt of another, or that such debt is collectible, means that it is "collectible by due course of law," the same as if those words had been written in the guaranty, and that legal proceedings must be had and exhausted against the parties liable when the guaranty was executed before a cause of action arises against the guarantor. These cases hold that the prosecution of such legal proceedings are a condition precedent to any liability on the part of the guarantor, and that it makes no difference if the previous parties liable for the debt are, and have all the time been, insolvent.<sup>14a</sup> The guarantor of collection is in such case liable for the costs incurred in the endeavor to collect the debt from the previous parties.<sup>15</sup> It is generally held that a guarantor

ment becomes absolutely liable upon any default of payment by his principal." *Wilkinson Gaddis Co. v. Van Riper*, 63 N. J. Law, 394, 43 Atl. Rep. 675.

<sup>14a</sup> *Craig v. Parkis*, 40 N. Y. 181 (three judges dissenting); *Mains v. Haight*, 14 Barb. (N. Y.) 76; *Cumpston v. McNair*, 1 Wend. 457; *French v. Marsh*, 29 Wis. 649; *Newell v. Fowler*, 23 Barb. (N. Y.) 628; *Cady v. Sheldon*, 38 Barb. (N. Y.) 103; *Burt v. Horner*, 5 Barb. (N. Y.) 501; *Shepard v. Phears*, 35 Tex. 763; *Lemmon v. Strong*, 55 Conn. 443.; *Salt Springs Nat. Bank v. Sloan*, 135 N. Y. 371, 32 N. E. Rep. 231; *Craig v. Parkis*, 40 N. Y. 181, 100 Am. Dec. 469; *McNall v. Burrow*, 33 Kans. 495, 496, 6 Pac. Rep. 897; *Roberts v. Loughlin*, 4 N. D. 167, 59 N. W. Rep. 967. In *Getty v. Schantz*, 100 Fed. Rep. 577, 40 C. C. A. 560, a guarantor of collection (not payment) of certain notes was held discharged by the creditor's resorting to a foreclosure suit to collect them, in which deficiency judgment was not obtained for eighteen months, and waiting eighteen months thereafter

before he issued execution, when he might have sued at law and obtained judgment much earlier. In *Rice v. McCague*, 61 Neb. 861, 86 N. W. Rep. 486 (citing the text), the guarantor of a mortgage, in Omaha, obtained it from the holder, in Philadelphia, for collection, and held it for over a year without collecting it or disclosing to the owner that by reason of a misdescription, it was inadequate security or uncollectable; held, that the owner upon discovering the facts, might sue the guarantor without first resorting to his remedies against the mortgagor or the property. A guaranty to pay all notes which should "prove to be uncollectible" is unenforceable until judgment and execution are returned unsatisfied. *Ralph v. Eldredge*, 58 Hun (N. Y.), 203.

<sup>15</sup> *Mosher v. Hotchkiss*, 2 Keyes (N. Y.), 589; *Id.*, 3 Abb. Rep. Omitted Cas. 326. But it is held that a guaranty of collection will not render the guarantor liable for expenses incurred in the collection, when by the terms of the guaranty it is so stipulated. *National Bank*

that a debt is collectible is only liable in case it is not collectible, because otherwise he is not in default.<sup>16</sup> But it is the doctrine of a majority of the courts, and seems the better opinion, that the fact that it is not collectible may be shown by any other competent evidence as well as the fruitless prosecution of a suit against the previous parties liable for the debt, and if such parties are actually insolvent, no suit against them is necessary to charge the guarantor.<sup>17</sup> Where the payee of a note, by an indorsement on its back, guaranties its collection, and the note is secured by a collateral mortgage, which is referred to in it, and which is assigned at the same time as the note, he is not liable upon the guaranty until resort has been had to the mortgage as well as to the note, for the collection of the money secured.<sup>18</sup> So where the defendants trans-

v. Marbourg, 22 Kan. 535. A guaranty of "all costs and expenses paid or incurred in collecting" a note has reference to definite legal costs, and not to uncertain allowances for the creditor's trouble in dunning the maker of the note. *Wetherbee v. Kusterer*, 41 Mich. 359.

<sup>16</sup> *Foster v. Barney*, 3 Vt. 60.

<sup>17</sup> *White v. Case*, 13 Wend. 543; *Peck v. Frink*, 10 Iowa, 193; *Brackett v. Rich*, 23 Minn. 485, 23 Am. Rep. 703; *Stone v. Rockefeller*, 29 Ohio St. 625; *McDoal v. Yeomans*, 8 Watts (Pa.), 361, *Gibson, C. J.*; *Thomas v. Dodge*, 8 Mich. 51; *Sanford v. Allen*, 1 Cush, 473; *Dana v. Conant*, 30 Vt. 246; *Cooke v. Nathan*, 16 Barb. (N. Y.) 342; *Jones v. Greenlaw*, 6 Cold. (Tenn.) 342; *Cady v. Sheldon*, 38 Barb. (N. Y.) 103; *Lemmon v. Strong*, 55 Conn. 443. But see *Schermerhorn v. Conner*, 41 Mich. 374; *Colby v. Farwell*, N. H., Nov., 1901, 51 Atl. Rep. 254; *Dewey v. W. B. Clark Investment Co.*, 48 Minn. 130, at 134, 50 N. W. Rep. 1032, 31 Am. St. Rep. 623; *Fall v. Youmans*, 67 Minn. 83, 69 N. W. Rep. 697, 64 Am. St. Rep. 390. Guarantor of collection of a

note held discharged by delay in suing and prosecuting suit against maker; *Chatham Nat'l Bank v. Platt*, 135 N. Y. 423, 32 N. E. Rep. 236.

<sup>18</sup> *Barman v. Carhartt*, 10 Mich. 338; *Johnson v. Shepard*, 35 Mich. 115. No proceedings need be had under the mortgage, however, if it is wholly valueless. *Cady v. Sheldon*, 38 Barb. (N. Y.) 103. See also *New York Security & Trust Co. v. Lombard Investment Co.* (C. C. W. D., Mo.), 73 Fed. Rep. 537, at 544, in which case defendant company, after doing an extensive business loaning money on farm lands, guaranteeing some of its loans outright and guaranteeing the collectibility of others, finally passed into the hands of a receiver; it was held that the following classes of claims against the assets should be rejected: (1) Those arising on guaranties of collection, as distinguished from its loans outright and guaranties of payment, where no foreclosure proceedings or action against the maker has been commenced, and where the holder has not shown proper diligence in ef-

ferred to the plaintiffs two notes, with a lien on a canal-boat given to secure their payment, and also executed a guaranty of the notes, conditioned that the plaintiffs should use all proper and reasonable means to collect them of the maker before resorting to the defendants on the guaranty, it was held that the lien on the boat must be exhausted before the defendants could be sued on their guaranty.<sup>19</sup> In these two cases, according to the fair construction of the terms of the guaranties, the guarantors were not in default until the liens on the property of the principals were exhausted. They do not at all conflict with the cases which hold that, where the surety or guarantor, by the terms of his contract, is in default, he may be sued at once without the creditor being obliged to foreclose a mortgage for the same debt on the property of the principal.

**§ 112. General and special guaranties—Measure of diligence due from the creditor in pursuing the principal debtor.**—Generally, in order to charge a guarantor, it must appear that reasonable and ordinary diligence has been used to collect the money from the principal by legal process or that a resort to legal process would have been unavailing.<sup>20</sup> But where the

forts to collect. (2) Those not matured, and in which there has been no default. (3) Those where time has been given without the guarantor's consent. This case contains various forms of guaranty, absolute and for collection, of land mortgages by a mortgage corporation. In *Dutton v. Pyle*, 195 Pa. St. 8, 45 Atl. Rep. 429, plaintiff sued defendant on his verbal guaranty of Kansas mortgages, which, on the trial, appeared to have been in default many years before the present suit was brought. There was no evidence of any attempt to collect them and no evidence to show that they were uncollectible. Held, that plaintiff was properly nonsuited.

<sup>19</sup> *Brainard v. Reynolds*, 36 Vt. 614.

<sup>20</sup> See note 14, § 2, *supra*. Also *Kirkpatrick v. White* (1857), 29 Pa. St. 176, action on the official bond of a defaulting constable. *Brown v. Brooks* (1855), action of guaranty of a contract for the delivery of lumber in which the court by Lewis, C. A., defined a guaranty as "an engagement to pay in default of solvency in the debtor, provided due diligence be used to obtain payment from him," and added that "the contract for due diligence requires that a suit be brought within a reasonable time after the maturity of the claim, and be duly prosecuted to judgment and execution, before an action can be sustained against the guarantor, unless in cases where it is shown that such a proceeding could have produced no beneficial result." *Willard v. Wickham*



guaranty is special or absolute and the measure of diligence to be exercised by the creditor is specified, no further showing of diligence to collect from the principal need be made.<sup>21</sup>

(1838), 7 Watts (Pa.) 292, an action by sci. fa. on the official bond of a constable. *Rudy v. Wolf* (1827), 16 S. & R. (Pa.) 79, action on defendant's agreement to "stand security, \* \* for the payment of" a money bond. *Rogers, J.*, said that this was "an engagement to pay the money on the insolvency of Lichtenberger [the principal] provided Day [the assignee of the bond] uses ordinary diligence for its collection," and whether Day used such diligence or not was a question of fact for the jury. *Hoffman v. Bechtel* (1866), 52 Pa. St. 190, action on guaranty of payment of a bond in which the court by *Strong, J.*, said: "The contract of guaranty is peculiar. Unlike that of an ordinary surety, it is collateral and secondary. The creditor must resort in the first instance to the debtor, and the guarantor is liable only after the debtor has proved insolvent, and the creditor has used due diligence to obtain in payment from him unsuccessfully." A prima facie case of due diligence is made out by a return of nulla bona on an execution. *Janes v. Scott* (1868), 59 Pa. St. 178, action on defendant's guaranty of the contract of one Burke to sink an oil well "that the said Burke shall well and faithfully perform his part of the foregoing contract." The principal testified that at the time of the breach of the contract he had a horse and \$500. Held that the trial court properly left it to the jury to decide whether or not the creditor could by process of law

have recovered any part of his demand from him. *National Loan and Bldg. Assn. v. Lichtenwalner* (1883), 100 Pa. St. 100, action on defendant's guaranty of a certificate of deposit in these words signed by defendant: "I hereby guarantee the payment of the within certificate." Held that the claimant was obliged to exercise due diligence to enforce payment from the principal before resort could be had to the guarantor but was not obliged to exhaust his remedies against the stockholders of the bank issuing the certificate. But it has been held that the guarantor of a building contract may subject himself to the liabilities of a surety by co-operating with the owner in the completion of the work and acting on the contractor's abandonment of the job as a settled fact and that when he does so, proof of diligence to collect from the contractor is not necessary in order to charge him. *Lender v. Kline*, 167 Pa. St. 188, also reported in 31 Atl. Rep. 550, without full statement of facts.

<sup>21</sup> In *Ritchie v. Walter*, 166 Pa. St. 604, 31 Atl. Rep. 334, defendant guaranteed payment of a judgment note provided the same could not be recovered out of certain land. Judgment was entered upon the note and kept a lien on the land for 17 years, at the end of which time a sale of the land left a deficiency in the amount due on the note. Held that, under the terms of the contract, plaintiff was not obliged to sell at an earlier date. Quoting from *Campbell v. Baker*,



Where, upon assignment of bonds and mortgage, there was a guaranty that if, in case of foreclosure and sale of the mortgaged premises, there should arise a deficiency, the guarantor would pay the same on demand, it was held that the guaranty was not one of payment; but the foreclosure and sale were conditions precedent, to be performed with due diligence in order to establish the liability of the guarantor.<sup>22</sup> An undertaking by a surety in a penal sum, that, if the principal is discharged from arrest, he shall at all times hold himself amenable to the processes of the court, is an undertaking of such a nature that proceedings must be taken against the principal before the obligation of the surety to pay arises, and therefore the issuing of process and entry of judgment are conditions

46 Pa. St. 243, the court said that: "When a guaranty is general, that is, without having any of its terms fixed in writing,—the law adds the usual conditions that there shall be due and unsuccessful diligence used by the creditor to collect the claim from the principal, unless it appears that all diligence would be hopeless. But the law adds or implies no such conditions where the parties themselves have fixed the terms of the contract." In the case from which this quotation was taken defendant guaranteed payment of a note "when due," and it was held that the guaranty was special and not general, that it was broken upon non-payment of the note at maturity and that it was not necessary to prove the insolvency of the principal or diligence to collect from him. See also § 113 post. In *Hernly v. Brannum*, 23 Ind. App. 388, 55 N. E. Rep. 512, defendants procured the plaintiff to release certain land from the lien of her mortgage thereon by signing and delivering to her the following: "We, the undersigned citizens of Alexandria, Indiana, do hereby guaranty that a certain note made and executed by Frank

K. Pierce of said city for the sum of one thousand dollars (\$1,000), payable to the order of Mary C. Hernly on the 14th day of February, 1894, will be paid." Held, on demurrer to a complaint, in a suit against the guarantors, that it was enough to aver that the note in question was overdue and unpaid without averring diligence in attempting to collect it. In *Yager v. Kentucky Title Co., Ky., Mich.*, 1902, 66 S. W. Rep. 1027, the guaranty endorsed on a bond read: "I hereby guaranty the payment of the principal and interest of the within bond at maturity." Held that the payee of the bond owed the guarantor no duty of diligence and that the guarantor's liability was not affected by the payee's delay of nearly a year after default before bringing suit, citing *Yeates v. Walker*, 1 Duv. (Ky.) 84, *Thompson v. Glover*, 78 Ky. 195, 39 Am. Rep. 220. See also *Pierce v. Merrill*, 128 Calif. 464, 61 Pac. Rep. 64.

<sup>22</sup> *McMurray et al. v. Noyes*, 72 N. Y. 523; *Vanderbilt v. Schreyer*, 91 N. Y. 392, reversing 21 Hun 537; *Briggs v. Norris*, 67 Mich. 325.

precedent to the liability of the surety.<sup>23</sup> Judgment may be entered against the guarantor of a judgment in favor of an assignee of the same without first showing unsuccessful efforts to collect from the principal debtor, where the guarantor guarantied the collection of the same and confessed judgment on the guaranty.<sup>24</sup> In an action on a guaranty of collection of a debt, where the defense is that the debtor was not prosecuted with due diligence, evidence of acquiescence of the guarantor in the delay is admissible as showing a waiver by the guarantor of his right to take advantage of the creditor's indulgence.<sup>25</sup>

**§ 113. The same continued—What will excuse want of diligence by the creditor.**—A guaranty on the back of a note was: "I hereby guaranty the payment of the within note." Held, the guarantor was not primarily liable, and in order to charge him it was necessary that the creditor should be diligent in endeavoring to collect the note from the principal, unless diligence would have been unavailing.<sup>26</sup> The same thing was held where the assignor of a non-negotiable note and a judgment guarantied the "payment" of the same;<sup>27</sup> where the assignor of a bond covenanted to "stand security for the payment of it;"<sup>28</sup> where the guaranty was, "I do hereby assign and guaranty the payment of the within bond;"<sup>29</sup> where two receipts of an officer for the collection of certain bills were assigned, as follows: "I trade the above to \* \* for value received, and guaranty the payment of the same;"<sup>30</sup> and where under a note was written: "I do hereby guaranty the payment of the above

<sup>23</sup> *Toles v. Adeo et al.*, 91 N. Y. 562. See same case on former appeal, 84 N. Y. 222.

<sup>24</sup> *Cooper v. Shaver*, 101 Pa. St. 547.

<sup>25</sup> *Mead v. Parker*, 111 N. Y. 259, affirming 41 Hun 577. That a guarantor of the payment of principal and interest of certain bonds and coupons as they mature may be sued before the maturity of the same, see *Sutherland v. Woodruff*, 26 Hun (N. Y.) 411. That he is liable for interest on overdue coupons, see *Philadelphia, etc. R. R. Co. v. Knight*, 124 Pa. St. 58.

<sup>26</sup> *Farrow v. Respass*, 11 Ired. Law (N. C.) 170. The same was held on an indorsement guarantying "the within note good till paid." *Cowles v. Peck*, 55 Conn. 251. And see to similar effect, *Lemmon v. Strong*, 55 Conn. 443; *Allen v. Rundle*, 50 Conn. 588.

<sup>27</sup> *Benton v. Gibson*, 1 Hill, Law (S. C.) 56.

<sup>28</sup> *Rudy v. Wolf*, 16 Serg. & R. (Pa.) 79; note 20, § 112.

<sup>29</sup> *Johnston v. Chapman*, 3 Pen. & Watts (Pa.) 18.

<sup>30</sup> *Craig v. Phipps*, 23 Miss. 240.

note.”<sup>31</sup> The payee of a note indorsed it as follows: “I hereby guaranty this note good until January 1, 1850.” Held, the effect of the guaranty was that the makers of the note should be in a condition that payment of the note could be enforced against them till January 1, 1850, if legal diligence was used.<sup>32</sup> Due diligence on the part of the creditor against the prior parties liable for the debt, or an excuse that they were insolvent, have been held necessary to charge the guarantor, when the assignment of certain notes stated: “We hereby agree to hold ourselves ultimately responsible with the above parties;”<sup>33</sup> when the indorsement on a note was, “to be liable only in the second instance;”<sup>34</sup> and when in the assignment of a bond the words were: “I \* \* hold myself liable for the ultimate payment.”<sup>35</sup> In the foregoing cases the fair import of the guarantor’s contract was considered to be that he did not become liable to suit unless due diligence was used to collect the money from the prior parties, if they were solvent. If the prior parties were wholly insolvent, then the fair import of the contract was held to be that no such diligence was necessary. When, however, the contract expressly provides that the guarantor shall not be liable until after “due course of law” has been exhausted against the prior parties, there is no room for construction, and the exact diligence stipulated for, no matter how vain it may be, nor how insolvent the parties, must be used to charge the guarantor.<sup>36</sup> The rea-

<sup>31</sup> *Isett v. Hoge*, 2 Watts (Pa.) 128. To similar effect, see *Mizner v. Spier*, 96 Pa. St. 533. Where a note was executed to a bank containing an indorsement guarantying the payment of the same without protest, it was held that the words “without protest” simply qualified the contract so as to exclude the specific defense on the part of the guarantor, that, by not protesting the note, prior indorsers were released, and did not require the bank to forbear making demand of the makers of the note. *Zahm v. First Nat. Bank*, 103 Pa. St. 576. *Aultman, Miller & Co. v. Roemer*, 112 Iowa 651, 84 N. W.

Rep. 668. *McClurg v. Fryer*, 15 Pa. St. 293.

<sup>32</sup> *Hammond v. Chamberlin*, 26 Vt. 406. As to what is a guaranty of collection necessitating diligence against the principal, see *Evans v. Bell*, 45 Tex. 553.

<sup>33</sup> *Johnston v. Mills*, 25 Tex. 704.

<sup>34</sup> *Pittman v. Chisolm*, 43 Ga. 442.

<sup>35</sup> *Lewis v. Hoblitzell*, 6 Gill & Johns. (Md.) 259.

<sup>36</sup> *Dwight v. Williams*, 4 McLean 581; *Moakley v. Riggs*, 19 Johns 69; *Eddy v. Stantons*, 21 Wend. 255; *Salt Springs Nat. Bank v. Sloan*, 57 Hun (N. Y.) 265. The precise opposite of this has been held in *Heraldson v. Mason*, 53 Mo.

son is, that the parties have so agreed, and the court cannot make a contract for them, which it would do if it dispensed with anything required by the contract. On the same principle, where a surety for the payment of rent stipulated that he should be notified of the tenant's default, it was held that he must be so notified, or he would not be bound, even though he was not in any manner injured by want of the notice.<sup>87</sup> In cases where the guarantor is not liable unless diligence is used by the creditor against the previous parties, the guarantor may, by parol, waive the use of such diligence.<sup>88</sup> When a note is guaranteed to be collectible, all prior solvent parties, such as an indorser,<sup>89</sup> and the estate of a deceased indorser,<sup>40</sup>

211, upon the ground that, the principal being insolvent, the law would dispense with a fruitless prosecution. Mr. Brandt in the 1st edition said that this is nothing more nor less than to make a contract for the guarantor without his consent, and enforce it against him. But see *Watts v. Bolin*, 86 Ill. App. 474, cited in note 14 to § 2. In an action against the guarantor of the collectibility of a note, the burden of proof is on the plaintiff to show that he has exhausted all legal remedies against the maker, or that the latter is insolvent, or that the guarantor had waived legal proceedings, if the latter be the case. *Allen et al. v. Rundle et al.*, 50 Conn. 9. And the plaintiff, if he claims to have exhausted his remedy at law, must show this fact by recovery of judgment, issue and return of execution unsatisfied at return day. *Schermerhorn v. Conner*, 41 Mich. 374. If the case was instituted in a justice court, a transcript of the judgment must have been filed in the circuit court and an issue and return of execution thereon. *Schermerhorn v. Conner*, 41 Mich. 374. See also Note to § 112, *supra*.

<sup>87</sup> *Corporation of Chatham v. McCrea*, 12 Up. Can. C. P. 352; *Hilary v. Rose*, 9 Phila. (Pa.) 139. Insolvency held not sufficiently shown by proof that execution has issued on judgments against the party and that his creditors are threatening suit. *Burton v. Willen*, 6 Del. Chan. 403 at 429, 33 Atl. Rep. 675.

<sup>88</sup> *Day v. Elmore*, 4 Wis. 190; *Ege v. Barnitz*, 8 Pa. St. 304; *Goodwin v. Buckman*, 11 Ia. 308; *Contra, Mosier v. Waful*, 56 Barb. (N. Y.) 80.

<sup>89</sup> *Loveland v. Shepard*, 2 Hill (N. Y.) 139; *Dana v. Conant*, 30 Vt. 246. Thus, where A indorsed on a promissory note a guaranty of payment, and afterwards B indorsed thereon a guaranty of collection, it was held that no recovery could be had against B. until it was shown that reasonable diligence had been used to collect the note from both the maker and the first guarantor, or legal excuse for the neglect of such diligence. *Summers v. Barrett et al.*, 65 Iowa 292.

<sup>40</sup> *Benton v. Fletcher*, 31 Vt. 418. If there are several principals, all must be exhausted. *Aldrich v. Chubb*, 35 Mich. 350.

must be exhausted before the guarantor is in default. When the effect of the undertaking is to guaranty the solvency of the prior parties, and no particular kind of diligence is stipulated for in the contract, the fact that such prior parties are actually insolvent, constitutes a breach of the guaranty. In such case, no suit need be brought against such prior parties; and such insolvency may be shown by any other competent evidence, as well as by fruitless legal proceedings against such prior parties.<sup>41</sup> If an execution, by virtue of which a levy upon all property of the prior parties might have been made, is returned by the proper officer *nulla bona*, this is *prima facie* evidence of the insolvency of such parties; but it is otherwise if the execution is issued by a justice of the peace, and real estate cannot, by virtue of it, be levied upon.<sup>42</sup> If the execution is thus returned within four days after it is issued, it is sufficient; for while a sale could not have been made in that time, property could have been found to levy upon if there had been any available for that purpose.<sup>43</sup> A promise by the guarantor to pay the debt, or giving his note for it, after the principal has failed to pay, is an admission that there has been no failure to use due diligence on the part of the creditor against the principal, and such diligence need not be otherwise proved in a suit against the guarantor.<sup>44</sup>

§ 114. **What is due diligence.**—When the terms of the guaranty and the circumstances of the parties are such that the creditor, in order to charge the guarantor, is bound to use due diligence against the parties previously liable for the debt, the question then arises: “What is due diligence?” “Due diligence generally, and in the absence of any special facts, would

<sup>41</sup> *Pittman v. Chisolm*, 43 Ga. 442; *Johnston v. Mills*, 25 Tex. 704; *Benton v. Gibson*, 1 Hill, Law (S. C.) 56; *Cates v. Kittrell*, 7 Heisk. (Tenn.) 606; *Lewis v. Hoblitzell*, 6 Gill & Johns. (Md.) 259; *McClurg v. Fryer*, 15 Pa. St. 293; *Ashford v. Robinson*, 8 Ired. Law (N. C.), 114; *Janes v. Scott*, 59 Pa. St. 178; *Farrow v. Mespass*, 11 Ired. Law (N. C.) 170; *Huntress v. Patten*, 20 Me. 28; *Bull v. Bliss*, 30 Vt. 127; *Wheeler v. Lewis*, 11 Vt. 265.

<sup>42</sup> *Gilbert v. Henck*, 30 Pa. St. 205.

<sup>43</sup> *Day v. Elmore*, 4 Wis. 190.

<sup>44</sup> *Tinkum v. Duncan*, 1 Grant's Cas. (Pa.) 228; *Teller v. Bernheim*, 3 Phila. (Pa.) 299. Holding that a surety cannot charge the creditor with laches until he has in vain prompted him to sue the principal, see *Coles' Adm'r v. Ballard*, 78 Va. 139.

require suit to be instituted at the first regular term of the court after maturity, and the obtaining judgment and execution thereon as soon as practicable by the ordinary rules and practice of the court."<sup>45</sup> By another court due diligence has been said to be that which a vigilant creditor employs when he has no other security than the obligation of the principal debtor. If the creditor employs legal process against the principal debtor without delay, the *prima facie* presumption is that he has been duly diligent, but suing out process simply, and letting it run its course, may not be due diligence. If the creditor has special knowledge of how he can collect the money, he must collect it, even if more than the regular process of suit is necessary.<sup>46</sup> What is due diligence in each particular case will depend upon the circumstances of that case. A judgment against the prior parties liable for the debt, promptly obtained, and execution issued thereon, are *prima facie* evidence of due diligence. If, in such case, other facts exist which show that due diligence has not been used, the burden of proving them is on the guarantor.<sup>47</sup> If the prior parties are without the state, but have property in the state, known to the creditor, which can be reached by attachment, the creditor must, in the exercise of due diligence, attach such property.<sup>48</sup> But if the creditor did not know, and by the use of reasonable diligence could not have ascertained, the facts which would have authorized an attachment, then he is not chargeable with negligence, if he does not cause an attachment to be issued.<sup>49</sup> If the prior parties are solvent, but live in another state, and have no property in the state where the creditor resides, it has been held that the creditor need not, in the exercise of due diligence, pursue such prior parties in such other state.<sup>50</sup> If the creditor causes an attachment to be levied

<sup>45</sup> *Voorhies v. Atlee*, 29 Iowa, 49, per Cole, C. J. And a return of *nulla bona* to the execution. *Jones v. Ashford*, 79 N. C. 172; *Osborne v. Smith* (Cir. Ct. D. Minn.) 18 Fed. Rep. 126; *Ricks et. al. v. Gantt*, 35 La. Ann. 920; *Durand et al. v. Bowen*, 73 Iowa 573.

<sup>46</sup> *Hoffman v. Bechtel*, 52 Pa. St. 190; *National Loan & Building As-*

*sociation v. Lichtenwalner*, 100 Pa. St. 100.

<sup>47</sup> *Backus v. Shipherd*, 11 Wend. 629; *Aldrich v. Chubb*, 35 Mich. 350. See, also, on this subject, *Nichols v. Allen*, 22 Minn. 283.

<sup>48</sup> *White v. Case*, 13 Wend. 543.

<sup>49</sup> *Forest v. Stewart*, 14 Ohio St. 246.

<sup>50</sup> *Towns v. Farrar*, 2 Hawks (N. C.) 163.



on the property of the principal, but fails to collect the money because the attachment is defectively served, he does not use due diligence, and the guarantor is discharged.<sup>51</sup>

§ 115. **What is due diligence, continued.**—A delay on the part of the creditor in bringing suit against the previous parties for upwards of six months;<sup>1</sup> for seven months;<sup>2</sup> for fourteen months;<sup>3</sup> for seventeen months;<sup>4</sup> and for five years and six months,<sup>5</sup> have been held to be unreasonable, and not the exercise of due diligence. Where a guaranty that certain notes then due were good was made April 21, 1841, and no demand was made on the parties primarily liable till July 29, 1842, and no notice of default was given the guarantor till February 29, 1844, it was held that due diligence had not been used, and the guarantor was not bound.<sup>6</sup> A guaranty made April 10th was as follows: "I warrant the within note good and collectible until the 1st day of July." Suit was commenced by the holder April 12th, and he could have obtained judgment in April, and the money could have been made, but in consequence of his negligence he did not get judgment until September, when the money could not be made. Held, the guarantor was not bound.<sup>7</sup> The institution of a suit against the principal six days after the maturity of a note, and prosecuting it diligently to judgment, has been held to be due diligence.<sup>8</sup> The same thing was held where judgment had been obtained against the

<sup>51</sup> *Beach v. Bates*, 12 Vt. 68.

<sup>1</sup> *Craig v. Parkis*, 40 N. Y. 181.

<sup>2</sup> *Penniman v. Hudson*, 14 Barb. (N. Y.) 579. A delay of nine months in foreclosing a mortgage discharges a guarantor of the collection of the mortgage. *Northern Ins. Co. v. Wright*, 76 N. Y. 445, affirming 13 Hun 166.

<sup>3</sup> *McMurray v. Noyes*, 72 N. Y. 523. In this case the holder of a bond and mortgage delayed foreclosure for fourteen months after they were due. For ten months of this time the mortgaged property, was a sufficient security; but afterwards the buildings thereon were destroyed by fire, and the value thereof reduced below the amount

of the mortgage debt. Held, the delay was sufficient to constitute laches discharging a guarantor.

<sup>4</sup> *Burt v. Horner*, 5 Barb. (N. Y.) 501.

<sup>5</sup> *Tiffany v. Willis*, 30 Hun (N. Y.) 266. But see *Lemmon v. Strong*, 55 Conn. 443, where it was held that an action against the maker of a note on demand, brought seven years after the guaranty thereof was executed, was not unreasonably brought.

<sup>6</sup> *Becker v. Saunders*, 6 Ired. Law (N. C.) 380. See, also, *Mains v. Haight*, 14 Barb. (N. Y.) 76.

<sup>7</sup> *Wheeler v. Lewis*, 11 Vt. 265.

<sup>8</sup> *Foster v. Barney*, 3 Vt. 60.



principal, and an execution against his property had been returned nulla bona two days after the suit against the guarantor was commenced.<sup>9</sup> In the spring of 1860, a guaranty of a note due the 1st of the following September was made. From the time the note became due, till 1865, the state was engaged in war, and no debts could be collected, and upon the ending of the war the principal became insolvent. No suit was brought upon the guaranty till 1867. Held, due diligence had been used, and the guarantor was bound.<sup>10</sup> So where suit was not brought against the principal for ten months, but he was all the time insolvent, it was held that the guarantor was chargeable, although the guaranty was such that suit within a reasonable time must have been commenced against the principal. The insolvency of the principal in such case has a bearing upon the question as to what is a reasonable time.<sup>11</sup> The question of due diligence, when the facts are not disputed, has been held to be one of law for the court,<sup>12</sup> It has also been held to be a question of fact for the jury.<sup>13</sup> And again, it has been held to be a mixed question of law and fact, which must be passed upon by the jury under the instructions of the court.<sup>14</sup> This latter seems the most reasonable view, and the one best supported by legal analogy. Where a debtor gave his check on funds in a bank for the payment of a debt, and the creditor waited seven days before presenting the same for payment, when it was dishonored, the debtor's funds in the meantime having been appropriated, it was held that the creditor had not exercised reasonable diligence in getting his money, and the surety for the debt was discharged.<sup>15</sup>

**§ 116. When neither previous proceedings against principal nor his insolvency necessary to charge guarantor.**—When the terms of a guaranty of payment fix the time within which the

<sup>9</sup> Woods v. Sherman, 71 Pa. St. 100.

<sup>10</sup> Kinyon v. Brock, 72 N. C. 554.

<sup>11</sup> Bashford v. Shaw, 4 Ohio St. 264; Gallagher v. White, 31 Barb. (N. Y.) 92.

<sup>12</sup> Burt v. Horner, 5 Barb. (N. Y.) 501; Battle v. Blake, 1 Dev. Law (N. C.) 381; Neal v. Freeman, 85 N. C. 441.

<sup>13</sup> Rudy v. Wolf, 16 Serg. & Rawle (Pa.) 79; Johnston v. Chapman, 3 Pen. & Watts (Pa.) 18; Woods v. Sherman, 71 Pa. St. 100. See also notes 20 and 21 to § 112, and note 14 to § 2.

<sup>14</sup> Backus v. Shipherd, 11 Wend. 629.

<sup>15</sup> Fegley v. McDonald, 89 Pa. St. 128.

payment shall be made, if the payment is not made within the time prescribed there is a breach of the guaranty, and no steps need be taken against the principal, nor need his insolvency be shown in order to charge the guarantor. This was held where the defendant gave an order for lumber, to be delivered to a third person, which specified: "I will see you paid between this and the closing of the year;"<sup>16</sup> where a bond due on a certain day was guarantied as follows: "For value received, we, the undersigned, guaranty the payment of the within bond according to its terms;"<sup>17</sup> where the guaranty was for the payment of a note "when due;"<sup>18</sup> and where the promisee, in a negotiable note, payable in six months, sold it, having made and signed the following indorsement: "I guaranty the payment of the within note in six months."<sup>19</sup> Where a state guarantied the "punctual payment of the interest" on certain bonds of a city, it was held that the state was liable immediately upon the default of the city, without any proceedings being had against it. The court said that while a guarantor was usually only liable after due diligence had been used to collect from the principal, yet the intention in each particular case must prevail, and in this case it was evidently the intention that the state should become liable immediately upon the default of the city.<sup>20</sup> A guaranty commenced as follows: "For a valuable consideration I hereby guaranty the prompt payment of \* \* \*" (certain notes—describing them), and concluded: "And I hereby obligate myself as firmly for the prompt payment thereof as if I had signed the same." Held, the guarantor was liable immediately upon default by the principals.<sup>21</sup> Where the payee of a negotiable

<sup>16</sup> *Cochran v. Dawson*, 1 Miles (Pa.) 276. An absolute guarantor of the payment of a certificate of deposit or note, held not released by delay of creditor in enforcing payment from the principal: *Hooker v. Gooding*, 86 Ill. 60, or delay to enforce a lien until it became lost: *Adams & French Harvester Co. v. Tomlinson Bros.*, 58 Iowa 129.

<sup>17</sup> *Roberts v. Riddle*, 79 Pa. St. 468.

<sup>18</sup> *Campbell v. Baker*, 46 Pa. St. 243.

<sup>19</sup> *Cobb v. Little*, 2 Greenl. (Me.) 261.

<sup>20</sup> *Arents v. Commonwealth*, 18 Gratt. (Va.) 750.

<sup>21</sup> *Blackburne v. Boker*, 1 Pa. Law Jour. Rep. 15. For a case holding that, if a party was liable at all, he was only secondarily liable, see *Richwine v. Scovill*, 54 Ind. 150.

note, after it was due, indorsed it as follows: "I guaranty the payment of this note, and costs, if any are made on it," it was held that the guarantor might be sued at once, and it was not necessary to proceed against the principal or show his insolvency.<sup>22</sup> Where the indorsement of a note by the payee thereof was, "I guaranty the payment of the within," it was held that no demand on the principal or notice of his default was necessary to charge the guarantor. The court said: "A guaranty of payment like the one in question is not conditional, but an absolute undertaking that the maker will pay the note when due."<sup>23</sup> It has also been held that the guaranty of "payment" of the debt of another is broken as soon as the principal is in default, without more, the distinction drawn being between a guaranty that the principal will pay and a guaranty that he is solvent. He may not pay and yet be solvent.<sup>24</sup> In all cases of guaranty of the payment of the debt of another, whether the guarantor is immediately liable upon the default of the principal, without more, depends upon the terms of his contract as construed by the court.<sup>25</sup> Where a note is transferred by a debtor to a creditor in payment of a debt, with a guaranty that it is good as gold and will be paid when due, and the note is in fact worthless for want of consideration, the

<sup>22</sup> *Burnham v. Gallentine*, 11 Ind. 295.

<sup>23</sup> *Brown v. Curtis*, 2 N. Y. 225, per *Bronson, J.* See also on this subject, *Heaton v. Hulbert*, 3 Scam. (Ill.) 489. And see, as supporting the doctrine of the text, *Huff v. Slife*, 25 Neb. 448; *Hungerford v. O'Brien*, 37 Minn. 306; *Pool v. Roberts*, 19 Brad. (Ill. App.) 438; *Stowell v. Raymond*, 83 Ill. 120; *Roberts v. Hawkins*, 70 Mich. 566.

<sup>24</sup> *Wren v. Pearce*, 4 Smedes & Mar. (Miss.) 91. See also *Bank of New York v. Livingston*, 2 Johns. Cas. 409.

<sup>25</sup> In Pennsylvania it is held that a contract of guaranty creates only a contingent liability, which becomes absolute by due and unsuccessful diligence to obtain satis-

faction from the principal, or by circumstances that excuse diligence. *Gilbert v. Henck*, 30 Pa. St. 205, and cases cited in notes to § 2 and § 112, *supra*. In Illinois a guarantor is held to be liable immediately upon default of his principal. *Heaton v. Hulbert*, 3 Scam. 489. Close attention should in every case be paid to the terms of the contract of the person who becomes responsible for the debt of another, by whatever name he may be called. Cases have sometimes been improperly decided from the fact that a person to whom a certain designation, such as "guarantor," applied, has been held to the same liability as his class generally, the special terms of his agreement being overlooked.

guaranty is broken as soon as made, and may be sued upon immediately.<sup>26</sup> A guaranty of a lease was: "I hereby guaranty and become security for the faithful performance of \* \* the party of the second part in the above indenture." Held, the guarantor was liable immediately upon the default of his principal.<sup>27</sup> The same thing was held where, upon the back of a paper providing for the delivery on demand of certain shares of stock, the following was written: "I hereby become security of \* \* for the fulfillment of the within obligation."<sup>28</sup>

§ 117. When a writing does not amount to a guaranty—Instances.—A party wrote to others as follows: "I have the pleasure of recommending to you my friend \* \* as a person in whom confidence can be placed. I am due him \$400, but it is inconvenient for me to raise the money just now; should you give him time on the machine till \* \* it will confer a favor on me, and you may rest assured that the money will be forthcoming at the proper time." A machine was sold on the strength of this letter. Held, the writer was not liable for the price of the machine. There was no promise to pay and no fraud.<sup>29</sup> Plaintiffs had given credit to McC. for goods, but had not delivered them, whereupon the defendant wrote to the plaintiffs: "McC. wishes you to send down his stove, for he wants to put it up to-morrow morning. He is good for the amount he got from you." Held, the defendant was not liable for the goods sold. His letter contained no promise to pay, and was a mere declaration that one who had obtained credit was good.<sup>30</sup> The defendant delivered the following letter to the plaintiff: "Let \* \* have what goods he may want on four months, and he will pay as usual." Held, this was not a guaranty, but at most an expression of confidence that the party purchasing would pay for the goods bought, and there being no ambiguity about it, there was no occasion to resort to the surrounding circumstances of the relations of the parties.<sup>31</sup> Certain soldiers purchased goods of a mer-

<sup>26</sup> Koch v. Melhorn, 25 Pa. St. 139. To similar effect, see Prentiss v. Garland, 64 Me. 155.

<sup>27</sup> Taylor v. Soper, 53 Mich. 96.

<sup>28</sup> Smeidel v. Lewellyn, 3 Phila. (Pa.) 70.

<sup>29</sup> Ashton v. Bayard, 71 Pa. St.

<sup>29</sup> Case v. Luse, 28 Iowa 527.

<sup>30</sup> Kimball v. Royce, 9 Rich. Law (S. C.) 295.

<sup>31</sup> Eaton v. Mayo, 118 Mass. 141.

chant which were charged to the persons purchasing them, and bills were made out to them. Across the face of each bill was written the word "accepted," and the name of the brigade quartermaster was signed thereto. Held, the quartermaster was not liable for the bills; the word "accepted" did not import a guaranty. If a guaranty had been intended, it would have been as easy to have written the word "guarantied" as the word "accepted."<sup>32</sup> A letter to this effect, viz.: "Any assistance you may render him will be duly appreciated," and vouching for his "industry, correct moral habits and attention to business" held not a guaranty for money to be advanced.<sup>33</sup>

**§ 118. Same continued.**—An instrument in the ordinary form of a promissory note, except that it contains the words, "this note given to secure the payment of the Universalist Church debt," is a promissory note and not a contract of guaranty, the words quoted being merely a recital of the consideration.<sup>34</sup> The following letter in reply to an inquiry as to the solvency of an applicant for credit, viz.: "I have no fear in becoming responsible for the goods, but dislike to be troubled with the settlement of other merchants' bills. \* \* I see no reason [why] you should doubt him and ask for security. I recommend him as being a safe man to sell to, and I think you ought to allow him credit. \* \* His credit is good here, as I furnish him with all his groceries and supplies. I hope you will ship his goods at once. \* \* I will look to your interests in the matter." Held not to be a guaranty, and the facts stated therein did not constitute a cause of action against the writer as a guarantor.<sup>35</sup> But if the writer thereof knew the statements contained in the letter to be false, he would be liable in damages to an action for deceit.

<sup>32</sup> Hatch v. Antrim, 51 Ill. 106.

<sup>33</sup> Mitchell v. Stewart & Bro., 10 Heisk. (Tenn.) 18. And see another writing held not a guaranty: Dillon v. Smith, 10 Heisk. (Tenn.) 595.

<sup>34</sup> Clanin v. Esterly Harvesting Machine Co., 118 Ind. 372.

<sup>35</sup> Thomas v. Wright, 98 N. C. 272. For further cases illustrating when a writing does not amount to a guaranty, see the following:

Bank of Montreal v. Munster Bank, 11 Irish Law Rep. 417; Eckman & Vetsburg v. Brash & Son, 20 Fla. 763; Meinhardt Bros. & Co. v. Mode, 22 Fla. 279; Beadle Co. Nat. Bank v. Hyman, 33 Ill. App. 618; Humphreys v. St. Louis, I. M. & S. R'y Co. (Cir. Ct. S. D. N. Y.), 37 Fed. Rep. 307; Wilson & Co. v. Dean, 21 S. C. 327. See also note 1, § 1, page 4, note 28, §§ 4, 119, post.

**§ 119. When a writing does amount to a guaranty—Instances.**  
 —A party wrote on the back of a promissory note as follows: “I assign this note to \* \* and indorse the prompt payment of it.” Held, that the word “indorse” meant “guaranty,” and that the party was bound as guarantor. The special indorsement was made either to restrict or enlarge the liability of the indorser. It was not used to restrict it. “The word [indorse] must be construed with reference to the words ‘prompt payment’ in the same clause of the sentence, and when thus interpreted it is obvious that the word ‘indorse’ was used in its broadest popular sense, which is sometimes synonymous with the word ‘guaranty.’”<sup>36</sup> In articles for the purchase of land the purchaser covenanted to pay for the same in notes “such as he would be responsible for.” Held, this agreement amounted to a guaranty of such notes as he transferred in payment for the land.<sup>37</sup> A letter written by a party to merchants with whom he had been in the habit of dealing, introducing to them his brother, who was a stranger, stating that the brother was going to their city to purchase goods, and requesting them to introduce him to some of the houses with which the writer dealt, “with assurance that any contract of his will and shall be promptly paid,” is a guaranty, and binds the writer to payment for the goods sold. The court said: “As a guaranty is regarded as a mercantile instrument, it is not to be interpreted by any strict technical rules of construction, but by what may fairly be presumed to have been the intention and understanding of the parties.”<sup>38</sup> H held a mortgage on G’s land to secure a debt presently due, and C held a mortgage of the equity of redemption of the same land. C wrote to H that he was “willing to agree to see him paid” \$500 for G on account of G’s mortgage to H, within sixteen

<sup>36</sup> *Tatum v. Bonner*, 27 Miss. 760. In *First National Bank v. Babcock*, 94 Calif. 96, 29 Pac. Rep. 415, Babcock endorsed the note of Story payable to the order of plaintiff bank, which was non-negotiable because it contained an agreement to pay 5 per cent attorney’s fees in the event of suit or the employment of an attorney for collection. Held that his liability was that of a guarantor.

<sup>37</sup> *Ward v. Ely*, 1 Dev. Law (N. C.) 372. As to what amounts to a guaranty, see, also, *Westphal v. Moulton*, 45 Iowa 163, and *Miller v. Rinehart*, 119 N. Y. 368. As to whether an agreement is a guaranty or original contract, held to be determined from the circumstances of the case. *Harris v. Frank*, 81 Cal. 280.

<sup>38</sup> *Moore v. Holt*, 10 Gratt. (Va.) 284, per Lee, J.

months. Held, this was not a mere proposal for an arrangement, but, under the circumstances, a promise to pay. The court said the intention was plain, and "the courts never catch at words where the meaning is clear."<sup>39</sup>

**§ 120. Same continued.**—The following indorsement on the back of a promissory note, viz.: "For a valuable consideration to me paid by S. B., and for value received, I promise to pay S. B. the within note," signed and witnessed, is a guaranty.<sup>40</sup> A promise to "see you paid for your trouble" is not an absolute promise, but a guaranty that payment shall be made.<sup>41</sup> A statement upon the back of a promissory note, to the effect that "we know them to be good," is a guaranty that the note is good and collectible at maturity.<sup>42</sup> A promise "that if the plaintiff would endeavor to collect the amount of the loss described from the Grand Trunk Railway Company, they, the defendants, would pay the said claim if the (said) railway did not do so," is a guaranty of the collection of the debt.<sup>43</sup> Where a sewing-machine agent agreed with the company that for all unpaid machines sold by him the purchaser should give his note to the company for the unpaid balance, he (the agent) to indorse and guaranty the collection of such notes, it was held that the agent, by indorsing such notes in compliance with the agreement, became a guarantor.<sup>44</sup> The contract of bondsmen, on the bond of a bank cashier, conditioned for the faithful discharge of their principal's duties, is a contract of guaranty.<sup>45</sup>

**§ 121. Guaranty of payment "when due" of overdue note and of void certificate of deposit, valid.**—A note was made payable in three years from date, and after the expiration of that time a party covenanted that it should be paid "according to its

<sup>39</sup> Colgin v. Henley, 6 Leigh (Va.) 85, per Cabell, J.; Powers v. Clarke, 127 N. Y. 417, 28 N. E. Rep. 402.

<sup>40</sup> Bunker v. Ireland, 81 Me. 519.

<sup>41</sup> Sedgwick v. Bliss, 23 Neb. 617.

<sup>42</sup> Union Nat. Bank v. First Nat. Bank, 45 Ohio St. 236.

<sup>43</sup> Phenix Ins. Co. v. Louisville & Nashville R. Co. (Cir. Ct. E. D. N. Y.), 8 Fed. Rep. 142.

<sup>44</sup> Osborne v. Smith (Cir. Ct. D. Minn.), 18 Fed. Rep. 126.

<sup>45</sup> La Rose et al. v. The Logansport Nat. Bank et al., 102 Ind. 332, Elliott and Zollars, JJ., dissenting; The Weed Sewing Machine Co. v. Winchel et al., 107 Ind. 260; Singer Mfg. Co. v. Littler, 56 Iowa 601. See further on this subject, Cole et al. v. Merchants' Bank, 60 Ind. 350; Jones v. Ashford, 79 N. C. 172. Compare § 2.



tenor." It was contended that the contract was impossible of fulfillment, and not binding. But the court said: "The contract is to be construed with reference to the state of things then known to the parties as existing, and it being thus known to them that the day of payment of the note had already passed, the parties must be understood to be contracting with reference to a note overdue, and the guaranty was equivalent to a stipulation for the payment of a note payable on demand."<sup>46</sup> The same thing was held when, on the back of an overdue note, a guaranty was indorsed for the payment of the note "when due."<sup>47</sup> A guaranty of payment upon a negotiable note, over the signature of the indorser, is, in the absence of proof, presumed to have been written at the same time as the signature.<sup>48</sup> Principal and surety signed a note payable to a bank ten days after date. The principal, without the knowledge of the surety, left the note with the bank as collateral for what he then owed or might thereafter owe it. Suit was brought on the note by the bank against the surety, and the only claim of the bank was for money advanced the principal after the note was due. Held, the surety was not liable. He was by the face of the note only liable for its amount at the end of ten days, and this was a very different thing from standing as a continuing guarantor.<sup>49</sup> The party to whom a certificate of deposit was issued transferred it to another, who had no connection with and was ignorant of the circumstances attending its origin, with a guaranty of the payment thereof. The certificate was void for matters *dehors* its face. Held, the guarantor was liable for the amount of the certificate. The court said the guaranty was in effect a representation that the instrument or claim was perfectly valid, as well as a promise to pay it.<sup>50</sup>

<sup>46</sup> Crocker v. Gilbert, 9 Cush. 131. No demand on the maker of an overdue note is necessary before charging a guarantor thereof. Winchell v. Doty, 15 Hun (N. Y.) 1.

<sup>47</sup> Gunn v. Madigan, 28 Wis. 158.

<sup>48</sup> Gilman v. Lewis, 15 Me. 452.

<sup>49</sup> Bank of St. Albans v. Smith, 30 Vt. 148.

<sup>50</sup> Purdy v. Peters, 35 Barb. (N. Y.) 239. For a case holding that if a guaranty is made *ultra vires*,

and the paper guaranteed afterwards comes to the guarantor's possession, and is issued by it with the guaranty uncanceled, the guaranty is binding, see Arnot v. Erie R. R. Co., 67 N. Y. 315. In Holm v. Jamieson, 173 Ill. 295, the treasurer of the Western Wheel Works signed its name to a note which defendants guaranteed. The note was decreed to be void and ordered to be surrendered and canceled. Held, that

§ 122. When surety for rent liable if tenant holds over—  
 Burning of house, and landlord getting insurance, does not discharge surety for rent.—A lessor, by a lease commencing “I agree to and with the said J to lease to him,” demised to J certain premises, and by the same phrase agreed, in the same instrument, at the option of J, to lease him the premises for another year upon the same terms and conditions. The defendant, by a covenant next following in the same instrument the stipulation for another year, agreed “that in case the said J shall neglect or refuse to pay the aforesaid rent in the manner aforesaid, I will pay the same within ten days thereafter.” Held, that the defendant was liable for the second year’s rent as well as the first.<sup>51</sup> The same thing was held where a lease was for one year, but contained this provision: “This contract is to be renewed for three consecutive years, if it is fulfilled to the satisfaction of both parties,” and the defendant, whose name was not mentioned in the lease, wrote at the bottom of it, “security for Frederick S. Gaylord,” the lessee.<sup>52</sup> The plaintiff, by a lease which contained no stipulation for a renewal, demised to J a house for one year, at a certain rent, payable quarterly, and it was provided that J, before the expiration of the term, should give one quarter’s notice of his intention to quit. The defendant, by a separate instrument, guarantied the faithful performance of the covenants of the lease; “also the

nevertheless the guarantors remained liable. The court said that the promise of the guarantors was not dependent on the validity or legality of the note, and said also: “If the liability of a guarantor of commercial paper were dependent on extraneous circumstances not appearing or suggested by the face of the instrument, and such guaranty might be rendered invalid because of fraud, forgery or other circumstances that might be set up as between the maker and the acceptor of the paper, it would practically destroy the value of commercial paper and unsettle business transactions, to the great detriment of public interests. The guaranty is a contract by which the validity of

the instrument is represented, and is binding on the guarantor to the full effect of such representation.”

<sup>51</sup> *Deblois v. Earle*, 7 R. I. 26. So a guarantor for “the payment of rent” on a lease “for the term of one year” \* \* “and such further time as the lessee may hold the same,” is liable if the lessee holds over after the expiration of the year and fails to pay rent for such further time. *Rice v. Loomis*, 139 Mass. 302.

<sup>52</sup> *Decker v. Gaylord*, 8 Hun (N. Y.) 110. To same effect, see *Dufau v. Wright*, 25 Wend. 636. Holding guarantor of rent, reserved by defective lease, liable for rent reserved if lessee occupies the premises, see *Clark v. Gordon*, 121 Mass. 330.

punctual payment'' of the rent. J did not give the notice, and held over. Held, the guarantor was not liable for any rent after the expiration of the first year.<sup>53</sup> A rented a house and lot to B, and C became surety on the lease. The house was destroyed by fire, and A had insurance on it to its full value, which he got, and refused to rebuild. Held, that neither B nor C were discharged from the payment of rent by these facts. Having agreed to pay the rent, they were obliged to do so, even though the house was destroyed, and A was under no obligation to insure for their benefit.<sup>54</sup> The surety on a lease is released if the lease is terminated and is not bound beyond the terms of his agreement.<sup>55</sup>

**§ 123. Liability of surety for rent continued.**—Where a person guarantied the payment of another's rent "so long as said M shall occupy said premises," it was held that the word "occupy" denoted the whole period of tenancy.<sup>57</sup> A surety for rent is exonerated from liability if the lessor has, by breach of a covenant in the lease, caused damages to the lessee equal

<sup>53</sup> *Gadsen v. Quackenbush*, 9 Rich. Law. (S. C.) 222. See, also, on this subject, *Brewer v. Knapp*, 1 Pick. 332.

<sup>54</sup> *Kingsbury v. Westfall*, 61 N. Y. 356. Holding guarantor for rent, on tenancy from years to year, discharged if the landlord gives notice terminating the tenancy, even though the tenancy is afterwards continued, see *Tayleur v. Wildin*, Law Rep. 3 Exch. 303. A surety for rent is also discharged if the tenant surrenders part of the demised premises and the rent is thereby reduced. *Holme v. Brunskill*, Law Rep. 3 Q. B. Div. 495.

<sup>55</sup> In *Snell v. Owen*, 63 Ill. App. 377, the tenant after judgment against her for restitution in a forcible detainer proceeding retained possession and the surety on her lease was sued for rent accruing subsequent to the judgment. Held, that there could be no recovery; the judgment terminated the lease. That

the surety on a lease is released by the landlord's eviction of the tenant, at least from all rent accruing after such eviction, see *Starkweather v. Maginnis*, 98 Ill. App. 143.

<sup>56</sup> In *Johnson v. Allen*, 70 Conn. 738, 40 Atl. Rep. 1076, defendant was sued upon his guaranty of a lease of a mill in which it was provided that the lessor should buy grain for the lessee to grind and sell, the lessee to be "responsible for all grain sold" and to "collect all the bills for the same" and "sell to whom he sees fit." It was held that the transaction, as far as the grain was concerned, was a bailment and not a sale, and that the guarantor was liable only for the price of the grain sold by the lessee.

<sup>57</sup> *Morrow v. Brady*, 12 R. I. 130. Payment of a note either by surety or principal extinguishes it as to the surety. *Neylan v. Green*, 82 Cal. 128.

to the amount of the rent.<sup>58</sup> In an action against a surety for rent, alleged fraud on the part of the landlord in failing to disclose the bad reputation of the house, is no defense where the tenant has entered and remained in possession without repudiating the contract of letting.<sup>59</sup> A surety for rent has an interest in personal property mortgaged to the landlord to secure the rent, and he may call upon him for an accounting; but the landlord has a right to a reasonable time in which to sell the property, and so long as the delay is not unreasonable or unjustifiable, the surety cannot complain.<sup>60</sup> A surety for rent is not released as to rents subsequently accruing because of a release or an extension of the time of payment of rent due.<sup>61</sup> In an action against a guarantor of rent, recovery must be had on the guaranty, and not under the common counts in *assumpsit*.<sup>62</sup> Where the guarantor of a lease seeks equitable relief judgment may be entered against him by way of counterclaim for rent due and unpaid.<sup>63</sup>

**§ 124. When surety concluded by result of litigation between other properties.**—Ordinarily a surety is not bound by judgment recovered against his principal when he has not been made a party to the suit<sup>64</sup> or duly notified to come in and

<sup>58</sup> *McAlester v. Landers*, 70 Cal. 79.

<sup>59</sup> *Carhart v. Ryder*, 11 Daly (N. Y. Com. Pleas) 101.

<sup>60</sup> *Coe v. Cassidy*, 72 N. Y. 133, affirming 6 Daly (N. Y. Com. Pleas) 242.

<sup>61</sup> *Coe v. Cassidy*, 72 N. Y. 133, affirming 6 Daly (N. Y. Com. Pleas) 242.

<sup>62</sup> *Potter v. Gronbeck et al.*, 117 Ill. 404.

<sup>63</sup> In *McDougald v. Hulet*, 132 Calif. 154, 64 Pac. Rep. 288, the administratrix of one of two guarantors of a lease filed her bill under a provision in the code that a guarantor may have an action that the amount of rent due be ascertained and that his co-guarantor be found to be a principal and required to pay his part of it. The trial court found the amount of rent due and

unpaid, but refused to enter judgment therefor against the plaintiff, holding that it was not subject of a counterclaim. Held, that judgment should have been entered against plaintiff for the amount of rent due. "The plaintiff brought the suit asking relief in the court as a court of equity. In such case, where the court has once obtained jurisdiction, it will decide the whole case, and will not permit litigation by piecemeal." (p. 160.)

<sup>64</sup> *Graves v. Bulkley*, 25 Kans. 249, 255, 37 Am. Rep. 249, cited and followed in *Park v. Ensign*, Kans., Jan'y, 1903, 71 Pac. Rep. 230, in which case the court held that where the surety, as attorney, defended a suit against the principal he was not bound by the judgment therein against the principal. Burch, J., said that "the contract of surety-

defend.<sup>65</sup> But if the effect of the obligation of the surety is that he shall be bound by the result of litigation between other parties, he is, in the absence of fraud and collusion, concluded by such result. Thus, a party gave bond with sureties in a chancery suit to abide the decree of the superior court. A decree was finally entered in said court, which the principal endeavored to have set aside, alleging fraud in obtaining the same. Under the circumstances of the case it was held that the principal could have no relief, and that the sureties stood in no better position. The court said that they had undertaken to abide the event of the suit and must do so. The sureties stood in no better position than the principal, subject to the single exception that, if a judgment or decree had been procured by collusion between the principal and the creditor, the sureties would not be bound thereby.<sup>66</sup> A party arrested for

ship imposed no duty upon the sureties to defend their principals, gave the principals no right to represent the sureties, and gave one surety no authority in any capacity to charge his fellows by either his knowledge or his conduct." Citing: *McConnell v. Poor*, 113 Iowa 133, 84 N. W. Rep. 968, 52 L. R. A. 312; *Giltinan v. Strong*, 64 Pa. St. 244; *Fletcher v. Jackson*, 23 Vt. 581, 592, 56 Am. Dec. 98.

<sup>65</sup> In *Consolidated Hand Method Lasting Machine Co. v. Bradley*, 171 Mass. 127, 50 N. E. Rep. 464, it was held that notice to one standing in the relation of surety, of the pendency of an action against the principal, in order to charge the surety with whatever judgment may be recovered against the principal must be "such as to give the person notified information that he is called upon to come in and defend the suit or be held responsible for the result." It was held not sufficient for the party sued to notify the party who was ultimately liable merely that the suit was pending and that the surety was expected to assist in the defence. This was a case

in which a sub-lessee sought to hold his lessor liable for a judgment for death of an employe recovered against the sub-lessee, the claim being grounded on the lessor's covenant in the lease to keep the electric light by which the deceased was killed in good repair. It was held that the lessor might be liable for some damages, but not for the judgment, one ingredient of which was the negligence of the sub-lessee. Compare *City of New York v. Brady*, 151 N. Y. 611, 45 N. E. Rep. 1122, affirming 30 N. Y. Supp. 1121, in which case, after notice had been duly served on the sureties on a sewer contractor's indemnity bond to "come in and defend," a judgment was obtained against the city for \$4,500 for personal injuries caused by the contractor's default. Held, that the sureties were liable and that it was no defence that the city had paid the contractor the full contract price after it had knowledge of the personal injury claim.

<sup>66</sup> *Riddle v. Baker*, 13 Cal. 295. So, the sureties on an indemnifying bond given to protect a sheriff against any judgment that might be

a debt fraudulently contracted gave bond with surety, which provided "that if the fraud complained of shall be established the said \* \* security shall be liable for the debt of the complaining creditor." The fraud was established by verdict and judgment, by which the amount of the debt was also established. Held, the surety was concluded by the judgment, even as to the amount of the debt.<sup>67</sup> A lease provided that the time when the rent commenced should be determined by arbitrators, which was done, and a certain amount was thus ascertained to be due. There was a surety on the lease who became responsible for the rent for one year, according to the terms of the lease. The surety being sued for the amount found due by the award, it was held that, in the absence of collusion or fraud, the surety was concluded by the award and could not show there was in fact no rent due.<sup>68</sup> A surety signed a bond with the claimant of some property. Another party gave the surety a bond, conditioned to save him harmless from loss or damage on account of the bond he had executed. In a suit on the last bond against the maker thereof the plaintiff offered in evidence a writ and judgment by which he had been adjudged to pay \$100 on account of signing the first bond. Held, this was sufficient to authorize a recovery, and he was not obliged to show the evidence by which the judgment had been obtained.<sup>69</sup>

**§ 125. When surety or guarantor liable for attorney's fees, costs, expense, additional damages.**—When such is the effect of his obligation the surety for a debt is also bound for stipulated damages. Thus, a note provided for the payment of twenty per cent per annum on its amount, as liquidated and agreed damages, if it was not paid at maturity. The following guaranty was written on the back of the note: "For value received, we guaranty the payment of the within note when due." Held, the guarantors were liable for the damages, for they were as much a part of the note as any other.<sup>70</sup> So sure-

recovered against him for making a levy are, in the absence of any charge of fraud or collusion, concluded by a judgment recovered against him by the owner of the property seized. *Connor v. Reeves*, 103 N. Y. 527, affirming 35 Hun 507.

<sup>67</sup> *Keane v. Fisher*, 10 La. Ann. 261.

<sup>68</sup> *Binsse v. Wood*, 37 N. Y. 526.

<sup>69</sup> *Sprathin v. Hudspeth*, *Dudley* (Ga.) 155.

<sup>70</sup> *Gridley v. Capen*, 72 Ill. 11.



ties on a promissory note, which stipulates "that a reasonable sum, to be fixed by the court, for attorney's fees, shall be allowed and taxed as costs against the parties making the notes," are liable for such attorney's fees.<sup>71</sup> A statute provided that interest at the rate of ten per cent might be contracted for; but if usury was contracted for, the creditor should only recover the principal sum, and judgment for ten per cent against the debtor and in favor of the state should

<sup>71</sup> First Nat. Bank of Fort Dodge v. Breese, 39 Iowa 640. In Abbott v. Brown, 131 Ill. 108, 22 N. E. Rep. 813, affirming 30 Ill. App. 376, it was held that a guaranty of the payment of a note and "all costs and expenses paid or incurred in collecting the same, including attorney's fees," did not authorize the recovery of attorney's fees incurred in a suit against the guarantor, but only in a suit against the maker of the note. In Patillo v. Alexander, 96 Ga. 60, 22 S. E. Rep. 646, the payee of a note in transferring it to another wrote and signed on the back of it: "I guarantee attorney's fees up to ten per cent. if this note has to be collected by law and its prompt payment." The note being made and payable in Tennessee, it was held that, under the common law, which was presumed to be in force there, the indorser was entitled to notice in order to be charged as indorser, and that before he could be charged with attorney's fees the holder must show that "in the effort to recover from the maker the sums due on the note the holder had incurred a liability, or had expended for attorney's fees the amount sought to be recovered from the payee, not exceeding ten per cent of the debt due." In Carlton v. White, 99 Ga. 384, 27 S. E. Rep. 704, an accommodation maker of a note was held liable for attorney's fees provided for in the

note, his relation to the note being well known to the payee and holder thereof; following Butler v. Mutual Investment Co., 94 Ga. 563, 20 S. E. Rep. 101. In McGhee v. Importers and Traders' Nat. Bank, 93 Ala. 192, 9 So. Rep. 734, the payee of a note, before maturity, indorsed a guarantee of payment "with all legal or other expenses or for collection." Held, that he was liable for attorney's fees incurred in the collection of the debt. "If it has not this application," said the court, referring to the words quoted, "we find no scope for its operation. The terms are too broad to be limited to costs of a suit." Hall v. Pratt, 103 Ga. 255, 29 S. E. Rep. 764, was a suit against maker and accommodation indorser of a note which contained a stipulation for payment of attorney's fees in case it should be collected by law. The statute provided that such stipulation should be void "unless a plea or pleas be filed by the defendant and not sustained." The maker filed no plea. The surety filed a plea which was not sustained. Held, that the surety alone was liable for attorney's fees. The court said that "the promise as to attorney's fees was a separate and distinct undertaking on his [the surety's] part, and his liability to perform it was in law binding upon him in case he made an unsuccessful defence in resistance to the plaintiff's action."



be entered for the benefit of the school fund. Suit was brought against a principal and surety on a note, and the surety set up and established usury. Held, judgment should be entered against both principal and surety and in favor of the state for the ten per cent. The statute did not except sureties and the court would not.<sup>72</sup> A surety who guaranties the punctual payment of "the interest" on a money bond in which there is no stipulation for interest is liable for interest accruing after the bond becomes due. As there was no interest on the bond when the guaranty was made, the guarantor must have intended to become liable for the interest to accrue after the bond was due.<sup>73</sup>

**§ 126. Whether surety liable beyond penalty of his bond—Interest, court costs, government building bonds.**—The surety on a bond cannot generally be held liable for any sum greater than the penalty thereof.<sup>74</sup> A surety in a stipulation given on

<sup>72</sup> McIntosh v. Likens, 25 Iowa 555.

<sup>73</sup> Hamilton v. Van Rensselaer, 43 Barb. (N. Y.) 117.

<sup>74</sup> Clark v. Bush, 3 Cow. 151; Fairlie v. Lawson, 5 Cow. 424; Oshiel v. De Graw, 6 Cow. 63; State v. Estes, 101 N. C. 541; Showles v. Freeman, 81 Mo. 540; Wilson's Case, 38 N. J. Eq. 205; Graeter v. De Wolf, 112 Ind. 1; Meadows v. The State, 114 Ind. 537; Fraser v. Little, 13 Mich. 195; Johnson v. McMillan, 13 Col. 423. Under the provisions of the statutory government building bond, the surety may become liable in a sum far exceeding the penalty and interest. Thus, in United States v. Rundle, 100 Fed. Rep. 400, 40 C. C. A. 450, Rundle gave a \$10,000 bond conditioned for the performance of his contract with the government for the erection of certain buildings and for the payment of all persons furnishing labor and material therefor. Having defaulted, the sureties finished the work at a cost exceeding the penalty of the bond. Held, reversing the Circuit Court, that they

nevertheless remained liable for all labor and material furnished to their principal, no matter how much it had cost them to finish the building. "Up to the maximum named in the bond as its penalty, those who furnished labor or materials in the construction of the work were entitled to look for payment." (p. 453.) These bonds are treated as expressing two distinct contracts of suretyship, one to the government, the other to the material man; release of one does not release the other, performance of one does not excuse non-performance of the other. See Thayer, J., in United States v. National Surety Co., 92 Fed. Rep. 549, 34 C. C. A., 526; Dewey v. State, 91 Ind. 173; Conn v. State, 125 Ind. 514, 25 N. E. Rep. 443; Doll v. Crume, 41 Nebr. 655, 59 N. W. Rep. 806; Kaufman v. Cooper, 46 Nebr. 644, 65 N. W. Rep. 796; Steffes v. Lemke, 40 Minn. 27, 41 N. W. Rep., 302. The principal may be liable for more than the surety. Thus in The Favorite, 11 Biss. 283, the owners of a libeled

the release from attachment of the property of a respondent in a suit in admiralty cannot, where the stipulation is in a sum certain, be compelled to pay more than that sum, although the stipulation is conditioned to pay such sum as shall be awarded to the libellant by the final decree in the suit.<sup>75</sup> Where the surety on a sheriff's official bond has paid under judgments rendered on it the amount of the penalty, he can be held responsible for no more. "The principle which limits the liability of the surety by the penalty of his bond inheres intrinsically in the character of his engagement. He does not undertake to perform the acts or duties stipulated by his principal, and would not be permitted to control their performance, and could not where his principal was a public officer."<sup>76</sup> When, however, the surety is bound to the same extent as the principal, and is himself in default, a sum in excess of the penalty of the bond, but not exceeding the legal rate of interest on the amount for the payment of which he is in default, may be recovered against him as damages for the detention.<sup>77</sup> "It may be a reasonable doctrine that a surety, who has bound himself under a fixed penalty for the payment of money, or some other

vessel, in a collision case, applied for a limitation of their liability to the value of the vessel and, such value having been appraised at \$12,297.80, obtained the vessel's release by giving bond conditioned for the payment of that sum into court whenever ordered. The damages allowed to the libellants exceeded \$18,000, and it was held (Blodgett, J.) that although the sureties were not liable beyond the appraised value, the owners, having had the use of the vessel during the litigation, were liable for interest on the appraised value and costs.

<sup>75</sup> *Brown v. Burrows*, 2 Blatch. 340.

<sup>76</sup> *Leggett v. Humphreys*, 21 How. (U. S.) 66, per Daniel, J.

<sup>77</sup> *Lewis v. Dwight*, 10 Conn. 95; *State v. Wayman*, 2 Gill & Johns (Md.) 254; *Harris v. Clap*, 1 Mass. 308; *Judge of Probate v. Heydock*, 8 N. H. 491; *Mayor and City Coun-*

*cil of Natchitoches v. Redmond*, 28 La. Ann. 274; *Perry v. Horn*, 22 W. Va. 381. See, also, *City of Camden v. Ward*, N. J. Err. & App., June, 1902, 52 Atl. Rep. 392, an action on the bond of a street paving contractor, in which the court said that the jury should find the amount of damages caused by the breach; if they exceed the penalty of the bond then the sureties are liable for interest on the penalty in addition to the amount of the penalty from the date of the breach, and the judgment should be that the plaintiff recover the penal sum, as debt, and interest thereupon, as damages for detention of the debt, and that the plaintiff have execution for the damages assessed on breach of the covenant, not exceeding the debt and damages for detention. Referring to 4 Chitty Forms (6th ed.) 108. *Gloucester City v. Eschbach*, 54 N. J. Law 150, 23

act to be done by a third person, has marked the utmost limit of his own liability. But when the time has come for him to discharge that liability, and he neglects or refuses to do so, it is equally reasonable, and altogether just, that he should compensate the creditor for the delay which he has interposed.

\* \* The question, in short, is not what is the measure of a surety's liability under a penal bond, but what does the law exact of him for an unjust delay in payment, after his liability is ascertained and the debt is actually due from him."<sup>78</sup> The surety's liability for interest accrues either after proper demand on the principal and his refusal to pay, or from the commencement of the suit, in which latter case interest accrues from the day of service.<sup>79</sup> There are cases holding that interest runs from the date of the breach.<sup>80</sup> Others from the date of demand.<sup>81</sup> Interest is allowable only as compensation

Atl. Rep. 360. That interest is not allowable from a date prior to the execution of the bond, see *McPhillips v. McGrath*, 117 Ala. 549, 23 So. Rep. 721.

<sup>78</sup> *Brainard v. Jones*, 18 N. Y. 35, per Comstock, J.; *Omaha Carpet Co. v. Clapp*, Neb., Jan'y, 1902, 89 N. W. Rep. 246. To precisely similar effect, see *Frink et al. v. Southern Express Co.*, 82 Ga. 33; *Wyman v. Robinson et al.*, 73 Me. 384; *Clark v. Wilkinson*, 59 Wis. 543; *Maddox v. Rader*, 9 Mont. 126. But it is held that this doctrine does not control in the case of a bond conditioned for the performance of a covenant other than for the payment of money. In such a case, quantum damnificatus is the issue. *Beers v. Shannon*, 73 N. Y. 292, reversing 12 Hun 161.

<sup>79</sup> *Cassady et al. v. Trustees of Schools*, 105 Ill. 561; *United States v. Curtis*, 100 U. S. 119; *United States v. Poulson* (Dist. Ct. E. Dist. Pa.), 30 Fed. Rep. 231. But see, contra, *State v. Blakemore*, 7 Heisk. (Tenn.) 638, and *United States v. Broadhead*, 127 U. S. 212.

<sup>80</sup> *James v. State*, 65 Ark. 415.

46 S. W. Rep. 937, action on guardian's bond. *Holmes v. Standard Oil Co.*, 183 Ill. 70, affirming *Holmes v. Standard Oil Co.*, 82 Ill. App. 476, action on a bond given by vendor to save vendee harmless from certain street assessments to be imposed on the land sold for opening a street through it. In *Providence Washington Insurance Co. v. The Sydney and The Wm. Worden* (C. C., N. Y.), 47 Fed. Rep. 260, at 262, it was held that, in admiralty, stipulators are liable for interest upon the stipulated sum only in case of default in complying with the terms of the stipulation.

<sup>81</sup> *Dwyer v. United States*, 93 Fed. Rep. 616, 35 C. C. A. 488, note 83 below. *Trumpler v. Colton*, 109 Calif. 250, 41 Pac. Rep. 1033, action on a guardian's bond. In *Foltz v. Tradesmen's Trust & Savings Fund Co.*, Pa. St. Feb., 1902, 51 Atl. Rep. 379, 384, it was held that the surety on a building contractor's bond was liable for interest, not from the date of principal's default, but from the date of beginning suit upon the bond. Re-

for loss suffered by the obligee. Where the facts are such that no loss can have been suffered no interest is allowed.<sup>82</sup> Court costs may be recovered from the surety in addition to the full amount of the penalty if he fails to pay on demand.<sup>83</sup> Where the bond states no sum as penalty the amount of damages recoverable is limited only by its terms.<sup>84</sup>

**§ 127. Whether surety liable beyond penalty of bond, continued.**—The sureties on a bond given to secure the performance of work undertaken by their principal are liable for the

ferring to *Pennsylvania Co. for etc., v. Swain*, 189 Pa. St. 626, 42 Atl. Rep. 297, the court said that “in order that there may be such default in payment by the surety as to create a basis for the running of interest, the surety must have been required by the creditor presently to make payment—either such formal demand for payment as evidences an intent to require payment forthwith, or some other action taken by the creditor which is equivalent thereto, and which places the surety in a position of failing on his part to comply with a present and matured obligation to pay.” In *Thomas Laughlin Co. v. American Surety Co.*, 114 Fed. Rep. 627, Lowell, J., said: “A surety’s liability does not ordinarily extend beyond the penal sum of the bond unless he has in some way resisted or obstructed the recovery of the claim against him.”

<sup>82</sup> In *Blewett v. Front St. Cable Ry. Co.*, 51 Fed. Rep. 625, 2 C. C. A., 415, 7 U. S. App. 285, affirming 49 Fed. Rep. 126, plaintiff conveyed to defendant certain lots in Seattle as a bonus to induce the building of a cable railway on a certain route, and the railway company executed to him its bond in the penal sum of \$18,000, conditioned to be void if the road should not be built and in operation with-

in a certain time. The road was not built. Held, that the measure of damages for breach of the bond was \$18,000, which sum was the stipulated value of the land, with interest from the date of breach, but since the land was vacant and produced no income, it was held that interest should not be recovered. Compare *The Favorite*, 11 Biss 283, cited in note 74, *supra*.

<sup>83</sup> In *Dwyer v. United States*, 93 Fed. Rep. 616, 35 C. C. A. 488, the sureties on a government building contractor’s bond in the penal sum of \$12,000 were held liable for \$10,924.56 due to plaintiff for labor and materials, with interest from July 16, 1897, the date of service of summons, to the date of verdict, total \$11,528.38, to which was added interest on the amount of the verdict to date of judgment thereon, \$336.30, and costs, \$953.32, making in all \$12,815.

<sup>84</sup> In *United States v. Haytien Republic*, 59 Fed. Rep. 476, 8 C. C. A. 182, a stipulation for the release of a libeled vessel omitted, in the clause containing the condition, the sum to be paid by the obligors in case of default, but contained a distinct obligation to pay a sum equal to the appraised value of the vessel. Held, that the bond might be enforced as to the latter provision. See note 88, next.

actual damages sustained by the obligee, but not for a penalty which the principal separately agrees to forfeit in case of his failure to perform as stipulated.<sup>85</sup> A finding in an action on a bond that the sureties thereon are liable for a sum greater than the penalty of the bond is not invalid because of the excess. "The greater includes the less, and it will hardly be claimed that because the debt exceeds the security the creditor must not only bear the loss of the excess but of the other also."<sup>86</sup> Where a statute provides that a surety on a constable's bond may limit the amount of his liability thereon, this does not limit the recovery of costs against the surety; and execution thereon may issue although the amount directed to be levied upon exceeds the penalty of the bond.<sup>87</sup> "Such provision has reference only to the amount the sureties are chargeable with on the penalty of the bond. It has no reference to the costs of the action upon the bond."<sup>88</sup>

**§ 128. When surety on note liable if it is not discounted by party to whom it is payable.**—When a surety becomes a party to a negotiable promissory note, payable to a particular person, with the design of raising money to be used by the principal for a certain purpose, and the note is not discounted by the payee, but is discounted by another, and the money is applied to the purpose intended, it is generally held that the surety is liable for the note.<sup>89</sup> To the objection that the surety

<sup>85</sup> Dill v. Lawrence, 109 Ind. 564.

<sup>86</sup> Odd Fellows v. Morrison, 42 Mich. 521. Judgment for an amount in excess of the penalty is void only as to such excess: Munks v. Jackson, 66 Fed. Rep. 571, 13 C. C. A. 641, in admiralty.

<sup>87</sup> Mayor, etc., v. Ryan, 9 Daly (N. Y. Com. Pleas), 316. But see Gay v. Hulst et al., 56 Mich. 153; note 83 to § 126.

<sup>88</sup> Daly, J., in Mayor v. Ryan, 9 Daly (N. Y. Com. Pleas), 316, 320. See also note 84 to preceding section. For the liability of sureties on guardian's bond where there is no penalty named therein, see State v. Britton, 102 Ind. 214; Britton v. State, 115 Ind. 55.

<sup>89</sup> Keith v. Goodwin, 31 Vt. 268; Starrett v. Barber, 20 Me. 457; Bank of Middlebury v. Bingham, 33 Vt. 621; Planters' and Merchants' Bank v. Blair, 4 Ala. 613; Bank of Newbury v. Richards, 35 Vt. 281; Browning v. Fountain, 1 Duvall (Ky) 13; Ward v. Northern Bank of Kentucky, 14 B. Mon. (Ky.) 283; Thrall v. Benedict, 13 Vt. 248. In State Solicitors' Co. v. Savage, 39 Fla. 703, 23 So. Rep. 413, Savage and wife mortgaged their land to secure the note of Sutton for \$1,500, payable to the order of Swayne. The understanding was that Swayne was to discount the note and divide the proceeds. Being unable to realize the desired

has a right to choose his creditor, it is answered that, if the payee had discounted the note, he might the next moment have transferred it to another, and so the surety cannot in such case choose his creditor, and as the object which the surety had in view has been accomplished, he is in nowise prejudiced, and is bound. A, being principal, and B, surety, executed a note payable to a bank, for the purpose of enabling A to raise money on it for his benefit. The bank refused to discount the note for A, and C, being told by A that the bank would discount the note, himself advanced the money on it to A, and took it to the bank, which again refused to discount it. C then got the bank to discount the note for him, and afterwards B gave the bank notice not to discount it. Held, the bank must be considered as having adopted the payment of the note made by C, and could sue on the note for C's use.<sup>90</sup> In another case J, being indebted to P, gave him a note signed by himself and sureties, payable to a bank, with the agreement between J and P that P should get it discounted and apply the proceeds, and if it could not be discounted it should be returned; but this agreement was not known to the sureties. P could not get the note discounted, but left it with the bank as collateral security for a debt he owed it, and so informed J, who made no objection; after the note came due it was by agreement between J and P, and without the sureties' knowledge, applied on J's indebtedness to P, and P thereafter prosecuted a suit which the bank had commenced for his benefit. Held, that as the note had accomplished the purpose intended the sureties were bound.<sup>91</sup>

amount, Swayne discounted the note as a note for \$1,000, indorsing it: "Pay to the order of the Solicitors' Company, Philadelphia, the said principal sum being reduced to \$1,000. (Signed) Charles Swayne," and indorsing the mortgage: "Philadelphia, July 8th, 1886. The debt due on note, for which the within mortgage is given to secure, is reduced to \$1,000. (Signed) Charles Swayne." In a suit by the indorsee to foreclose the mortgage it was held that the indorsements on the note and mortgage, which were

made without the knowledge of the Savages, did not have the effect of discharging the sureties. "This was not an alteration of the note," said the court, Mabry, J., "but in legal effect a credit of five hundred dollars on it." Citing: *Merchants' & M. Bank v. Evans*, 9 W. Va. 373; *Cambridge Savings Bank v. Hyde*, 131 Mass. 77, 41 Am. Rep. 193; *Moore v. Macon Savings Bank*, 22 Mo. App. 684.

<sup>90</sup> *Bank of Burlington v. Beach*, 1 Aiken (Vt.) 62.

<sup>91</sup> *Bank of Montpelier v. Joyner*,



**§ 129. Note used for purpose different from that intended, surety remains liable—Continued.**—A as principal, and B as surety, signed a note payable in six months to C, for the purpose of enabling A to get cloth to the amount of the note from C. A got cloth from C amounting to more than half the note, and C not having enough of the cloth, D furnished the rest on an understanding between A, C and D that a pro rata share of the note should inure to the benefit of D. Afterwards C transferred the entire note to D, and he sued on it. Held, B was liable.<sup>1</sup> Principal and surety executed a note with the expectation that with it the principal would buy a yoke of oxen of A, and give the surety a mortgage on them for his indemnity. The principal did not buy the oxen of A, but bought a yoke of oxen of B, he knowing that the note had been given to buy the oxen of A, but not knowing of the agreement about the mortgage. The oxen purchased from B did not come to the face of the note, and \$6.25 was credited on the back of the note when it was delivered to B. Held, both the principal and surety were liable on the note. It was used for the purpose intended, and the credit on its back was not an alteration of it any more than a credit at any other time would have been.<sup>2</sup> A bought a horse of B, and in payment for it gave his note, with two sureties, payable to a bank or order. It was intended to raise money on the note to pay for the horse, but there was no evidence that the sureties knew the purpose for which the note was given. The bank refused to discount the note, and before it became due the sureties notified the bank not to discount it. After the note became due the bank indorsed it to B, who had always held it, and he sued upon. Held, the sureties were liable. The court said: "It [the note] has not followed, perhaps, the precise channel that was anticipated, but it has not been turned from a strictly legal channel."<sup>3</sup> Principal and surety executed a note to a married woman for some land, and she alone made a deed for it, which was void. Afterwards she died, leaving her property, by will, to her husband. The principal became insolvent, and after the note became due, discovering that his title was bad, applied to the husband,

33 Vt. 481. To similar effect, see Smith v. Moberly, 10 B. Mon. (Ky.) 266; Perry v. Armstrong, 39 N. H. 583.

<sup>1</sup> Lyman v. Sherwood, 20 Vt. 42.

<sup>2</sup> Laub v. Rudd, 37 Iowa 617.

<sup>3</sup> Cross v. Rowe, 22 N. H. 77, per Eastman, J.



who made him a deed for the land. Held, the surety was liable on the note. The principal could not repudiate it, having received the consideration, and as the surety had executed the note for the purpose of purchasing the land, and it had been used for that purpose, he was bound.<sup>4</sup> The condition of a bond that the principal shall pay "all notes, acceptances and other obligations whatever," given by him for his indebtedness, is applicable not alone to his several notes, but also to notes, if given for his contemplated indebtedness, in which other parties are joint promisors with him.<sup>5</sup> A made a note payable to B, and C executed the note with A as joint maker, the object being to raise money for A's use. B did not discount the note, nor indorse it, but D did advance money on it to A, and sued A and C on it in the name of B. The court held C liable, and said the law was that if C signed the note with the understanding that it was to be passed to B and no one else, then he was not liable. But if C signed as surety with the general purpose of enabling A to raise the money on the note, without limiting him as to the person to whom he was to pass it, he would be liable to any one to whom it was passed.<sup>6</sup>

**§ 130. When surety on note not liable if it is discounted by party other than payee.**—When a surety signs a negotiable note with the principal for a particular purpose, and it is diverted from that purpose by the principal, and the party taking it has then knowledge of facts sufficient to charge him with notice of such diversion, the surety is not bound.<sup>7</sup> But if the party taking the note has no such notice, express or implied, and takes the note in good faith and for value, the surety will be bound to him notwithstanding such diversion.<sup>8</sup> A party became surety on a note for \$100, payable to a bank, for the purpose of purchasing lumber for the principal with \$75 of the money, and paying \$25 of it to the surety and his

<sup>4</sup> Campbell v. Moulton, 30 Vt. 667.

<sup>5</sup> Parham Sewing Machine Co. v. Brock, 113 Mass. 194.

<sup>6</sup> Perkins v. Ament, 2 Head (Tenn.) 110. The fact that a person was induced to sign his name as surety to a negotiable note without reading it, under representations of the maker that it was payable to a bank, when it was in fact payable to

an individual, constitutes no defense to the note in an action thereon by the payee, when it does not appear that he had any knowledge of the alleged fraud. Wright v. Flinn, 33 Iowa 159.

<sup>7</sup> Brown v. Tabor, 5 Wend. 566.

<sup>8</sup> McWilliams v. Mason, 31 N. Y. 294.

partner for a debt due them from the principal. The bank never discounted the note, but another creditor of the principal, to whom he owed \$22, took out that sum and gave the principal the balance in money. Suit was brought against the surety in the name of the bank, for the use of the party discounting the note, and it was held he was not liable. "From the fact that the defendant was willing to become surety to a particular party to raise money for particular objects, it would be unreasonable to infer that he consented to assume a general liability to any party and for any purpose." The note had been diverted from the purpose intended, and the party who took it had notice thereof, from the fact that on its face it was payable to the bank.<sup>9</sup> So where principal and surety, for the purpose of raising money for the principal's family, signed a note payable to the order of a bank, which the bank refused to discount, and the principal gave it to a creditor of his to pay a pre-existing debt, it was held the surety was not liable. The fact that the note was payable to the bank was sufficient notice to the creditor that the note was made for the purpose of raising money, and, if he had inquired, he would have found that his taking the note would defeat the very purpose for which the surety signed.<sup>10</sup> Principal and sureties signed a note payable to a bank, with the understanding that it should be discounted at the bank. The note never was discounted by the bank, but was sold by the principal to one Cook, who sued it in the name of the bank. Held, the sureties were not liable. The court said the sureties might have been willing to be bound to the bank, but to no one else. "The reason for such a preference may be perfectly satisfactory and prudential. Then, as the sureties \* \* agreed to be bound to the bank only, and signed the note with the understanding that it was to be delivered to and discounted by the bank, and that they were not to be bound unless it should be so delivered and discounted, the sale and delivery of the note to Cook, without their knowledge or assent, had no binding operation as to them."<sup>11</sup>

<sup>9</sup> Manufacturers' Bank v. Cole, 39 J. Marsh (Ky.) 128, per Robertso., Me. 188. C. J. The precise opposite of this

<sup>10</sup> Russell v. Ballard, 16 B. Mon. was held in Farmers' and Mechanics' Bank v. Humphrey, 36 Vt. 554; (Ky.) 201.

<sup>11</sup> Conway v. Bank of U. S., 6 J. Briggs v. Boyd, 37 Vt. 534. It

§ 131. When surety on note not liable if it is discounted by party other than payee.—The same thing was held where the note was payable to a bank or order, and it was discounted by a third person, the fact that the note was payable to the bank being held sufficient notice to such third person.<sup>12</sup> It has been held that an accommodation drawer of a bill of exchange, made payable to a particular bank for the purpose of being discounted by the bank named, cannot be held liable on the bill to a third person who, after discount by the bank had been refused, took the bill from the principal for value, and also that such drawer cannot be held liable to the bank where it subsequently discounts the bill for such third person, with notice of the suretyship of the drawer.<sup>13</sup> In holding that a note by principal and surety, made payable to a bank, but discounted by a third person, did not bind the surety, the court said: “He might be willing to lend his name to procure a loan from a party who would indulge him—who would advance to his principal the full face of the note—when he would be utterly unwilling to go security to one who was his personal enemy, or who would exact harsh terms or heavy interest of his principal.”<sup>14</sup> Again, it has been held, that if a note payable to a particular person is signed by a surety and sold to another person, the surety is not liable thereon without his express or implied consent, but such consent may be inferred from the course of business between the parties. This was held, “not upon the ground that there has been a change of contract prejudicial to him, but that there has been no completed contract at all; that there was no delivery to the only party to whom the note, by its very terms, was to be delivered, and therefore that the contract, which was merely undertaken to be made, never took effect.”<sup>15</sup> From the cases referred to it appears there is some conflict of authority on this subject. Unless the party suing on the note is the bona fide holder thereof for value, without notice, and has the right to sue

seems that in these two last cases the surety was held liable on a contract he never consented to make, and which the taker of the note should have known he never consented to make.

<sup>12</sup> Prescott v. Brinsley, 6 Cush.

233. To same effect, see Allen v. Ayers, 3 Pick. 298.

<sup>13</sup> Knox Co. Bank v. Loyd's Adm'r, 18 Ohio St. 353.

<sup>14</sup> Clinton Bank v. Ayres, 16 Ohio 283, per Birchard, C. J.

<sup>15</sup> Chase v. Hathorn, 61 Me. 505, per Peters, J.

thereon in his own name, there seems to be much force in the objection that the surety has a right to choose his creditor. A reason not already suggested is, that while the payee, if he had discounted the note, would have had the power to sell it to another, yet he might not have done so. In every instance much will depend upon the form of the paper and the special circumstances of the case.

**§ 132. When guarantor on general guaranty, or on guaranty addressed to another, liable to person acting on it.—** Where a letter of credit is general, addressed to all persons, any one to whom it is presented may act upon and enforce it.<sup>16</sup> A letter of credit addressed to one with the design that it be shown to others to induce them to act upon it, may be sued on by such others in their own names, if acted upon by them.<sup>17</sup> An action may be maintained by the several partners of a firm, upon a guaranty given to one of them, if there be evidence that it was given for the benefit of all.<sup>18</sup> D, who was a merchant in the country, dealing in all sorts of merchandise, being about to purchase a stock of goods in New York, received from A, who had been his partner, a guaranty addressed to no person named, by which A agreed to be responsible for what goods D might purchase in New York. Held, A was liable to every person from whom D purchased goods in pursuance of the guaranty; that the guaranty was not limited to the first person who sold goods on its credit; and that A was liable for goods sold on the credit usual in such cases.<sup>19</sup> Defendant signed a letter of credit addressed to F, as follows: "As you request, we are willing to help you in the purchase of a stock of goods. We will, therefore, guaranty the payment of any bills which you may make under this letter of credit in Baltimore, not exceeding fifteen hundred dollars." Held, that any person advancing goods to F upon the faith of the guaranty could maintain an action thereon against the

<sup>16</sup> *Birckhead v. Brown*, 5 Hill (N. Y.) 634; affirmed on error, 2 Denio 375. See, on this subject, *Wheeler v. Mayfield*, 31 Tex. 395; *Mayfield v. Wheeler*, 37 Tex. 256.

<sup>17</sup> *Lonsdale v. Lafayette Bank*, 18 Ohio 126.

<sup>18</sup> *Garrett v. Handley*, 4 Barn. & Cress. 664. A and D were real es-

tate partners. M wrote to A that he would guaranty a certain payment if A would rent him a certain plantation. Held, M was liable on the guaranty whether the renting was done by A or by A and D. *Anderson v. May*, 10 Heisk. (Tenn.) 84.

<sup>19</sup> *Lowry v. Adams*, 22 Vt. 160.

defendant as guarantor.<sup>20</sup> A letter of credit was as follows: "James McElroy—Dear Sir: Mr. John Tichenor is going to the city to purchase goods. \* \* I will guaranty the payment of such debts as he may contract for the purchase of goods on credit." McElroy was at that time a clerk in a store, but had no store of his own. Tichenor bought goods from four different houses on the strength of the guaranty, the whole amounting to a less sum than that mentioned in the guaranty. Held, the guarantor was liable for all the bills. The court said it was apparent from the face of the guaranty that McElroy was not expected to furnish the goods. "It is a general letter of credit addressed through McElroy, a common friend, to the merchants in the city."<sup>21</sup> Defendant addressed to J. V. & Co. the following guaranty: "In consideration of your filling the orders for goods from your Birmingham house of J. C. & Co., say the spring importations, I hereby hold myself responsible for and guaranty the payment of the same to you." J. V. & Co. were the agents in New York for the Birmingham house referred to. The goods having been furnished to J. C. & Co., it was held that the Birmingham house could sue on the guaranty, if intended for their benefit, and whether so intended might be proved by parol.<sup>22</sup> A guaranty was as follows: "Captain Charles Drummond—Dear Sir: My son William, having mentioned to me that, in consequence of your esteem and friendship for him, you had caused and placed property of your and your brother's in his hands for sale, and that it is probable from time to time you may have considerable transactions together; on my part I think proper to guaranty to you the conduct of my son, and shall hold myself liable, and do hold myself liable, for the faithful discharge of all his engagements to you, both now and in future. George Prestman." Held, this guaranty extended to and covered a debt incurred by William Prestman to Charles Durand and his brother Richard Durand, as partners, it being proved that the transactions to which the letter related were with them as partners, and that no other brother of Charles Durand was interested therein. The court said that, accord-

<sup>20</sup> Griffin v. Rembert, 2 Rich. N. S. (S. C.) 410. To the same effect, see Manning v. Mills, 12 Up. Can. (Q. B.) 515.

<sup>21</sup> Benedict v. Sherill, Lalor's Sup. to Hill & Denio, 219.

<sup>22</sup> Van Wart v. Carpenter, 21 Up. Can. (Q. B.) 320.

ing to the ordinary construction of the words of the guaranty, they were intended to apply to a partnership liability.<sup>23</sup> One who gauranties a bond and mortgage to enable the mortgagee to sell the same to a contemplated purchaser is liable on his guaranty to a different purchaser who relied upon the guaranty.<sup>24</sup> In all these cases the guaranty, although addressed to no one, or to the purchaser, or to a third person, or to one of several, was held to be intended for the party advancing upon it, and the guarantor was for that reason held liable.

§ 133. **When guarantor not liable to any one except party to whom guaranty is addressed.**—Usually a guaranty, when addressed to a particular party, can only be acted upon and enforced by such party.<sup>25</sup> A guaranty was on its face addressed to "Col. Smith & Pilgrim," but on its back it was addressed to Smith only. The day previous to the date of the letter the partnership of Smith & Pilgrim was dissolved, and Smith alone sold the goods. Held, the guarantor was not liable. The face of the guaranty only could be considered, and not the address on the back. As there was no ambiguity about the guaranty, parol evidence could not be received to vary it.<sup>26</sup> A letter of credit was addressed to A. After the date of the letter A entered into partnership with B, and A & B furnished the goods. Held, the writer of the letter was not liable for the goods so furnished. A's manner of doing business may have been different from that of the firm, or the writer of the letter may have expected favors from A which the firm would not grant him.<sup>27</sup> In another case in which the same thing was decided the court said: "It is a case of pure guaranty, a contract which is said to be *strictissimi juris*, and one in which the guarantor is entitled to a full disclosure of every point which would be likely to bear upon his disposition to enter into it. \* \* He has a right to prescribe the exact terms upon which he will enter into the obligation, and to insist on his discharge in case those terms are not observed. It is not a question whether he is harmed by a deviation to

<sup>23</sup> Drummond v. Prestman, 12 279; Second Nat. Bank of Peoria Wheat. 515. v. Diefendorf, 90 Ill. 396.

<sup>24</sup> Tucker v. Blandin, 48 Hun (N. Y.) 439. <sup>25</sup> Smith v. Montgomery, 3 Tex. 199.

<sup>26</sup> Taylor v. Wetmore, 10 Ohio 490; Plecker v. Hyde, 3 McLean (S. C.) 620. <sup>27</sup> Sollee v. Mengy, 1 Bailey, Law



which he has not assented. He may plant himself upon the technical objection, this is not my contract, *non haec in foedera veni.*"<sup>28</sup> A, of New York, gave a letter of credit to B, addressed to C, in Albany, requesting him to deliver goods to B on the best terms, to a certain amount. C, instead of delivering the goods himself, gave B a letter to D, in Geneva, requesting him to deliver goods to B to the same amount, and engaging to be responsible. D delivered the goods to B. In an action by C against A for the amount it was held he was not liable. A had the right to stand on the terms of his contract, and, moreover, D may not have given B as good terms or sold the goods as cheap as C would have done.<sup>29</sup> Two firms, composed of the same members, were doing business in the same city, but in different parts thereof, the name of one firm being Taylor, Gillespie & Co., and that of the other David B. Taylor & Co. A party knowing these facts gave a letter of credit addressed to "Messrs. Taylor & Gillespie," and the firm of David B. Taylor & Co. gave credit on it. Held, the guarantor was not liable.<sup>30</sup> The guaranty was intended for Taylor, Gillespie & Co., and the other firm could not recover on it. A partnership consists of something besides its individual members. It has its stock in trade, place of business, books, bills, papers, accounts, etc.<sup>31</sup> A letter of credit purported to bind the guarantors to "any person in Macon, Georgia, who may feel disposed" to advance goods. Without the writer's consent this was changed by inserting Griffin in place of Macon, and the goods were bought in Griffin. Held, the guarantors were not bound.<sup>32</sup> A mortgage was given to secure the debt of a third party to the extent of \$800, so long as the creditor should continue to sell goods to such third party. Subsequently, the creditor transferred his business to other persons, with whom the debtor continued to deal for some time. During the course of such dealing the debtor paid in more than sufficient to cover the amount of the mortgage. Held, the payments must be applied to the

<sup>28</sup> *Barns v. Barrow*, 61 N. Y. 39, per Dwight, C. To same effect, see *Stevenson v. McLean*, 11 Up. Can. (C. P.) 208; *Allison v. Rutledge*, 5 Yerg. (Tenn.) 193; *Bussier v. Chew*, 5 Phil. (Pa.) 70. A letter of credit addressed to P & Co. will not au-

thorize advances by P alone after the firm is dissolved. *Penoyer v. Watson*, 16 Johns. 100.

<sup>29</sup> *Walsh v. Bailie*, 10 Johns. 180.

<sup>30</sup> *Taylor v. McClung's Ex'r*, 2 Houston (Del.) 24.

<sup>31</sup> *Johnson v. Brown*, 51 Ga. 498.



oldest items of account, and that the mortgage was discharged.<sup>32</sup> A guaranty commenced: "C. C. Trowbridge, Esq., President, Detroit, Mich.," and there was no further designation of the party address; money was advanced on the guaranty by the Michigan State Bank, of which Trowbridge was president. Held, it might be shown by parol that the guaranty was intended for the bank. The court said that a guaranty follows the general rule of law with reference to simple contracts, "which is that they may be sued either in the name of the nominal or of the real party, \* \* and in the present case, the letter of credit being addressed to the person as president, and the showing him president of the plaintiffs' bank, and of no other institution, renders it certain that it was intended for the plaintiffs' benefit."<sup>33</sup> The following letter of credit, viz.: "Messrs. Bingham Bros., Evansville, Ind. Dear Sirs—Any drafts that you draw on Mr. A. Feigelstock, of our city, we guaranty to be paid at maturity. Kaufman Bros.," was held to be a special guaranty, and that where plaintiff, an Indiana bank, discounted certain drafts drawn by Bingham Bros. on Feigelstock, it acquired no right of action on the guaranty.<sup>34</sup>

**§ 134. Surety for several not liable for one—Surety for one not liable for several.**—The sureties on a bond conditioned that the principal shall pay for all purchases made by him from the obligee are not liable for purchases made from the obligee by a partnership of which the principal has subsequently become a member.<sup>35</sup> A wrote to B as follows: "Anything you can do for the bearer, Major S. M. Neill, whom I introduce

<sup>32</sup> Royal Canadian Bank v. Payne, 19 Grant's Ch. (Can.) 180.

<sup>33</sup> Michigan State Bank v. Pecks, 28 Vt. 200, per Redfield, C. J. For other cases where parol evidence was held admissible, see Wadsworth v. Allen, 8 Gratt. (Va.) 174; Garrett v. Handley, 4 Barn. & Cres. 664; Van Wart v. Carpenter, 21 Up. Can. (Q. B.) 320; Drummond v. Prestman, 12 Wheat. 515. If there is no ambiguity, parol evidence is not admissible. Smith v. Montgomery, 3 Tex. 199.

<sup>34</sup> Evansville Nat. Bank v. Kaufman et al., 93 N. Y. 273, reversing 24 Hun 612.

<sup>35</sup> Parham Sew. Mach. Co. v. Brock, 113 Mass. 194. To same effect see Shaw v. Vandusen, 5 Up. Can. (Q. B.) 353. And to similar effect, see Connecticut Mutual Life Ins. Co. v. Scott, 81 Ky. 540; White Sewing Machine Co. v. Hines, 61 Mich. 423. Compare Kelley v. London Guaranty & Accident Co., Mo. App., Jan'y, 1903, 71 S. W. Rep. 711.

as my friend, will be done for me, he being a merchant in Clinton. P. S. If you should accept for Mr. Neill for \$1,000, I will be bound by this note." On the strength of this B guarantied two drafts of Hardesty & Neill. Held, A was not liable for such guaranty. . A "might have been willing to become the surety of Neill, and not of Hardesty & Neill. The engagement was personal as to Neill."<sup>36</sup> The defendant executed a bond as surety to an insurance company for the fidelity of A, who was appointed an agent of the company at Adelaide, and who was about to, and afterwards did, enter into partnership (as merchants) with B, also an agent of the company at that place. The condition of the bond was that A should well and truly account for all money received by him. Held, the defendant was not, under this bond, responsible for money received by the firm A & B, notwithstanding he was aware at the time he signed the bond that A was about to become B's partner.<sup>37</sup> A bond given by the defendant to the plaintiff recited that A had been appointed agent for the plaintiff, and was conditioned for A's good behavior. At the time the bond was given the defendant knew that A was to be employed only as a partner with B. Afterwards A & B received money, as partners, for which they did not account. Held, the defendant was not liable for the money so received by A & B. "When a party makes himself surety for the conduct, not of A & B, but of A, the stronger proof you give that he knew the relation in which A and B stood to each other the stronger you make the inference arising from his mentioning only A."<sup>38</sup> A guaranty for goods to be sold to a firm will not cover advances made to one member of the partnership after its dissolution.<sup>39</sup> If a guaranty is given to a partnership and one of the members dies,<sup>40</sup> or there is a change

<sup>36</sup> Bell v. Norwood, 7 La. (4 Curry) 95, per Bullard, J.

<sup>37</sup> Montefiore v. Lloyd, 15 J. Scott (N. S.) 203.

<sup>38</sup> London Assurance Co. v. Bold, 6 Adol. & Ell. (N. S.) 514, per Lord Denman, C. J. See also where the sureties on precisely such a bond in legal effect, and on the same plea, were released. Connecticut Mutual Life Ins. Co. v. Scott, 81 Ky. 540.

<sup>39</sup> Cremer v. Higginson, 1 Mason 323.

<sup>40</sup> Holland v. Teed, 7 Hare 50. To same effect, that the death of partner releases a guarantor to the firm, The Cosgrove Brewing & Malting Co. v. Starrs, 5 Ont. (Can.) 189. And see London & County Banking Co. v. Terry, Law Rep. (25 Ch. Div.) 692. A surety cannot be held on a judgment against a partnership, which has ceased to exist by the

in the membership of the firm in any other way,<sup>41</sup> the guaranty will not cover any advances which are afterwards made. A, B and C were partners as bankers, and their partnership articles provided that if any one of them died the legal representatives of such one might take his place in the business. D agreed to become responsible "for all sums of money, not exceeding £20,000, which were then or should afterwards become due (from E) to A, B and C, and the survivors, or survivor, of them, or the executors or administrators of such survivor." A died, and his legal representative became a member of the firm. Held, D was not liable for any advances made to E after the death of A.<sup>42</sup> A bond recited that A and B were bankers at Sunderland, and was conditioned that they would remit to plaintiff all such sums as they, "or either of them," should draw on plaintiff. A died, and B afterwards drew bills. Held, the surety on the bond was not liable for such bills. From the whole instrument, the intention appeared to be to become responsible for bills which the two partners, or one of them, during the existence of the partnership, should draw.<sup>43</sup>

**§ 135. The same continued—Effect of changes in partnership.**—But where a party agreed to guaranty such notes as should be indorsed by a firm, and the firm was dissolved, and one of the partners was, by power of attorney, authorized by the others to transact any remaining partnership business, it was held the guarantor was liable for indorsements made by such partner in the firm name in closing up the partnership business.<sup>44</sup> A party agreed to guaranty the payment for such goods as should be sold to two partners. A bill of goods was so sold, and immediately afterwards the seller arranged with one of the partners that the other should go out of the firm, and took the note of the remaining partner alone for the goods, the note being payable to a third person. Held, these transactions discharged the guarantor, as the whole course of dealing was

death of one of the partners before the date of the judgment. *McClosky, Bigley & Co. v. Wingfield & Bridges*, 29 La. Ann. 141.

<sup>41</sup> *Spiers v. Houston*, 4 Bligh (N. R.) 515; *Dry v. Davy*, 2 Perry & Dav. 249; *Dupee v. Blake*, 148 Ill. 453, 35 N. E. Rep. 867, cited in note 53 to § 136.

<sup>42</sup> *Pemberton v. Oakes*, 4 Russell 154.

<sup>43</sup> *Simson v. Cooke*, 8 Moore 588. To similar effect, see *Hawkins v. New Orleans Print. & Pub. Co.*, 29 La. Ann. 134.

<sup>44</sup> *New Haven Co. Bank v. Mitchell*, 15 Conn. 206.

changed.<sup>45</sup> The guarantor for goods to be sold to a partnership is not liable for goods sold to the partnership after a change in the members composing it.<sup>46</sup> Sureties became bound for the performance of a particular act (the sale of property) by two persons, one of whom died, and the other sold the property and failed to account for it. Held, the sureties were not liable for such failure. They became sureties for both parties, and might not have been willing to become bound for the acts of one alone.<sup>47</sup> A gave B a guaranty for goods to be purchased by C to the extent of £200, the guaranty not being a continuing one. C took D as a partner, and B sold C and D goods on the credit of the guaranty to the extent of more than £200, and C and D failed. Afterwards, B sold C alone goods on the credit of the guaranty. Held, B could not recover on the guaranty for the goods sold C and D, because they were not within its terms. Nor could he recover for the goods sold to C alone, because then, by his own act, the circumstances of C were changed, and he was jointly with D saddled with a debt of more than £200.<sup>48</sup> A surety for gas, to be supplied to a person on certain premises, is not liable for gas supplied to another person on the same premises, even if the person for whom he became responsible did not notify the gas company of the change in the proprietorship of the premises.<sup>49</sup> The defendant guaranteed that certain parties would receive and pay a certain price for a steam-engine and two boilers of a given capacity, particularly described. By agreement of the principals, without the consent of the defendant, an engine with three boilers, and of greater capacity and power, at an addi-

<sup>45</sup> *Bill v. Barker*, 16 Gray 62.

<sup>46</sup> *Backhouse v. Hall*, 6 Best & Smith 507. In *In re Cinque* (D. C., N. Y.), 109 Fed. Rep. 455, A guaranteed future purchases by the firm of B & C, to the extent of \$500, from D. Immediately thereafter the firm of B & C dissolved and B continued the business in the former name. No notice of the dissolution was given by D, who continued to supply goods on the strength of A's guaranty. Held, that there was no dissolution as to the vendor and that the guarantor

remained liable for purchases made subsequent thereto. "This conclusion," said Thomas, J., "is not in accord with *Burch v. De Rivera*, 53 Hun 367, 6 N. Y. Supp. 206, but it has the support of Judge Story in *Cremer v. Higginson*, 1 Mason 323, 337, Fed. Cas. No. 3,383." See also § 137, post.

<sup>47</sup> *State v. Boon*, 44 Mo. 254.

<sup>48</sup> *Shaw v. Vandusen*, 5 Up. Can. (Q. B.) 353.

<sup>49</sup> *Manhattan Gas Light Co. v. Ely*, 39 Barb. (N. Y.) 174.

tional price, was substituted, and it was held that the defendant was not liable therefor. The court said that the defendants may be supposed to have known the circumstances of his principals, their ability to pay, the power of an engine which could be profitably employed, and may have been willing to guaranty the contract first made, and totally unwilling to guaranty the substituted one.<sup>50</sup> All these cases are illustrations of the rule that the surety will only be bound to the extent, and in the manner, and under the circumstances that he consented to become liable. A party who guaranties a note signed by two may, however, under certain circumstances, be liable for the default of one. Thus, A and B signed a note, B signing upon the express condition that he should not be bound unless C also signed the note as maker. C, knowing these facts, did not sign the note as maker, but guarantied its collection. B, by suit in chancery, had his name stricken from the note, because the terms upon which he signed had not been complied with, and C claimed that he was thereby discharged from his guaranty. Held, that as C knew B was not bound when he signed the guaranty, it was the same as if he had guarantied the note of A alone, and he was liable. "Where the surety knows that the undertaking of the principal is liable to be defeated, he must be considered as entering into his obligation with reference to such a contingency."<sup>51</sup>

**§ 136. Surety to or for firm not liable if partners changed—Surety for performance of award not liable if arbitrators changed.**—A surety for the good behavior of the clerk of a sole trader is not liable for his acts or defaults after the sole trader takes in a partner.<sup>52</sup> George Smith was doing business under the name of George Smith & Co., as banker, and employed Noble as teller in the bank, Noble giving bond with sureties for his conduct. Afterwards Smith entered into a

<sup>50</sup> Grant v. Smith, 46 N. Y. 93.

<sup>51</sup> Sterns v. Marks, 35 Barb. (N. Y.) 565, per Morgan, J.

<sup>52</sup> Wright v. Russell, 2 W. Black. 934. If a surety becomes bound to or for several persons, the engagement must be understood to be in behalf of those persons collectively and jointly, and in case of the death

of any of them it will not continue on behalf of the survivors, unless the obligation so states, or the persons to or for whom the surety is bound are described as a class, body or the like, so as to plainly imply that the security is given to or for a class or body. Gargan et al. v. School Dist. No. 15, 4 Col. 53.

contract with Willard such as the court held constituted them partners. The firm name continued the same, and Noble continued teller the same, and, after the arrangement with Willard, became a defaulter. Held, the sureties were not liable for such default. The court said: "The money then which Noble abstracted was not Smith's, but it belonged to Smith and Willard. Smith alone is the obligor in the bond, and the sureties only undertook for the principal that he should act with fidelity to Smith when in his employ alone. They never undertook to answer for him when in the employ of Smith and Willard, or of any other person than Smith."<sup>53</sup> B, C and J, who were partners, being appointed agents for the sale of certain books, gave bond with sureties, conditioned that they and the survivors, and survivors of them, and such other person and persons as should, or might at any time thereafter, in partnership with them, or any or either of them, act as agents for selling books, would duly account. J retired from the

<sup>53</sup> Barnett v. Smith, 17 Ill. 565, per Caton, J. In Dupee v. Blake, 148 Ill. 453, 35 N. E. Rep. 867, reversing 50 Ill. App. 155, defendants became sureties for J. C. F. & Co. on a warehouseman's bond. Breach: That two years after the date of the bond J. C. F. & Co. borrowed \$20,000 from the Metropolitan National Bank on false warehouse receipt and made false statements of warehouse receipts. The sureties pleaded that since the execution of the bond a new member had been admitted to the firm of J. C. F. & Co. and that at the time of said misconduct the firm was composed of different members than at the execution of the bond, and that they were thereby released. Held, that the plea was good. The court, by Mr. Justice Magruder, said (p. 462): "As the sureties' liability is strictissimi juris and cannot be extended by construction, his guaranty to a partnership is extinguished if any person is taken into or retires from

the partnership, unless it appears from the terms of the instrument that the parties intended the guaranty to be a continuing one without reference to the composition of the firm. A party may be induced to become surety for the individuals who compose a firm because of his confidence in their integrity, prudence, accuracy and ability as business men but he cannot be presumed to have intended to become responsible for the possession of such qualities by some third person who may be afterwards taken into the firm without his knowledge or consent. It is often in the power of one partner by want of discretion or integrity to ruin another. \* \* It follows that appellant, who became surety for J. C. Ferguson & Co., when that firm was composed of Neeld and the two Fergusons, did not continue to be liable as surety for the firm after it was changed by the admission into it of E. B. Howard."



partnership, and it was held that the sureties were not liable for any subsequent acts of B and C.<sup>54</sup> The condition of a bond recited that the obligor had “taken and employed \* \* (A) as a servant, and in the nature of a clerk to him \* \* (obligee), and likewise as his book-keeper;” and provided that A should serve faithfully and account for all money, etc., to the obligee and his executors. Held, the surety in the bond was not liable for money received by A after the death of the obligee, although he was continued in the same employment by the obligee’s executor. No service, except to the obligee, was contemplated, although it might have become necessary to account to his executors.<sup>55</sup> Two parties agreed to leave a matter in dispute between them to certain arbitrators named, or a majority of them, and one of the parties gave bond with sureties that he would perform the award. Afterwards, without the knowledge of the sureties, two new arbitrators were substituted, and an award was rendered, a majority of the original arbitrators concurring therein. Held, the sureties were not liable for the award.<sup>56</sup>

**§ 137. When surety for the acts of one person liable if such acts performed by him and a partner—Exceptional cases.**—Under certain circumstances a surety for the acts of one person will be held liable for such acts, even though they are performed by such person as the partner of another. Thus, the defendant executed a bond of indemnity, conditioned that one F, who had been appointed by the plaintiffs their general agent to sell sewing machines, should pay over the proceeds of the sales. F, after his appointment, took in a partner. The plaintiffs knew of this, and the machines were afterwards delivered at the firm’s place of business, but they were all delivered on the order of F, and charged to his individual account. In an action on the bond, it was held that while the surety would not have been bound for the acts of any firm, as such, of which F might be a member, yet the agencies employed by F in disposing of the machines did not change his relations with his principals so long as they confined their dealings to him; and the delivery of the goods at the place of business of the firm was not sufficient to establish that they changed, or intended to

<sup>54</sup> *University of Cambridge v. Baldwin*, 5 Mees. & Wels. 580.

<sup>55</sup> *Barker v. Parker*, 1 Durn. & East 287.

<sup>56</sup> *Mackey v. Dodge*, 5 Ala. 388.



change, such relations, as they could not have based a refusal to deliver upon the ground that F had taken a partner.<sup>57</sup> A agreed with B, an attorney, to pay him for all such services as he had rendered or should render C. Afterwards B took in a partner and rendered services for C, in the pay for which his partner was entitled to share, but the services were rendered by B. Held, A was liable for the services. The fact that B's partner was entitled to receive part of the money for the latter services rendered by B made no difference.<sup>58</sup> By law, no one but persons licensed for that purpose had authority to sell goods at auction, and a licensed auctioneer had to give bonds. A, being a licensed auctioneer, gave bonds with surety, but was conducting the business in the name of A & B as partners, B not being licensed. Held, the sureties of A were liable for goods thus sold by him. As no one but a licensed auctioneer could legally sell goods at auction, if they were properly sold, it must be considered the act of A, "and the obligation which he and his sureties contracted in consequence of the privilege granted to him by the government ought not to be impaired by the circumstance of his having conducted the affairs of his office with the aid of a partner in the profits, any more than they would be if he had acted by the assistance of a hired clerk. His situation in relation to his partner did not concern the public who applied to him as an auctioneer."<sup>59</sup> These decisions do not controvert the rule that the surety for a single individual is not liable for a partnership of which such individual is a member, but each case, from its peculiar circumstances, was held not to come within the rule.

**§ 138. When obligation given by surety to firm binds him after change in firm—Effect of railroad consolidation—Receivership.**—An obligation given to a firm, securing it against loss from the acts or default of another, is sometimes held to bind the obligor for matters occurring subsequent to a change in the members of the firm. Thus a principal and three sureties signed a promissory note, payable on demand to a firm

<sup>57</sup> *Palmer v. Bagg*, 56 N. Y. 523. To similar effect, see *Hayden v. Hill*, 52 Vt. 259. See, generally, as to liability of guarantor of sewing-machine contract, *Davis Sewing Ma-*

*chine Co. v. McGinnis*, 45 Iowa 538. See also note 3, § 135.

<sup>58</sup> *Roberts v. Griswold*, 35 Vt. 496.

<sup>59</sup> *Kuhn v. Abat*, 14 Martin (La.) 2 N. S. 168, per Mathews, J.

“or order,” for £300. The note was made for the purpose of enabling the principal to obtain credit with the firm. Held, that the note being payable to the members of the firm, or order, and being evidently intended to be a continuing security, the makers were liable upon it, notwithstanding a change in the members of the firm.<sup>60</sup> A bond recited that the plaintiff “had agreed to take one Philip Jones into their service and employ, as a clerk in their shop and counting-house,” and was conditioned that he should account “for and pay the plaintiffs all sums of money,” etc. Subsequently a new partner was taken into the firm of the plaintiffs, and Jones afterwards made default. Held, the sureties were liable for such default. The court said the security was intended to be given to the house as a house, and “the circumstance of taking in a new partner makes no difference, either as to the quantity of business or the extent of the engagement. He continues to carry on the business of the plaintiffs, and this contract is co-extensive with his continuance in the house. This is a security to the house of the plaintiffs, and no change of partners will discharge the obligor.”<sup>61</sup> This decision can only be sustained upon the ground that it was the intention of the parties, and the effect of the obligation, to give the security to the house as a house, the same as if it had been a corporation, and regardless of who might compose it. A surety executed a bond conditioned for the faithful service of a clerk to a railway company. While the service continued, that company and another railway company were dissolved and united into one company by a statute which provided that all bonds, etc., made in favor of or by the dissolved companies should inure to the benefit of and bind the new company. Held, the surety was liable for a default of the clerk after the union of the two companies. The court placed its decision entirely on the words of the statute, and said it made the bond the same as if the name of the amalgamated companies had been mentioned therein.<sup>62</sup>

<sup>60</sup> Pease v. Hirst, 10 Barn. & Cress. 122. See also to like effect, Greer v. Bush et al., 57 Miss. 575.

<sup>61</sup> Per Mansfield, C. J., in Barclay v. Lucas, 1 Durn. & East 291, note; Id., 3 Doug. 321.

<sup>62</sup> Eastern Union Railway Co. v. Cochrane, 9 Wels, Hurl. & Gor. 197.

In Pennsylvania & Northwestern R. Co. v. Harkins, 149 Pa. St. 121, 24 Atl. Rep. 175, a freight agent of the Bell's Gap R. R. Co. in 1888 gave a bond with sureties conditioned for the faithful performance of his duties. In 1890 the Bell's Gap and another railroad consoli-

Where a bond is directed by statute to be taken by a corporate body, but no form is prescribed, it is good though taken in the names of the individual members thereof as obligees.<sup>63</sup> It has been held that the appointment of a receiver of the creditor or obligee does not release the surety or guarantor.<sup>64</sup>

dated, forming the Pennsylvania & Northwestern, and thereafter the freight agent defaulted. Held, that the sureties were not released by the consolidation. They must be considered as having entered into the contract of suretyship with the general statute permitting consolidations in contemplation. In *Springfield Lighting Co. v. Hobart*, Mo. App., June, 1902, 68 S. W. Rep. 942, the sureties on the bond of a street railway company conditioned that it would pay for electrical power furnished by the Springfield Electric Light Company were held not to be released by the consolidation of that company with the Springfield Gas Light Company, by which consolidation the Springfield Lighting Company was formed. The court, Smith, J., said that the consolidation statute must be read as forming part of the contract of suretyship and if the consolidation altered the surety's contract by substituting a new obligee the alteration was consented to in advance by the surety and therefore the surety continued bound.

<sup>63</sup> *Greenfield v. Yeates*, 2 Rawle (Pa.) 158; *Foster v. Franklin Life Ins. Co.*, Tex. Civ. App., Jan., 1903, 72 S. W. Rep. 91. Compare *Arkansas Democrat Co. v. Press Printing Co.*, 57 Ark. 322, 21 S. W. Rep. 586.

<sup>64</sup> In *Phila. & Reading Coal & Iron Co. v. Daube* (C. C. & N. D., Ill.), 71 Fed. Rep. 583, defendant guaranteed payment for coal sold by plaintiff to Daube & Rosenheim, co-partners at Chicago. Afterwards

a receiver was appointed for plaintiff and its business at Chicago was conducted by "The Finance Company of Pennsylvania, Commercial Agents," for such receiver. Held, that the guarantor was liable for coal furnished to the parties guaranteed after the appointment of such receiver. The court said that when a receiver is appointed there is no such substitution of parties as occurs when an executor or administrator continues the business of the deceased or when an assignee in bankruptcy succeeds to the business of the bankrupt, and there is no such alteration of the contract as occurs when there is a change in the members of a partnership or an increase in the stock of a banking corporation. In those cases it has been held that the executor or assignee cannot have the benefit of contracts of indemnity executed to the deceased or the bankrupt and the sureties are discharged because the contract is varied without their consent. "But the appointment of a receiver by a court of chancery," said Seaman, J., "does not operate to transfer title to the property, or dissolve the corporation. \* \* This change of management may well be likened to that which takes place when the stockholders, in honest effort for reform, elect a new board of directors, and new agencies are substituted in conducting the affairs, in which case, I presume, there would be no contention that existing contracts of the character in question would be released. \* \* I am unable to find in the

**§ 139. Surety not liable beyond scope of his obligation—**  
**Instances.**—A written guaranty of “the payments of all powder consigned” to a certain person for sale does not render the guarantor liable for a sale to the consignee of the powder remaining unsold upon closing the account between the consignor and the consignee.<sup>65</sup> A guaranty of the payment of a certain sum of money in consideration of the building of a bridge by a county at a place then fixed by a report of viewers is not binding if the bridge is built at another place.<sup>66</sup> A guaranty that O would consign the plaintiffs sugar to the value of \$30,000 does not, in case of the failure of O therein, bind the guarantors for more than the \$30,000, as for commissions on the advances made to O on the faith of the guarantied consignment and for exchange, etc. If O had consigned the sugar, the guarantor would not have been liable at all, and his liability cannot exceed the stipulated value of the sugar.<sup>67</sup> A party guarantied the payment for gold with which the plaintiff should supply a goldsmith for the purposes of his trade. The plaintiff discounted bills for the goldsmith, and gave him for them part gold and part money. The gold was applied to the goldsmith’s trade, but he did not indorse the bills. Held, the guarantor was not liable for the gold so furnished. He meant only to pay for gold sold the goldsmith, and this was not sold, but paid on the purchase of bills of exchange.<sup>68</sup> A guarantor of payment of any loss which may arise by reason of the sale of goods which, by stipulation between the principal parties, are to be sold within ninety days, is not liable if, by agreement between such parties, the goods are not sold within that time, and the time for sale is extended to one hundred and eighty days.<sup>69</sup> A guaranty provided that the guarantor would be answerable to the plaintiffs to the extent of £5,000 for the use of the house of S & Co. When the guaranty was given S & Co were indebted to the plaintiffs,

relationship of a receiver any of the elements which interfere with the rule established for the protection of guarantors, and feel constrained to hold that all the sales were made as transactions of the plaintiff notwithstanding the receivership.”

<sup>65</sup> Carkin v. Savory, 14 Gray 528.

To same effect, see Wilson v. Edwards, 6 Lans. (N. Y.) 134.

<sup>66</sup> Mercer County v. Covert, 6 Watts & Serg. (Pa.) 70.

<sup>67</sup> Dunlop v. Gordon, 10 La. Ann. 243.

<sup>68</sup> Evans v. Whyte, 5 Bing. 485; Id., 3 Moore & Payne 130.

<sup>69</sup> Fisher v. Cutter, 20 Mo. 206.

for which the plaintiffs held their notes and bills. Upon receiving the guaranty, the plaintiffs canceled the notes and delivered up the bills to S & Co, and S & Co thereupon delivered the bills and a new note to the plaintiffs, but no money passed. Held, the guaranty only contemplated future loans to S & Co, and the transaction did not amount to a loan which would charge the guarantor.<sup>70</sup> The defendant was surety by a bond to the plaintiff for the performance of a contract by S, according to an agreeemnt which provided that S was to be paid by instalments and one-fourth retained till after the work was done. The plaintiffs made advances to S not called for by the contract, and in excess of the work done by him. S failed to complete the work, and the plaintiffs got others to complete it. The amount paid to S and the last contractor exceeded the contract price, but the value of the work done by S and the price paid the last contractor did not together equal the contract price. Held, the plaintiff could recover nothing on the guaranty. The advances made by him to S were made in his own wrong, and he must lose them.<sup>71</sup> Sureties for the faithful performance of his duties, by the freight agent of a railroad company, are not responsible for money received by another person appointed by the railroad company and in its employ at the same station, but who is under the orders of such freight agent.<sup>72</sup> The surety on an employe's fidelity bond is not liable ordinarily for his failure to account for money advanced by his employer.<sup>73</sup>

<sup>70</sup> Glyn v. Hertel, 8 Taunt. 208.

<sup>71</sup> Warre v. Calvert, 2 Nev. & Per. 126; Id., 7 Adol. & Ell. 143. Approved and followed in a case similar in principle in Texas. Ryan v. Morton, 65 Tex. 258. See also note 73 post. Compare St. Peter's Cath. Church v. Vannote, N. J. Ch., Feb., 1904, 56 Atl. Rep. 1037.

<sup>72</sup> C. & A. R. R. Co. v. Higgins, 58 Ill. 128.

<sup>73</sup> In Charles Brown Grocery Co. v. Wasson, Ky., May, 1902, 24 Ky. Law Rep. 307, 68 S. W. Rep. 404, the condition of the fidelity bond of a salesman and collector was that he "shall well and faithfully discharge his duties as salesman and collector and shall also account for

all moneys and properties and other things which may come into his possession or under his control in such capacity." His pay was 40 per cent of the gross profits of his sales. The employer advanced money to cover his expenses and salary, \$572.77 in excess of commissions earned. Held, the sureties were not liable therefor. "The sureties, by the terms of the bond," said Hobson, J., "risked the integrity of the agent, but did not risk the uncertainties of the business and his ability to replace money he had spent as his own with the consent of the company." For the same ruling upon like facts, see John Hancock Mutual Life Insurance Co. v. Loewen-

§ 140. **Liability of surety or guarantor—Special cases.**—A guaranty was as follows: “I will be accountable to you for payment within six months of the seed order forwarded by my son, R. A. H., and also for payment within three months of six hundred barrels of vetches, to be forwarded by the first steamer.” The seeds were furnished and the vetches were not. Held, the seeds might be recovered for, as the contract was not entire. That portion concerning the vetches was distinct from the other, to be paid for in a different time, etc.<sup>74</sup> The condition of a bond executed by E to the F & M Bank, was that A shall and will from time to time ask for and receive from said bank certain sums of money, at no time exceeding \$5,000. Now if said A shall well and truly pay, or cause to be paid, to said bank, all such sums as he may as aforesaid receive, then the obligation to be void, etc. Held, taking the whole instrument together, it was the intention of E to restrict the whole amount of the indebtedness of A to the bank, at any one time, to \$5,000, and the bank having allowed him to become indebted in a larger amount, E was not liable at all. E may have thought that A could not successfully handle more than \$5,000; and such may have been the fact. Having restricted his liability, he could only be held to his contract as he had made it.<sup>75</sup> In a case very similar to this, it was held that the surety was liable for the amount specified in the bond, notwithstanding a greater sum had been advanced. The court said if it was intended that a greater advance than the sum mentioned in the bond should avoid it, then the bond should have said so.<sup>76</sup> These cases do not differ in principle. The court, in one case, held that the intention of the surety appeared, from the instrument, to be that he should not be

berg, 120 N. Y. 44, 23 N. E. Rep. 978; Burlington Ins. Co. v. Johnson, 120 Ill. 622, 12 N. E. Rep. 205, in which case Scott, J., said that “should it be held the sureties are liable for moneys advanced to the agents of plaintiff, although for their business, by the same reasoning they could be held liable for the default of the agents to perform any other agreement they might make with the insurance com-

pany outside the written contract concerning their business. There is no warrant of law for extending the liability of the sureties to such an unreasonable extent.” See note 71, *supra*.

<sup>74</sup> Nash v. Hartland, 2 Irish Law Rep. 190.

<sup>75</sup> Farmers' & Mechanics' Bank v. Evans, 4 Barb. (N. Y.) 487.

<sup>76</sup> Parker v. Wise, 6 Maule & Sel. 239.



bound at all if a greater sum than that stipulated was advanced. In the other case, the court held that no such intention appeared. A guarantor for the price of goods ordered, but not yet sent, is not discharged by the fact that the purchaser, upon receiving the goods, was dissatisfied with them, but finally agreed to keep them upon the seller deducting ten per cent from the original price.<sup>77</sup> A guaranty of the payment of different kinds of goods, to be sold on a credit of six months, does not render the guarantor liable for anything, if one kind of the goods is sold on a credit of four, and another on a credit of six months. The guaranty offered was entire, and if not accepted as offered, it could not be accepted at all, and there was no contract.<sup>78</sup> Where the contract, the performance of which is guaranteed, provides for notes at four months, to be renewed, if desired, for sixty days, at eight per cent interest, the guarantor is not holden for notes running six months, with interest for four months at seven per cent, and thereafter at eight per cent; nor for six months' notes with interest at eight per cent, commencing four months after date.<sup>79</sup> So a guarantor for the price of goods to be sold on a credit of six months, is not liable if the goods are so sold, but afterwards the term of credit is, by agreement between the purchaser and seller, lengthened as to a part and shortened as to another part.<sup>80</sup> A surety who agrees to indemnify A if he will give his drafts at three months to B, in order to enable B to raise money to pay C, is not liable, if A give B the money, instead of the drafts, to pay C, and B with the money pays C.<sup>81</sup> The reason is that B became immediately liable to A for the money so advanced, when, if the original agreement had been carried out, such liability would not have arisen for three months, and this time may have been of great value to B. It made no difference that three months' time was actually given B, for there was no certainty that it would be given. A guaranty as follows: "I hereby guaranty the payment of any purchases of bagging and rope which \* \* may have occasion to make between this and the first of December next," extends the liability of the guarantor to purchases upon

<sup>77</sup> Rice v. Filene, 6 Allen 230.

<sup>78</sup> Leeds v. Dunn, 10 N. Y. 469.

<sup>79</sup> Locke v. McVean, 33 Mich. 473.

<sup>80</sup> Henderson v. Marvin, 31 Barb.

(N. Y.) 297.

<sup>81</sup> Bonser v. Cox, 6 Beav. 110. See also 4 Beav. 379.



a reasonable credit made before the first of December, although the time of payment was not to arrive till after that day.<sup>82</sup> When a guarantor agrees to be responsible for a bill of goods to be sold on three months' credit, he is liable, if the seller take the note of the purchaser, at three months, for the goods. It was a credit of three months, as usually understood in the commercial world, and the fact that the note had three days of grace after the expiration of the three months made no difference, as no business man would have thought of cutting off the days of grace.<sup>83</sup> A gave B the following guaranty: "I have given C an order to purchase cotton, and \* \* I have, in such case, to request that you will honor his drafts to the amount of those he may send to you for sale on my account, and I engage that his bills on me so transmitted shall be regularly accepted and paid." Held, the guarantor was liable for drafts drawn by C on A, and honored by B, on the representation of C that they were for A's benefit, when they were not so in fact. The fair construction of the guaranty was, that A would be liable for such bills as C should represent he had drawn on A's account.<sup>84</sup>

**§ 141. When surety cannot set up illegal acts of creditor or principal as a defense.**—A contract providing for the return to the owner, who had loaned them, of certain shares of railroad stock, and for the payment of interest for their use, was signed, in the name of the railroad company which borrowed them, by its president, and guaranteed by certain parties. Held, the guarantors were estopped to deny that the president of the company had authority to sign the contract. By guarantying the contract, they had in substance asserted its validity, and to permit them to deny it would be to allow them to take advantage of their own wrong.<sup>1</sup> The teller of a bank had authority to issue due bills for the bank, for a special purpose, and issued such bills, not for such purpose, but to raise money for himself. Held, that neither he nor his surety could set up a want of power in the bank to issue them. The teller and his sureties were "not as parties to the instrument entitled to contest them, although they were issued for

<sup>82</sup> Louisville Mfg. Co. v. Welch, 10 How. (U. S.) 461.

<sup>83</sup> Smith v. Dann, 6 Hill (N. Y.) 543.

<sup>84</sup> Ogden v. Aspinwall, 7 Dow. & Ryland 637.

<sup>1</sup> Simons v. Steele, 36 N. H. 73.

the bank in the name of the teller. As well might the teller contend that, as he committed a fraud, the bank was not bound by his act. This he could not be heard to do."<sup>2</sup> A party was, by resolution of a city council, appointed the city's agent to negotiate certain bonds of the city on specified terms. The agent accepted the trust and gave bond with sureties for the faithful performance of his duties. He afterwards borrowed \$5,000 for thirty days, for which he gave the city's note, and put up as collateral thereto, \$21,000 of city bonds. This money he did not pay over. The city paid the note for \$5,000, and took up the bonds, and sued the surety of the agent for the \$5,000. Held, he was liable, and it made no difference, under the circumstances, whether the bonds were legally or illegally issued by the city, not whether or not it was bound by the note, signed by the agent. The city adopted the act of the agent, and paid the note to save its credit, and he and his sureties were liable for the money received by him.<sup>3</sup> But where the seller and purchaser of a national bank had both been guilty of acts in the purchase and sale which were prohibited by the banking act, and impaired the value of the bank, it was held that the surety of the purchaser was not liable, and this although the purchaser did not seek to rescind the contract. Both the creditor and principal had been guilty of an act prohibited by law which was injurious to the surety, and the equity of the surety to a discharge did not depend upon the fact that the principal should desire to rescind the contract.<sup>4</sup>

**§ 142. When surety not liable for specific performance—Surety not charged to exonerate estate of principal—Other cases.**—A second tenant in tail joined in a mortgage and bond with the first tenant in tail, who received the money lent thereon. The first tenant in tail died, and it was held that his creditors could not, by bill in equity, have the money secured by the mortgage made out of the mortgaged premises, so as to exonerate the personal estate of the first tenant in tail.<sup>5</sup> A held two mortgages on the same property, each of

<sup>2</sup> Wayne v. Com. Nat'l Bank, 52 Pa. St. 343, per Thompson, J.

<sup>4</sup> Denison v. Gibson, 24 Mich. 187.

<sup>5</sup> Robinson v. Gee, 1 Vesey Sr.

<sup>3</sup> City of Indianapolis v. Skeen, 17 Ind. 628; Wilson et al. v. Town of Monticello, 85 Ind. 10.

them to secure a separate note. He sold the second mortgage, and the note secured by it, to B, and guarantied the payment of the note; and transferred the other note and mortgage to C, as collateral security. Held, the guaranty of the note which A sold to B did not give such note, and the mortgage securing it, a preference over the other. The only effect of the guaranty was to render A personally liable.<sup>6</sup> A owed B two notes, each for £1,000, on one of which C was surety. A had a security up with B for both debts, and became bankrupt. B proved both claims against his estate, and received a dividend, and also received a certain sum from the security. Held, C was only liable for one-half the sum proved by B against A's estate, after deducting therefrom one-half of both sums received by B.<sup>7</sup> A purchased land from C, and gave his note with B as surety for the purchase money, C also retained a lien on the land to secure the purchase money. A became insolvent, and the land was sold under execution, and purchased by D. Afterwards, C obtained judgment on the note against A and B, and levied his execution on the land. Held, D could not compel C to exhaust the property of B before selling the land. If B had paid the debt, he would immediately have been subrogated to C's lien, and D would have been in no better position.<sup>8</sup> A party gave bond, with surety, to convey two hundred acres of land, situated within a certain district. Upon default of the principal, it was held that the surety could not be compelled to specifically perform the contract by conveying land of his own, although he owned more than the required amount and kind within the prescribed district. The surety covenanted that the principal, not himself, would convey. He could only be held liable in damages, and not for a specific performance.<sup>9</sup>

<sup>6</sup> *Gansen v. Tomlinson*, 8 C. E. Green (N. Y.) 405.

<sup>7</sup> *Coates v. Coates*, 33 Beav. 249.

<sup>8</sup> *Cole County v. Anguey*, 12 Mo. 132. In *In re Fritch's Estate*, 191 Pa. St. 283, 43 Atl. Rep. 394, in distributing a fund arising from a sale of the debtor's property by assignees for the benefit of creditors, it was held that such distribution must be made upon the principle

that the principal debtor's property must be exhausted before recourse could be had to the surety for satisfaction of the debt.

<sup>9</sup> *Johnson v. Hobson*, 1 Litt. (Ky.) 314. But the surety may maintain a bill for specific performance by the principal of his contract. *Street v. Chicago Wharfing Co.*, 157 Ill. 605, 41 N. E. Rep. 1108, affirming 54 Ill. App. 569. Post, § 277.

Three parties purchased, jointly, separate lots of ground, and each gave his note for one-third of the amount. The act of sale declared that each had a one-third interest in the property, and provided "that, to secure the payment of the aforesaid notes, the purchasers hereby mortgage the herein described property." Two of the purchasers paid their notes, and it was held that their land could not be sold to pay the note of the third. The court said it was the same as if each had given a separate mortgage on his portion of the land, and when any one paid, it operated the release of his land.<sup>10</sup> But where two joint owners of a piece of land jointly mortgaged it to secure the several notes of each of them, it was held that the interest of both might be sold to pay the note of one.<sup>11</sup>

**§ 143. What payment by person indemnified will charge surety—When surety liable for costs—Other cases.**—When a party indemnified by bond with surety, against the payment of money, is obliged to pay it, and does pay it by giving his negotiable note, which is accepted as payment, he may sue the surety, and recover the same as if he had paid in money.<sup>12</sup> The guarantor of a note is not liable for protest fees, because protest is not necessary in order to fix his liability.<sup>13</sup> Nor is the guarantor of a note, who is absolutely liable, without any suit against the maker, chargeable with the costs of such a suit.<sup>14</sup> But where one partner, by bond with surety, agreed to pay all the firm debts, and failed to do so, and the retiring partner was arrested in another state for one of the debts, and paid the debt and costs, it was held that the surety was liable for such costs.<sup>15</sup> A guaranty was as follows: "Gentlemen, you will please to credit Mr. A to the extent of £30, monthly, from time to time, and in default of his not paying,

<sup>10</sup> Erwin v. Greene, 5 Rob. (La.) for serious consideration." Same case, 31 L. Ed. 825, 8 Sup. Ct. Rep. 70.

<sup>11</sup> Hunt v. McConnell, 1 T. B. 1004, at 1007. The authorities as to the proposition stated in the

<sup>12</sup> Lee v. Clark, 1 Hill (N. Y.) 56; Gage v. Lewis, 68 Ill. 604; § 232, post.

<sup>13</sup> Woolley v. Van Volkenburgh, 16 Kan. 20.

<sup>14</sup> Woodstock Bank v. Downer, 27 Vt. 539.

<sup>15</sup> Wright v. Sewall, 9 Rob. (La.) 128.

debt was spoken of as "too trivial

I will be accountable for the above amount.” Held, the guaranty was not limited to £30 in all, but authorized an advance of £30 every month, even though the aggregate indebtedness might amount to much more than £30.<sup>16</sup> Where a lease provided for the payment of rent in monthly instalments, and a party guarantied the prompt performance of all the covenants thereof by the lessee, the guarantor is liable, and may be sued for the rent each month as it becomes due.<sup>17</sup> Where one who has contracted with A to indemnify and keep him harmless as to “liabilities” incurred by him as indorser for B permits a judgment to be taken against A on such indorsement, it is not necessary that the judgment should have been collected to enable A to maintain an action for breach of the contract.<sup>18</sup> A note was guarantied to be “good and collectible two years.” Held, the guaranty covered the period of two years after the maturity of the note, as the note was not collectible till it was due.<sup>19</sup> Where a bond of \$1,000 is required of an accused person, and he gives such a bond, in which each of the two sureties becomes bound for \$500, the bond is valid.<sup>20</sup>

**§ 144. Surety not liable for greater sum than principal—Other cases—Usury.**—A surety who signs in the absence, and without the knowledge, of the principal is bound.<sup>21</sup> A guaranty may have a retrospective operation, where it appears from the instrument that such was the intention of the parties; and an instrument may be ante-dated so as to embrace a particular transaction; and the date of the instrument is evidence of the time when the parties intended it to take effect.<sup>22</sup> Suit was commenced against the principal and one surety, on a paymaster’s official bond, and judgment for \$10,000 recovered. Afterwards suit was brought against another surety on the bond, and a greater recovery than \$10,000 claimed. Held, that as the liability of the principal was fixed at \$10,000 by the first judgment, the surety in the last suit could not be held liable for more. Otherwise the surety would be held to

<sup>16</sup> *Tennant v. Orr*, 15 Irish Com. Law 397.      date,” see *Davis v. Copeland*, 67 N. Y. 127.

<sup>17</sup> *Bing v. Tyler*, 79 Ill. 248.

<sup>20</sup> *Moore v. The State*, 28 Ark.

<sup>18</sup> *Smith v. Chicago & N. W. R. R. Co.*, 18 Wis. 17.

480.

<sup>21</sup> *Hughes v. Littlefield*, 18 Me.

<sup>19</sup> *Marsh v. Day*, 18 Pick. 321. As

400.

to liability of the surety on a bond

<sup>22</sup> *Abrams v. Pomeroy*, 13 Ill. 133.

“to be binding only one year from

a greater liability than the principal.<sup>23</sup> If the consideration upon which a surety signs fails, he is discharged, and may come into equity and have his obligation canceled.<sup>24</sup> A common money bond, payable on demand, given by a principal and surety, to a person then the creditor of the principal, is presumed to be given for the existing debt, and not to cover future advances by the creditor to the principal.<sup>25</sup> When a surety, who had an opportunity to read it, but did not, signed a bond for the payment of a debt, believing it, from the representations of the principal, to be a bond for the delivery of attached property, he is guilty of such gross negligence as will prevent him from having relief in equity against the bond.<sup>26</sup> A guarantor that a party shall not become bankrupt is not liable unless a commission of bankruptcy is sued out against such party.<sup>27</sup> The same causes which will discharge a surety on a promissory note will ordinarily discharge an indorser of the same.<sup>28</sup> If a note is void for usury, a guaranty thereof, which has no other consideration than the note, is also void for the usury.<sup>29</sup>

<sup>23</sup> *United States v. Allsburg*, 4 Wall. 186.

<sup>24</sup> *Cooper v. Joel*, 1 De Gex, Fish. & Jo. 240. In *Satterfield v. Speer*, 114 Ga. 127, it was held that the surety on a note may show that the note was given for a bond to convey land and that the obligor failed to produce the land. Non-negotiable note given for farm machinery: surety allowed to show that machinery was worthless and consideration had failed: *Stockton Savings & Loan Co. v. Giddings*, 96 Calif. 84, 30 Pac. Rep. 1016.

<sup>25</sup> *Walker v. Hardman*, 4 Clark & Fin. 258.

<sup>26</sup> *Glenn v. Statler*, 42 Iowa 107.

<sup>27</sup> *Bulkeley v. Lord*, 2 Stark. 406.

<sup>28</sup> *Smith v. Rice*, 27 Mo. 505.

<sup>29</sup> *Heidenheimer v. Mayer*, 10 Jones & Spen. (N. Y.) 506. In Georgia waiver of homestead exemption in a note is valid but is void if the note is tainted with usury. In *Prather v. Smith*, 101 Ga. 284,

28 S. E. Rep. 857, it was held that usury without the surety's knowledge, in a note which contains such waiver of homestead, releases the surety because if the homestead waiver is void, by reason of the usury, the risk of the surety is increased to an amount equal to the value of the homestead. It makes no difference, the court held, that the maker of the note is a woman and in fact has no homestead, for at some future time she might acquire one and the waiver if valid would operate as to it when it was acquired. See also *Lewis v. Brown*, 89 Ga. 115, 14 S. E. Rep. 881; *Harrington v. Findley*, 89 Ga. 385, 15 S. E. Rep. 483. In a later case, *First National Bank v. McEntire*, 112 Ga. 232, 37 S. E. Rep. 381, 56 L. R. A. 679 (note 1, f.), it was held that this rule does not operate when the payee in the note is a National Bank, but is superseded by Acts of Congress. In *Lazear v.*



§ 145. **Sureties on assignee's bond not liable to those who defeat the assignment—Principal cannot allege for error that surety is discharged—Other cases.**—The sureties on the bond of an assignee, given pursuant to a statute with reference to voluntary assignments for the benefit of creditors, are not liable for the failure of their principal to account for the assets in his hands, as required by a judgment in favor of creditors declaring the assignment void as to them, and directing the assignee to pay over the assets and avails thereof in his hands, to be applied in satisfaction of their claims. The bond was not intended for the benefit of persons who attacked and defeated the assignment, and thereby defeated the trust, but was for the good behavior of the assignee as trustee under the assignment.<sup>30</sup> When the surety is discharged on the trial of a case against principal and surety, in the court below, the principal cannot allege for error in the court above such discharge of the surety. "The release of the surety, whether erroneous or not, could in nowise prejudice the defendant or affect his liability as principal, and he will not, therefore, be heard to complain of it."<sup>31</sup> The surety on a note given for the price of a horse, and which is void because it is payable in Confederate money, is not liable on the note, because it is void; nor is he liable for the price of the horse, because his only liability existed by virtue of the note.<sup>32</sup> A surety is bound to ascertain his principal, and where, by mistake, he signs a bond for the lessee of a telegraph company instead of for the com-

Nat'l Union Bank of Md., 52 Md. 78, 121, it was held that the demand and receipt by a national bank of usurious interest from indorsers upon notes discounted by it, the payment of which notes was guarantied to the bank, does not avoid the contract of guaranty between the guarantor and the bank, unless the law regulating the rate of interest provides that the taking of illegal interest makes the contract void. In *Howard v. Johnson*, 91 Ga. 319, 18 S. E. Rep. 132, it was held that a note which by reason of concealed usury was void as to a surety thereon could not be

made valid by an agreement between the lender and the borrower purging the note of usury, to which the surety did not consent.

<sup>30</sup> *People v. Chalmers*, 60 N. Y. 154. But they are liable if the principal refuses to obey an order made to subvert the assignment. *Adams v. Hyams* (Cir. Ct. D. Conn.), 8 Fed. Rep. 417. Further, as to liability of sureties on bond of assignee for benefit of creditors: *Cau-miser v. Humpich*, Ky., Oct., 1901, no official report, 64 S. W. Rep. 851, 23 Ky. Law Rep. 1133.

<sup>31</sup> *Fewlass v. Abbott*, 28 Mich. 270.

<sup>32</sup> *Shepard v. Taylor*, 35 Tex. 774.



pany, to release property from attachment, he will be bound.<sup>33</sup> If it is agreed that a certain party shall be surety on a bond to a sheriff, and a blank bond is taken to him and he signs it, and dies, and afterwards the bond is filled up according to the agreement and delivered to the sheriff, the estate of the surety is liable on the bond. As the surety had been previously agreed upon, the contract was complete as soon as the surety signed.<sup>34</sup> The sureties on the bond of an assignee for the benefit of creditors, which provides that the assignee shall "faithfully execute the trusts confided to him." are concluded by the final decree of a court upon the account of the assignee, by which he is directed to pay the claim of a specific creditor.<sup>35</sup> It has been held that the fact that a voluntary bond is not stamped is no defense to the sureties therein. They or their principal should have stamped it.<sup>36</sup>

**§ 146. When surety released if creditor and principal intermarry—Surety not liable to party who pays debt at principal's request—Other cases.**—A party who, at the request of the principal alone, pays the debt for which a principal and surety are bound, cannot usually collect the amount so paid from the surety. Thus, where an executor, supposing the estate of his testator to be solvent, paid in full a debt due by the testator on which there was a surety, it was held that the executor could not, upon the estate proving insolvent, recover any portion of the sum so paid from the surety.<sup>37</sup> A as principal, with others as his sureties, executed a note to B, a feme sole, and afterwards A and B intermarried; under the provisions of an ante-nuptial contract between them, the note did not pass to A upon the marriage, but remained the sepa-

<sup>33</sup> Doane v. Telegraph Co., 11 La. Ann. 504.

<sup>34</sup> Wells v. Moore, 3 Rob. (La.) 156.

<sup>35</sup> Little v. The Commonwealth, 48 Pa. St. 337.

<sup>36</sup> McGovern v. Hoesback, 53 Pa. St. 176.

<sup>37</sup> Paine v. Drury, 19 Pick. 400. Holding the same principle with reference to the surety on a distiller's bond, see Elmendorph v. Tappen, 5 Johns. 176. And so where an ad-

ministrator, with money of his decedent, pays on a note executed by his decedent as principal, with sureties, an amount in excess of the sum applicable out of the assets upon that debt, under the mistaken belief that he was surety on such note, he cannot recover against a surety on said note the amount so paid in excess of the ratable share of the assets applicable to such debt. Proudfoot v. Clevenger, 33 W. Va. 267; 10 S. E. Rep. 394.

rate property of B. Held, that upon the marriage the wife lost her remedy by action against the husband, and the sureties were thereby discharged.<sup>38</sup> A creditor authorized his agent, B, to administer on the estates of any of his debtors who might die intestate. B administered on one of those estates, and gave bond with C as surety for the faithful performance of his duty as administrator. B used the funds of the estate and became bankrupt. Held, C was not liable to the creditor for B's default. B was the agent of the creditor, and represented him in that regard. C was therefore the surety of the creditor, and the creditor had no cause of action against his own surety.<sup>39</sup>

**§ 147. When agreement to pay in good notes not guaranty that notes in which payment is made are good—Guaranties of interest and dividends on stock.**—Where, in an agreement for the sale of goods, it was stipulated that a part of the purchase money should be paid in "good obligations," and certain notes were tendered to the seller, and received and receipted for by him "on payment of goods," there is no guaranty of the solvency of the makers of such notes. The insertion of the word "good" implied no guaranty, but gave the seller a right to refuse notes which did not answer that description; and having received the notes as good, and receipted for them, he has not, in the absence of fraud, any claim upon the purchaser."<sup>40</sup> A guaranty was as follows: "This may certify that we, being acquainted with Frank Stevens, and reposing great confidence in his honesty, and the goods you may see fit to intrust him with, we will hold ourselves good for, provided he should sell them and abscond with the money or squander them away; and this shall be your note against us." Held, this was a mere guaranty of the honesty of Stevens. The guarantors were not liable unless Stevens sold the goods and absconded, or squandered

<sup>38</sup> Govan v. Moore, 30 Ark. 667.

<sup>39</sup> Moodie v. Penman, 3 Dessaus. Eq. (S. C.) 482. Holding that a surety for a suit to be commenced at the next term of court is not liable for a suit commenced at the third term, see Hibbs v. Rue, 4 Pa. St. 348. To the effect that a surety cannot prevent a judgment against

the principal from being amended, see Pryor v. Leonard, 57 Ga. 136. As to when a guaranty, which by its terms is not to be produced till the death of the parties, is valid if produced before, see Washburn v. Van Norden, 28 La. Ann. 768.

<sup>40</sup> Corbet v. Evans, 25 Pa. St. 310.

them; and a failure to pay for the goods was not evidence that they had been squandered.<sup>41</sup> A guaranty that the owner of stock in a corporation shall receive dividends thereon of a specified amount, for a certain number of years, by paying to the guarantor all he receives above that amount, is valid. It is not a wager, but "not only in words, but also in its plain design, a guaranty to the plaintiffs of a certain yearly profit on railroad stock owned by them."<sup>42</sup> On a transfer of certain shares of railroad stock, the assignor guaranteed "that said stock shall yield annually six per cent dividends for the space of three years." Held, this was a guaranty that the stock was equal in value to stock yielding annual dividends of six per cent, and not merely a guaranty that the assignee should receive six per cent annually for three years on the par value of the stock. The measure of damages was the difference between the actual value of the stock assigned and stock which would have yielded dividends of six per cent for the three years.<sup>43</sup> A guaranty on a bond was as follows: "For value received, I guaranty the punctual payment of the interest on the within bond, and will pay the interest on demand in default of its payment by \* \* \* [the principal]. The bond was due in six and a half years, and the interest was payable semi-annually. Held, the guaranty only extended to the payment of interest falling due before the time of payment of the principal sum. If it was otherwise, and the bond was never paid, the guarantor would be liable for interest forever.<sup>44</sup> If the principal borrow money to pay a note, the law

<sup>41</sup> *McDougal v. Calef*, 34 N. H. 534; *Monongahela Coal Co. v. Fidelity & Deposit Co. (La.)*, 94 Fed. Rep. 732, 36 C. C. A. 444.

<sup>42</sup> *Elliot v. Hayes*, 8 Gray 164, per Metcalf, J. In *Ripley v. Eddy*, 106 Ga. 422, 32 S. E. Rep. 343, defendants gave a bond in the sum of \$1,000 conditioned to be absolute if the makers thereof should fail or refuse on demand to purchase certain stock in a land company at \$1,000. Held, that a demurrer was rightly sustained to a declaration which failed to state facts showing that plaintiff had sustained any injury through the obligor's refusal to

buy the stock on demand at the agreed price. "Upon the facts alleged," said the court, "the measure of damages was the difference between the contract price of the stock in question and its market value in case it was really worth less than \$1,000. The action should have been brought accordingly and the necessary facts alleged."

<sup>43</sup> *Struthers v. Clark*, 30 Pa. St. 210.

<sup>44</sup> *Hamilton v. Van Rensselaer*, 43 N. Y. 244; *Melick v. Knox*, 44 N. Y. 676; *Bousquet v. Ward*, Iowa, Feb., 1902, 89 N. W. Rep. 196; *Rector v. McCarthy*, 61 Ark. 420, 33 S. W.

will not imply an authority in him from those who signed the note as sureties only, to borrow the money on the joint credit of the principal and sureties, nor a promise from the sureties to the lender to repay the money so borrowed.<sup>45</sup>

**§ 148. Surety for return of slave liable, if death of slave caused by principal—Other cases.**—A surety who executes a bond for the hire of a slave, which contains a covenant for the return of the slave at the end of a year, is not discharged from his obligation to return the slave by the fact that before the end of the year such slave dies in consequence of the inhuman treatment which he received at the hands of the principal. The death of the slave was not the act of God or the owner. The principal and surety “are joint covenantors, equally bound for the performance of the covenant, and neither can exonerate himself from liability on the ground that the wrongful act of the other has rendered a performance by him impossible.”<sup>46</sup> A party wrote a letter introducing another, stating that he wanted to purchase a certain amount of goods, and concluding, “I consider him perfectly good, and, if required, will indorse for him to that amount.” Held, he was not liable for goods sold on the strength of this letter, unless he had been requested to indorse, and had refused. The guaranty was conditional, to be created by indorsement, if required, and the protection of the party writing the letter may have depended upon the form of the security.<sup>47</sup> A bond provided that a secretary of state should return certain fees, if it should be decided by the legislature or supreme court that were not chargeable to a fund commissioner. Held, the sureties were not liable unless the legislature or supreme court decided as provided in the bond. A decision by one house of the legislature was not sufficient, and neither the sureties nor their principal were bound to procure the decis-

Rep. 633, 31 L. R. A. 121, 54 Am. St. Rep. 271, in which case the note guaranteed by defendants provided for interest “until paid.” Held, that the guarantors were liable for interest only until maturity.

<sup>45</sup> Rolfe v. Lamb, 16 Vt. 514.

<sup>46</sup> Carney v. Walden, 16 B. Mon. (Ky.) 388, per Simpson, J., § 467. Death of a mule while in the possession of principal on forthcoming or

replevin bond does not release surety, unless caused by act of God: Carr v. Houston Guano & Warehouse Co., 105 Ga. 268; Young v. Waldrip, 91 Ga. 765, 18 S. E. Rep. 23.

<sup>47</sup> Stockbridge v. Schoonmaker, 45 Barb. (N. Y.) 100; Kenneweg Co. v. Finney & Robinson, Md., Dec., 1903, 56 Atl. Rep. 482.

ion.<sup>48</sup> A covenant to indemnify A against all damages and costs which he may incur in consequence of indorsing any notes of B, past or prospective, relates only to indorsements made by A for the accommodation and at the request of B, and does not extend to indorsement by A of notes given him by B for debts of B due to A.<sup>49</sup> A statute concerning paupers provided that a settlement might be gained "by any person who shall bona fide take a lease of any real estate of the yearly value of ten dollars, and shall dwell upon the same one whole year, and pay the said rent." A took a lease of ground for a year at a rent of \$1 a month, and paid \$1.50 rent himself, and his surety, B, paid the balance. Held, this was sufficient to entitle A to a settlement. It was the same as if A had borrowed the money from B and paid the rent.<sup>50</sup> Upon a bond conditioned that one J should pay to plaintiffs monthly, "and every month during the time for which he should act as their agent, all moneys which he then had received or which he should receive for premiums, etc., and should repay to the applicants all moneys which he had then received or should receive for insurances not accepted by the plaintiffs, and should in all things well and faithfully conduct himself as their agent," it was held the sureties were only liable for moneys received after the bond was executed.<sup>51</sup>

**§ 149. Surety for balance which may remain due after sale of property not liable till completed sale made—Other cases.—** An executor's bond, describing the testator as James L. Findley, cannot by parol evidence be made applicable to the estate of Joseph L. Findley, although it was the intention to give the bond in the estate of the latter, and the mistake was a clerical error.<sup>52</sup> In consideration that the plaintiff would advance £1,200 to a third person, upon mortgage of certain leasehold premises, the defendant promised that if, after any "sale" of said premises duly made, the premises did not pay the debt, the defendant would immediately make good the difference. The premises were put up for sale and knocked down to W for £650, who paid a deposit of £100 and signed

<sup>48</sup> Field v. Rawlings, 1 Gilm. (Ill.) 581.

<sup>49</sup> Trask v. Mills, 7 Cush. 552.

<sup>50</sup> Butler v. Sugarloaf, 6 Pa. St. 262.

<sup>51</sup> Canada West etc. Ins. Co. v. Merritt, 20 Up. Can. (Q. B.) 444.

<sup>52</sup> McGovney v. The State, 20 Ohio 93. The guaranty must be strictly complied with or the guarantor is

the usual contract, but afterwards refused to complete the purchase, and the plaintiff sued him on the contract, which suit was pending. The plaintiff then sued the defendant on the guaranty. Held, the suit was premature and could not be sustained. The word "sale" meant a completed sale. Otherwise there was no means of ascertaining the damage.<sup>53</sup> A guaranty on the back of a bond was as follows: "I \* \* do hereby guaranty and bind myself and heirs to \* \* for the payment of the amount of the within bond." The condition of the bond was that the obligors should at a certain time pay a sum of money, "on receiving from the obligee a title" to certain land. Held, the covenants were mutual and dependent, and the plaintiff could not recover without showing a tender of a deed for the land to the obligor.<sup>54</sup> A covenanted with B that C should sell and account for all merchandise which B might put into his hands. B settled with C, and a balance was found due from C, for which B took his note due one day after date. Held, if the note was not paid A was liable on his covenants, for taking the note was nothing more than was reasonably within the contemplation of the parties.<sup>55</sup> If the payee of a note guaranties its collection and transfers it, and afterwards takes it up and then transfers it to another person, who agrees to take it at his own risk, but the guaranty is not erased, the payee is not liable to the holder on the guaranty. When the payee took up the note the guaranty became *functus officio*, and there was no contract of guaranty between the payee and the holder.<sup>56</sup>

**§ 150. When guaranty not revoked by death of guarantor—When surety cannot relieve himself from future liability by notice.**—When the engagement of a surety is a contract, and not a bare authority, it is not usually revoked by his death, and his estate remains liable, the same as he would have been if he had lived.<sup>57</sup> Thus where a party became

not liable. *Bigelow v. Benton*, 14 Barb. (N. Y.) 123; *Myers v. Parker*, 6 Ohio St. 501. But see *Neininger v. State*, 50 Ohio St. 394, 34 N. E. Rep. 633, where it was held that a bastardy bond mis-stating complainant's name may, upon petition filed in the same case, be reformed and enforced.

<sup>53</sup> *Moor v. Roberts*, 3 J. Scott (N. S.) 830.

<sup>54</sup> *Gardner v. King*, 2 Ired. Law (N. C.) 297.

<sup>55</sup> *Bush v. Critchfield*, 5 Ohio 109.

<sup>56</sup> *Gallagher v. White*, 31 Barb. (N. Y.) 92.

<sup>57</sup> *Hightower v. Moore*, 46 Ala.



surety for a deputy-sheriff, his estate was held liable for a breach committed three years after his death. The court said: "The efficacy of contracts does not cease upon the death of one of the contracting parties. \* \* Whether a man undertakes

387; *White's Ex'rs v. The Commonwealth*, 39 Pa. St. 167; *Royal Ins. Co. v. Davies*, 40 Iowa 469. And to same effect, see *Hecht v. Weaver* (Cir. Ct. D. Oregon), 34 Fed. Rep. 111; *Estate of Rapp v. The Phoenix Ins. Co.*, 113 Ill. 390; *Lloyds v. Harper*, Law Rep. (16 Ch. Div.) 290; *Carter v. Hampton's Adm'x*, 77 Va. 631. But see *National Eagle Bank v. Hunt*, 16 R. I. 148, and see note 66, § 151, post. In *McClaskey v. Barr* (C. C. S. D. Ohio), 79 Fed. Rep. 408, a bond for costs in form: "I, A B, acknowledge myself security for all costs for which the plaintiff may become liable in this suit," was held to charge the sureties with costs incurred before as well as after the bond was given, with costs on appeal as well as in the trial court, and to charge each surety's estate with costs incurred subsequent to, as well as before, his death. Citing as to costs before giving bond: *Sawyer v. Williams*, 72 Fed. Rep. 296, where the surety on a like bond was held liable for costs incurred in the state court before removal to the U. S. court, and *Wilson v. Hudspeth*, 3 Dev. 57. Citing to the effect that sureties are liable for costs on appeal: *Dunn v. Sutliff*, 1 Mich. 24; *Robinson v. Plimpton*, 25 N. Y. 484; *Smith v. Lockwood*, 34 Wis. 72, which holds that the surety on a cost bond given in a justice's court is liable for costs on appeal to the circuit court; and *Martin v. Kelly*, 59 Miss. 664, 665, and *Hendricks v. Carson*, 97 Ind. 245, where the sureties on cost bonds were held liable for costs of appeal to the supreme court. It was also

held that the court "cannot release a surety for costs without the consent of the party for whose benefit he became surety." Citing to this point: *Holder v. Jones*, 7 Ired. (29 N. C.) 191, in which case it was held that the trial court erred in entering an order that plaintiff who had given bond for costs should prosecute in forma pauperis; the order should have been to allow him to prosecute his suit without giving further security; the bond could not be released without defendant's consent. Citing also *Standard Publishing Co. v. Bartlett*, 5 Cin. Wkly. Law Bul. 501, in which case judgment was entered up against the sureties on the bond for costs of a non-resident plaintiff for the full amount of costs incurred after plaintiff had become a resident of the county in which suit was brought, and after the trial court had entered an order purporting to discharge the sureties from further liability. The district court there said that the trial court had no power to discharge the surety in the absence of statutory provision to that effect. In *McClaskey v. Barr*, supra, the court also held that summary judgment may be entered against the surety's administrator even after the termination of the statutory period for filing claims against his estate in the probate court. This on the theory that by signing the bond he becomes a party to the suit and consents to the summary judgment provided for by rule of court. See also *Fewlass v. Keeshan* (Ohio), 88 Fed. Rep. 573, 32 C. C. A. 8, by Taft, J., in which case the deceased



for himself or others in regard to future transactions, the contingency that death may remove him before the obligation can be fulfilled must be in the contemplation of all parties, but it

became surety on a bond for costs in 1887 and died in 1888. In 1895 a decree for costs was entered against his principal. Held, that the successful party might in 1896 maintain his suit against the administrator, appointed in 1888, and the heirs at law of the deceased surety and compel them to make good the default of the principal. The court said that death and notice thereof revoked a guaranty that the guarantor could have revoked at will. A bond for costs is not so revokable; in fact, cannot be revoked, without statutory authority or consent of the obligees, even by order of court. Therefore it is not revoked by the death of the guarantor. In *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. Rep. 641, the breach of a guardian's bond occurred seven years after the death of the surety therein and after the surety's estate had been settled and after the time within which suit might have been brought against his executor. It was held, by force of a statute permitting suit in such cases within one year after the cause of action accrues, that the creditor might recover from devisees of the deceased surety to the extent of the value of their devises. Compare § 12, Ill. Statute of Frauds. Further, as to the liability of heirs and distributees of the estate of a deceased surety upon a judgment recovered by the obligee subsequent to his death, see *Lewis v. Hill*, 87 Ga. 466, 13 S. E. Rep. 588. In *United States v. Keiver* (C. C., Wis.), 56 Fed. Rep. 422, it was held that a penal bond for the appearance of the principal to answer an indictment for embezzlement "is a continuing

obligation and binds the estate of the obligor upon his death." To the same effect see *Broome v. United States*, 15 How. (U. S.) 143; *Pond v. United States* (Calif.), 111 Fed. Rep. 989, at 997, 49 C. C. A. 582, at 590, and note on death of surety at 591. In *Estate of Rapp v. Phoenix Insurance Co.*, 113 Ill. 390, it was held that the fidelity bond of an insurance agent was governed as to the effect of the death of a surety, not by the rule applicable to continuing guarantees but rather by the rule applicable to bonds of executors and administrators, and that therefore the death of the surety did not terminate his liability. Following *Phillips v. Foxall*, 27 L. T. (N. S.) 231, 7 L. R. Q. B. 666, and *Anderson v. Aston*, 28 L. T. (N. S.) 35, 8 L. R. Exch. 73, and distinguishing *Pratt v. Trustees*, 93 Ill. 475; *Jendevine v. Rose*, 36 Mich. 54; *Harris v. Fawcett*, 15 L. R. Eq. C. 311, and *Jordan v. Dobbins*, 122 Mass. 168. See, at page 402 (113 Ill.), the dissenting opinion of Craig and Dickey, J. J., to the effect that the surety's death in cases where his further liability may be terminated at will, terminates the liability of his estate. In *Wallber v. Wilmanns*, Wis., Jan'y, 1903, 93 N. W. Rep. 47, the surety on an executor's bond died in 1891 and his estate was duly closed in the following year. In 1899 the account of his principal, as executor, was stated showing a balance due from him of over \$7,000 which, upon demand in 1900, he failed to pay. No claim had been filed against the estate of the deceased surety within the time fixed by law for filing such claims. Held, that nevertheless the

remains unaffected by that event.”<sup>58</sup> A written continuing guaranty was given by A and B, which, by its terms, was to continue in force till revoked by written notice. A died, leaving a solvent estate, and four years after his death, no notice having been given, a liability was created, covered by the guaranty, which B had to pay, and he sued the estate of A for contribution. Held, he was entitled to recover. The court said: “What obstructs one from indemnifying against the consequences of an event which may not happen for more than four years after his death, more than giving his promissory note, which may not reach maturity for more than four years from his death? It is asked how long such a guaranty shall continue in force, and the answer is, until it be ended according to its terms.”<sup>59</sup> When a guaranty was as follows: “I request you will give credit in the usual way of your business, to L, and in consideration of your doing so, I hereby engage to guaranty the regular payment of the running balance of his account with you till I give you notice to the contrary; to the extent of £100 sterling,” it was held that the estate of the guarantor was liable for goods supplied after his death.<sup>60</sup> A party who has entered into a contract as surety cannot ordinarily, by notice, relieve himself from future liability for his

heir and legatee of the deceased surety, who had received \$14,000 from his estate, was liable for the amount of the executor's default. Citing *Mann v. Evarts*, 64 Wis. 372, 25 N. W. Rep. 209, and *South Milwaukee Co. v. Murphy*, 112 Wis. 614, 88 N. W. Rep. 583.

<sup>58</sup> *Green v. Young*, 8 Greenl. (Me.) 14, per Weston, J. *Balfour v. Crace*, 1 L. R. 1902, Ch. 733, holding that the guaranty, under seal, of the integrity of a rent collector was not affected by the death of the guarantor and knowledge thereof coming to the obligee. Citing: *In re Silvester*, L. R. 1 Ch. 1895, 573, and *Coulthart v. Clementson*, L. R. 5 Q. B. D. 42. After reviewing the authorities, the court came to the conclusion “that upon the whole where an office or employment is

conferred in consideration of such a guarantee as that in this case it is safer to hold that the guarantor must expressly so stipulate or provide if he desires the guarantee to be determinable by notice, or to be determined by his own death.” In *In re Silvester*, L. R. 1 Chan. 1895, 573, a bond provided that any of the sureties might be discharged by a month's notice in writing to the obligees. Held, that a notice to the obligees of the mere fact of the surety's death by his executor, who did not know of the existence of the bond, did not release surety's estate from future liability.

<sup>59</sup> *Knotts v. Butler*, 10 Rich. Eq. (S. C.) 143, per Wardlaw, C. J. To same effect, see *Fennell v. McGuire*, 21 Up. Can. (C. P.) 134.

<sup>60</sup> *Bradbury v. Morgan*, 1 Hurl. &

principal, in the absence of a stipulation to that effect; thus, a party on taking in a clerk, took from him a bond with surety for his good behavior. The time of service was not fixed, but it was to be determinable at the option of either the clerk or the employer. The surety died, and his executrix gave notice to the employer that she should no longer consider herself liable on the bond. The employer read the notice to the clerk, and required him to execute a new bond with another surety, which was done. Held, the estate of the first surety was liable for defaults of the clerk occurring after the notice was given. The employer did not agree to release the estate, and his acts upon receiving the notice did not operate as such a release.<sup>61</sup> Upon a bond by a surety, conditioned for a collecting clerk's paying over money received by him from time to time, and at all times during his continuance in the service, it has been held that the surety cannot discharge himself from further liability by giving notice on a particular day that from thenceforward he will not remain surety. The court said if he desired to have the right to terminate his suretyship by notice, he should have so specified in his contract.<sup>62</sup> Where a guaranty was revocable, it was held it could not be revoked so as to prejudice the party who had already acted upon it, nor prevent him from renewing obligations which he had taken on the faith of it.<sup>63</sup> It has been held that a general guaranty continues in force till it is shown by the guarantor to have been rescinded.<sup>64</sup> If a wife mortgages her real estate for the debt of her husband, the land remains liable after her death.<sup>65</sup>

**§ 151. When death of guarantor revokes guaranty—When surety may terminate his liability by notice.**—One who guaranties the performance of a contract by another has the right, after the default of his principal, which would justify its termination, to require that the contract be terminated and the claim against himself as surety be confined to the dam-

Colt. 249. To similar effect, see *v. McVean*, 33 Mich. 473; *Farmers Menard v. Scudder*, 7 La. Ann. 385. *Bank v. Kercheval*, 2 Mich. 505;

<sup>61</sup> *Gordon v. Culvert*, 2 Simons, note 15 to § 1, *supra*.

253; affirmed, 4 Russell 581; *Exchange Bank v. Barnes*, 7 Ont. Ryl. 124.

(Can.) 309, 320. Contra, *LaRose v. Logansport Nat. Bank*, 102 Ind. Curry) 230.

332, 337, 1 N. E. Rep. 805, citing <sup>64</sup> *Knight v. Fox, Morris (Ia.)* 305.

*Gage v. Lewis*, 68 Ill. 604; *Locke* <sup>65</sup> *Miner v. Graham*, 24 Pa. St. 491.

ages then recoverable.<sup>66</sup> A surety upon an ordinary lease for one year (with provision that if there was a holding over it should run for another year, unless the landlord sooner determined it, and upon which there had been such a holding that the tenancy was one from year to year) gave three months' notice in writing to the landlord that, at the expiration of the then current year, he would no longer be responsible for rent, and it was held that at the expiration of that year he was released from further liability.<sup>67</sup> It has been held that the death of a person who has given a letter of credit authorizing another to draw on him to a certain amount for a limited period, and agreeing to accept the drafts drawn and pay them if not paid by the drawer at maturity, will operate as a revocation of all authority to thereafter draw on his credit so as to bind his estate, though the person to whom and for whose security the letter was given has no notice of his death, and the period for which the authority was given has not expired.<sup>68</sup> The court treated it as a question of agency, and said that the death of the principal revoked the authority of the agent, while admitting that if there had been a contract the death of the guarantor would not have affected it. It has also been held that a guaranty to secure money to be advanced to a third party on discount, to a certain extent for the space of twelve months, may be revoked within that time.<sup>69</sup> The court said the promise, by itself, created no obligation unless advances were made, and the fact that twelve months was mentioned in the guaranty limited the time beyond which it should not extend, instead of making a binding contract for

<sup>66</sup> *Hunt v. Roberts*, 45 N. Y. 691. While a surety may terminate his liability by notice, yet he can only be discharged subject to rights which a creditor may have acquired on the faith of a continuance of the suretyship. *Jendervine v. Rose*, 36 Mich. 54. In *Emery v. Baltz*, 94 N. Y. 408, an action on an insurance agent's bond, Finch, J., said that "a surety bound for the fidelity and honesty of his principal, and so for an indefinite and contingent liability, and not for a sum fixed and certain to become due, may revoke

and end his future liability in either of two cases, viz.: First, where the guaranteed contract has no definite time to run; and, second, where the principal has so violated the contract, and is so in default, that the creditor may safely and lawfully terminate it for that reason."

<sup>67</sup> *Estate of Desilver*, 9 Phila. (Pa.) 302. To similar effect, see *Pleasanton's Appeal*, 75 Pa. St. 344.

<sup>68</sup> *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209.

<sup>69</sup> *Offord v. Davies*, 12 J. Scott (N. S.) 748.

that time. Both these cases may well be sustained by the fact that the writings in each were simply offers to guaranty, which were only binding so far as they were acted on, and might at any time be revoked, the same as any other offer before it is accepted.<sup>70</sup> A guaranty was determinable by six months' notice, and the guarantor died, leaving as his executor the debtor, on whose behalf the guaranty was given. The creditors, knowing these facts, and also that there was no personal estate to answer the guaranty, continued to make advances to the debtor for two or three years. Held, the creditors could not recover against the guarantor's estate for any advances made after his death. This was not put upon the ground that the guarantor's death terminated the guaranty, for the court said it did not think that alone would terminate it, but upon the ground that when the creditor knew there was no personal estate, it would be presumed that the advances were not made on the guaranty, and that it would be grossly inequitable to allow the creditor to charge the real estate under the circumstances.<sup>71</sup> It has been held that doubtful expressions in a subsequent correspondence should not be construed as revoking an explicit guaranty.<sup>72</sup>

§ 152. **Same continued.**—Where one of several joint guarantors revokes his guaranty at any time before acceptance, and the person to whom the revocation is made accepted the guaranty without informing the others of such revocation, they will be released from liability as joint guarantors.<sup>73</sup> A continuing guaranty, in the absence of express provision, is revoked as to subsequent advances by notice of the death of the guarantor.<sup>74</sup> In a case in California, Valentine deposited

<sup>70</sup> To this effect, see also *Jordan v. Dobbins*, 122 Mass. 168.

<sup>71</sup> *Harriss v. Fawcett*, Law Rep. 8 Ch. App. Cas. 866. See also same case in court below, Law Rep. 15 Eq. Cas. 311.

<sup>72</sup> *Lanusse v. Barker*, 3 Wheat. 101.

<sup>73</sup> *Potter v. Gronbeck et al.*, 117 Ill. 404, affirming 17 Brad. (Ill. App.) 251.

<sup>74</sup> *Coulthart v. Clementson*, Law Rep. (5 Q. B. Div.) 42. For other cases holding that the death of the

guarantor revokes his guaranty, see *Hyland v. Habich*, 150 Mass. 112; *Home Nat. Bank v. Waterman*, 30 Ill. App. 535. In *Gay v. Ward*, 67 Conn. 147, 34 Atl. Rep. 1025, the stockholders of a corporation executed a continuing guaranty to a bank of "the full, prompt and ultimate payment" of all commercial paper that the bank might discount, each guarantor reserving the right to terminate his liability by notice. After the bank had received notice of the death of two of the guar-

with defendant bank a mortgage for \$50,000 to secure payment of any advances that might be made thereafter to the Francis-Valentine Company. After Valentine's death and notice thereof to the bank, the Francis-Valentine Company overdrew its account. Held, that the note and mortgage occupied the position of a surety and that "the guaranty for future advances ceased when Valentine died and defendant had notice of his death. He could at any time during life have terminated the guaranty as to future advances, by giving notice," said the court. "His death, with knowledge thereof, was notice. At his death his property vested in others, subject to all valid liens thereon. In case of a continuing guaranty, each advance made by the guarantee constituted a fresh consideration, and, when made, an irrevocable promise on the part of the living guarantor. A dead guarantor can make no promise. The guarantee, after knowledge of the death of the guarantor, cannot be held to have made the advance at the request of a dead man."<sup>75</sup> A guaranty by a partnership is not terminated by the death of the sole surviving member of the partnership.<sup>76</sup>

**§ 153. When notice revoking guaranty takes effect.**—Where a surety on the bond of a bank cashier notified one of the directors and vice-president that he wished no longer to be the cashier's surety, and that he had so notified the cashier, it was held that, whatever might be the effect of such notice,

antors, it discounted paper of the corporation and renewed notes that were due at the time of such deaths and notice thereof. It was held that the estates of the deceased guarantors could not be held liable for such discounts or extensions made after their deaths and notice thereof to the bank. The court declined to follow the Massachusetts case of *Jordan v. Dobbins*, 122 Mass. 168, where "death is held to work a revocation of the guaranty," but adopted the views expressed in the English case of *Coulthart v. Clementson*, L. R. 5 Q. B. Div. 42, holding that a continuing guaranty is not revoked by death of the guarantor until notice of such death is

given to the obligee. "The bank from that moment are aware that the person who could during his lifetime have discontinued the guaranty by notice can no longer be a giver of notices; that his estate has passed to others who have trusts to fulfil, and it is easy for them to ascertain what those trusts are. If these trusts do not enable the executor to continue the guaranty then the bank has constructive notice that the guaranty is withdrawn."

<sup>75</sup> *Valentine v. Donohoe-Kelly Banking Co.*, 133 Calif. 191, at 195, 65 Pac. Rep. 381.

<sup>76</sup> *Kernochan v. Murray*, 111 N. Y. 306. Compare *City National Bank v. Phelps*, 86 N. Y. 484.



it could not operate instantaneously, for the directors must have a reasonable time to give notice to the cashier and the other sureties, and to procure a new bond. The court say: "If the effect of the notice is to be such as is now claimed on the part of the appellant, that is, if it discharged Haight [the surety], and, in consequence thereof, discharged all the other sureties, the instant it was communicated to the bank, it might be quite embarrassing and damaging to the bank. The cashier might be so situated that the directors could not immediately arrest his discharge of duty or his ability to bind the bank, and hence reasonable time at least must be given to the bank in such a case to act after receiving the notice."<sup>77</sup> What is a reasonable time depends upon the facts of each case. In one case thirty days was held too short a time.<sup>78</sup>

**§ 154. Who may sue.**—When a public official is required to give a bond conditioned for the performance of his official duties, any person to whom such duty is owing may, independent of any statutory provision, maintain an action at law on such bond for his use. Upon the taking of such bond there is an implied consent on the part of the obligee therein named

<sup>77</sup> *Bostwick v. Van Voorhis*, 91 N. Y. 353, 363, 364, per Earl, J. To the effect that a continuing guaranty is subject to revocation at any time so that the guarantor shall not be liable for sales made subsequent to revocation, see *Conduit v. Ryan*, 3 Ind. App. 1, 29 N. E. Rep. 160. Citing and following *La Rose v. Logansport Nat'l Bank*, 102 Ind. 332, 1 N. E. Rep. 805, where it was held that the sureties on a bank cashier's official bond might relieve themselves from future liability by giving due and proper notice of revocation to all concerned, and that without regard to misconduct on the part of the official. Citing 2 Pars. Contracts, 29, 30, Bish. Cont. § 682.

<sup>78</sup> In *Reilly v. Dodge*, 131 N. Y. 153, 29 N. E. Rep. 1011, the surety on the official bond of a deputy sheriff pleaded that one month before the wrongful levy in question

he had notified the sheriff that he would no longer be liable as surety by a notice in writing delivered to the under sheriff in charge of the office at the time, who immediately notified the deputy that he could not have any new business until he furnished a new bond, but did entrust to him a new execution under which he made the wrongful levy in question. The court said that the sheriff, after receiving the notice, might continue the deputy on duty for a reasonable time and that the surety, notwithstanding his notice, remained liable upon the bond for such reasonable time thereafter. The court refused to say that thirty days was an unreasonable time for the sheriff to keep the deputy on duty, therefore held the surety liable. Citing *Emery v. Baltz*, 94 N. Y. 408. See note to § 150, *supra*.



to such use of his name.<sup>79</sup> When a bond has been made running to the wrong obligee, it is held that the real beneficiary may maintain an action in the name of the obligee for his use.<sup>80</sup> A public building contractor's bond was made to run to the city as obligee when it should have run to the state. Held, that anybody might sue upon it.<sup>81</sup> A lodge officer's official bond ran to the people instead of to the lodge. It was held that it might be reformed and the real beneficiary might then maintain a suit upon it.<sup>82</sup> The usual form of government building contractor's bond conditioned for the performance of the builder's contract with the state and for the payment for labor and materials, is regarded as two separate bonds. One furnishing labor or materials may maintain a suit upon it, regardless of anything that may have occurred between the builder and the state.<sup>83</sup>

<sup>79</sup> *United States v. Howard* (C. C., Mo.), 93 Fed. Rep. 719, at 721, affirmed in 42 C. C. A. 169, and in *Howard v. United States*, 184 U. S. 676, 46 L. Ed. 754. This is an action on the official bond of the clerk of a U. S. district court. Compare cases cited, note 1, § 32, *supra*. See also *Carnegie, Phipps & Co. v. Hulbert*, 36 U. S. App. 81, 16 C. C. A. 498, 70 Fed. Rep. 209, an action on a building contractor's bond in which no obligee was named.

<sup>80</sup> *Bd. of Education of Detroit v. Grant*, 107 Mich. 151, 64 N. W. Rep. 1050. As to who may sue on a guaranty, see *Jenness v. True*, 30 Me. 438.

<sup>81</sup> *Stephenson v. Monmouth Mining & Mfg. Co.*, 84 Fed. Rep. 114, 28 C. C. A. 292, following *Board of Education v. Grant*, 107 Mich. 151, 64 N. W. Rep. 1050.

<sup>82</sup> *Court Valhalla v. Olson*, 14 Colo. App. 243.

<sup>83</sup> In *United States Fidelity & Guaranty Co. v. Omaha Bldg. & Construction Co.* (Neb.), 116 Fed. Rep. 145, 53 C. C. A. 465, the building company obtained from the state of Nebraska the contract for

a public building, and in compliance with a statute, gave its bond, with the Guaranty Company as surety, conditioned that the building company would comply with the terms of its contract with the state and would "well and truly pay for all material and labor entering into or employed in the construction of said building." The building company afterwards assigned to the Omaha National Bank all moneys to become due to it, failed to pay for labor and material and abandoned the work without finishing it. The Guaranty Company filed a bill praying that it be decreed not to be liable for the labor and material claims by reason of such assignment, and because the state had not held back 15 per cent of such estimate as the contract required, though the money held back at the last estimate amounted to 15 per cent of the aggregate of all the estimates. It was held that the surety was not released by the contractor's assignment of its earnings, since such assignment was not forbidden by the statute, the contract or the bond,

**§ 155. When surety may be sued jointly with principal.—** When principal and surety are jointly liable on the same contract, they may be sued jointly for its enforcement, and this whether or not the fact of suretyship appears from the instrument.<sup>1</sup> A surety who signs a note made out in the singular number, "I promise," and adds to his name the word "surety," is liable in a joint suit with the maker, who has also signed the note.<sup>2</sup> But where sureties on a joint and several note had been released pro tanto by the creditor surrendering a security for the debt of less value than the debt, it was held that the principal and sureties could not be sued at law together, because, as the principal was liable for the full amount, and the sureties for only a portion, no judgment could be entered according to the liability of the parties.<sup>3</sup> A principal bound himself by bond for the payment of a certain sum of money. Immediately under the signature of the principal, on the same paper, certain sureties wrote: "We hereby bind ourselves as security for said Olds (principal) for the full and faithful performance of the above agreement," and signed and sealed under those words. The bond was executed and delivered by

and was liable for the unpaid labor and material claims. The court said that the bond was dual in its nature, equivalent to two separate bonds, one to the labor and material men, the other to the state, and held that it was not invalidated as to those furnishing labor and material by either of the assigned causes. Citing *U. S. v. National Surety Co.*, 34 C. C. A. 526, 92 Fed. Rep. 549.

<sup>1</sup> *Kleckner v. Klapp*, 2 Watts & Serg. (Pa.) 44; *Craddock v. Armor*, 10 Watts (Pa.) 258. But the weight of authority is probably to the effect that a guarantor and his principal, or a guarantor and the maker of a note, cannot be sued jointly. See *Abbott v. Brown*, 131 Ill. 108, affirming 30 Ill. App. 376; *Clark v. Morgan*, 13 Bradwell (Ill. App.) 597; *Graham v. Ringo*, 67 Mo. 324; *Parmerlee v. Williams*, 71 Mo. 410; *Tyler v. Trustees*, 14 Oreg. 485; *Barton v. Speis*, 5 Hun 60. See same

case on appeal, 73 N. Y. 133; and see on this subject, *Neil v. Board of Trustees*, 31 Ohio St. 15, 41; *Widner v. Western Union Tel. Co.*, 47 Mich. 612; *Foster v. Honan*, 22 Ind. App. 252, 53 N. E. Rep. 667. In Massachusetts, by statute, several judgments may be entered against principal and sureties and several executions issued thereupon. For a case where sureties were thus enabled to avail themselves of a defence that was not open to their principal, see *Briggs v. McDonald*, 166 Mass. 37, 43 N. E. Rep. 1003. In *Stanley v. Akoi*, 12 Hawaii 344, it was held that though all the obligors on a joint bond must be made parties defendant, plaintiff may proceed to trial and judgment against those served only.

<sup>2</sup> *Dart v. Sherwood*, 7 Wis. 523; *Fond du Lac Harrow Co. v. Haskins*, 51 Wis. 135.

<sup>3</sup> *Cummings v. Little*, 45 Me. 183.

principal and sureties at the same time and on the same consideration. Held, they were all liable together in one suit. The court said: "Where several persons execute an instrument in parol, or under seal, upon the same consideration, at the same time and for the same purpose, and taking effect from a single delivery, they are in legal effect joint contractors or obligors. \* \* The particular form or manner in which the parties have affixed their signatures to a contract or bond is immaterial. It matters not whether those who execute as sureties sign their names directly under that of the principal, and then append to each name the fact of signing merely as surety, or whether, as in this instance, the sureties write between their names and that of the principal that they sign as securities, and then affix their signatures."<sup>4</sup> The same thing was held, when at the foot of a money bond a surety had written: "I \* \* join in the above obligation with \* \* (principal) and am his security for the above sum of \* \* ;"<sup>5</sup> and where, under a contract for the payment of wages, a surety wrote: "I \* \* agree to stand as surety for \* \* (principal) in the above agreement."<sup>6</sup> A and B, being partners, dissolved their partnership, and B executed an agreement to A that he would pay the firm debts. C signed this agreement with B, writing before his name the word "security." The firm was at the date of the agreement indebted to D, who sued A, B and C in a joint action for his debt, and it was held they were liable, on the ground that C was a surety, and primarily liable, and, the contract having been made for the benefit of the creditors of the firm, any of the creditors might sue on it.<sup>7</sup> Where a third party guarantied a lease, as follows: "For value received, I guaranty the payment of the rent, as stipulated by said \* \* (principal), in case of non-payment by him," it was held that the guarantor and lessee could not be sued jointly for rent. The court said: "The undertaking or contract of the guarantor was distinct from that of the principal and collateral thereto, and his liability dependent upon a contingency, namely, the non-payment of rent by the lessee."<sup>8</sup> The same thing was held where,

<sup>4</sup> Stage v. Olds, 12 Ohio 158, per Read, J. To same effect, see Leonard v. Sweetzer, 16 Ohio 1. And also Neil v. Board of Trustees, 31 Ohio St. 15.

<sup>5</sup> Atwell's Adm'r v. Towles, 1 Munf. (Va.) 175.

<sup>6</sup> Watson v. Beabout, 18 Ind. 281.

<sup>7</sup> Dunlap v. McNeil, 35 Ind. 316.

<sup>8</sup> Virden v. Ellsworth, 15 Ind. 144,

under a lease, sureties wrote: "For the payment of said contract being fulfilled on the part of said \* \* (principal), we, the undersigned, will become responsible;"<sup>9</sup> and where, on a lease under seal, a guaranty not under seal was as follows: "I hereby become security for \* \* (principal) for the rent specified in the within lease:"<sup>10</sup> But where a party not the lessee, joined in the execution of a lease, and guarantied on his part that the payments of rent should be made as they became due, it was held that he might be jointly sued with the lessee.<sup>11</sup> Where a stranger to a note payable in clocks, at the time of its execution wrote on its back, "I guaranty the fulfillment of the within contract,"<sup>12</sup> and where, under similar circumstances, a stranger to a note payable to bearer indorsed it, "for value received, I guaranty the payment of the within note and waive notice of non-payment,"<sup>13</sup> it was held that the maker and indorser might be sued jointly. But where a third party wrote on the back of a bond, "I do join with \* \* (principal) as his security for the performance of the agreement mentioned in the present note," it was held that he could not be sued jointly with the maker, on the ground that their undertakings were distinct and different.<sup>14</sup> Where a bond is executed by sureties for the fulfillment of a contract entered into by their principals in a separate instrument, both principals and sureties may be sued jointly in an action for a breach of the contract.<sup>15</sup> In an action against the sureties on the bond of a clerk in a banking house, conditioned for his good behavior, and where he defaulted and absconded, it was held that the principal was a necessary party defendant.<sup>16</sup>

**§ 156. When recovery on common money counts cannot be had against surety—Surety for alimony cannot be compelled by motion to pay it—Other cases.—**A joint and several promis-

per Hanna, J. See a similar ruling on the guaranty of the payment of a note, *Mowery v. Mast & Co.*, 9 Neb. 445.

<sup>9</sup> *Cross v. Ballard*, 46 Vt. 415.

<sup>10</sup> *Turney v. Penn*, 16 Ill. 485.

<sup>11</sup> *McLott v. Savery*, 11 Iowa 323.

<sup>12</sup> *Goles' Adm'r v. Van Arman*, 18 Ohio 336. See, contra, *Mowery v. Mast & Co.*, 9 Neb. 445.

<sup>13</sup> *Prosser v. Laqueer*, 4 Hill (N. Y.) 420. See, contra, *Mowery v. Mast & Co.*, 9 Neb. 445.

<sup>14</sup> *Preston v. Davis*, 8 Ark. (3 Eng.) 167.

<sup>15</sup> *Wibaux v. Grinnell Live Stock Co.*, 9 Mont. 154.

<sup>16</sup> *Exchange Bank v. Springer*, 29 Grant's Ch. (Can.) 270.

sory note was signed by two, one adding to his name the word "surety." They were sued on the common money counts. Held, no recovery could be had on those counts against the surety. The court said: "The rule is nearly or quite universal that there can be no recovery against a surety where his character appears on the face of the instrument, without declaring specially on the contract. \* \* In the common case of a suit against the makers of a promissory note, the instrument may be given in evidence under the money counts, for the reason that the note is evidence of money lent to or had and received by the makers to the plaintiff's use. But when one of them signs as a surety for the other, and that fact appears on the face of the instrument, the note furnishes no evidence that he received the whole or any part of the consideration. Indeed, it proves the contrary."<sup>17</sup> Where a statute provided that the maker, drawer, indorser or acceptor of a bill of exchange or promissory note might be joined in one suit, it was held that this did not authorize a joint suit against the maker and guarantor of a promissory note,<sup>18</sup> it having been previously decided by the same court, that in the absence of a statute the maker and guarantor of a note could not be sued together.<sup>19</sup> A statute provided that in case of a foreclosure of a mortgage, a decree for any balance due after sale of the mortgaged premises might be made against any of the parties to the suit who were liable. Held, that a mortgagee who assigned the mortgage and guarantied the debt was a proper but not a necessary party to a suit to foreclose the mortgage, and a personal decree might be rendered against him for any deficiency.<sup>20</sup> Under nearly the same circumstances, it has been held that the guarantor was not a proper party to the foreclosure suit, and that no personal decree could be rendered against him.<sup>21</sup> The surety for alimony in a divorce suit cannot be compelled to pay the alimony by motion, but must be sued on his bond.<sup>22</sup>

**§ 157. When surety who is not liable at law will not be**

<sup>17</sup> *Butler v. Rawson*, 1 Denio 105, per Bronson, C. J. To same effect, see *Wells v. Girling*, 8 Taunt. 737.

<sup>18</sup> *Stewart v. Glenn*, 5 Wis. 14.

<sup>19</sup> *Ten Eyck v. Brown*, 3 Pinney 115. (Wis.) 452.

<sup>20</sup> *Jarman v. Wiswall*, 9 C. E. Green (N. J.) 267.

<sup>21</sup> *Borden v. Gilbert*, 13 Wis. 670.

<sup>22</sup> *Appeal of Guenther*, 40 Wis.

**charged in equity.**—When the surety in a joint obligation dies, there is no remedy at law on the obligation against his estate, and, in the absence of fraud or mistake, equity will not charge his estate with the payment of such obligation. Where an obligation is joint, and all the obligors participated in the consideration, or there is any previous equity which imposes a moral obligation to pay on all the obligors, there a court of equity will enforce the obligation against the estate of the deceased obligor, because the reasonable presumption is that the parties intended the obligation to be joint and several, but through fraud or mistake it was made joint only. But “this presumption is never indulged in the case of a mere surety, whose duty is measured alone by the legal force of the bond, and who is under no moral obligation whatever to pay the obligee, independent of his covenant, and consequently there is nothing on which to found an equity for the interposition of a court of chancery.” The surety may have had the obligation made joint, with express reference to the contingency of his death.<sup>23</sup> Where a joint appeal bond is signed by two sureties, and one of them dies, his estate is discharged from liability, both at law and in equity, and the fact that the bond was given in pursuance of a statute does not affect the liability thereunder. In cases of suretyship, the contract is the measure of liability, and a statute under which it is made will not be so construed as to enlarge the obligation of the surety beyond the terms of his contract.<sup>24</sup> Principal and surety signed

<sup>23</sup> *Pickersgill v. Lahens*, 15 Wall. 140, per Davis, J.; *Harrison v. Field*, 2 Wash. (Va.) 136; *Risley v. Brown*, 67 N. Y. 160; distinguished in *First Nat. Bank v. Morgan*, 73 N. Y. 593, affirming 6 Hun 346; *Peeke v. Julius*, 2 Browne (Pa.) 31; *Weaver v. Shryock*, 6 Serg. & Rawle (Pa.) 262; *Rawstone v. Parr*, 3 Russ. 539; *Kennedy v. Carpenter*, 2 Whart. (Pa.) 344; *Other v. Iveson*, 3 Drew. 177; *Towne v. Ammidown*, 20 Pick. 535; *Dixon v. Vandenberg et al.*, 35 N. J. Eq. 47; *Davis v. Van Buren*, 6 Daly (N. Y. Com. Pleas) 391. Contra, *Smith v. Martin*, 4 Des. Eq. (S. C.) 148; following *Smith v. Martin*, see *Susong v.*

*Vaiden*, 10 Rich. (S. C.) 247; and the following Texas cases: *Mays v. Cockrum*, 57 Tex. 352; *Bergstroem v. State*, 58 Tex. 92; *Glascock v. Hamilton*, 62 Tex. 143; *Boyd et al. v. Bell et al.*, 69 Tex. 735.

<sup>24</sup> *Wood v. Fisk*, 63 N. Y. 245. To similar effect, see *Chard v. Hamilton*, 56 Hun (N. Y.) 259; *Davis v. Van Buren*, 72 N. Y. 587, affirming 6 Daly (Com. Pleas) 391; *Randall v. Sackett*, 77 N. Y. 480. Upon an affirmance of the judgment appealed from, the surviving surety will be held liable for the amount secured by the appeal bond. *Comins v. Pottle*, 22 Hun (N. Y.) 287.



a joint and several bond, by which they bound themselves as "principals" for the conduct of the principal. Suit was brought on the bond jointly against the principal and surety, and a joint judgment was recovered against them. Afterwards the principal became insolvent and the surety died. Held, that the remedy at law being gone against the estate of the surety, equity would not charge it. The bond was merged in the judgment, and after judgment the obligee could not have sued the principal and surety separately.<sup>25</sup> A mortgage to secure the debt of F and Bro. to the complainant was executed by F and his wife on premises which were the separate property of the wife; afterwards the complainant executed a satisfaction of the mortgage, upon F's promise to give a new mortgage and obtain the wife's signature thereto, which signature, however, the wife refused to give. Held, the satisfaction would not be annulled, and the mortgage enforced against Mrs. F, she being only liable as surety, and there being no accident or mistake in the execution of the satisfaction, and no fraud on her part. The court said: "The obligation of the surety is stricti juris, and if his contract is not binding at law, there is no liability in equity founded on the consideration between the principal parties. A court of equity will not enforce a liability upon a surety where he is not held at law."<sup>26</sup>

§ 158. **When surety's estate held liable.**—When the surety or guarantor in a joint obligation is directly benefited from the contract, his estate will not be discharged from liability. Thus where a stockholder in a corporation executed a joint guaranty of the payment of its bonds and died before the bonds fell due, it was held that the liability upon the guaranty was not extinguished by his death. The joint guarantors owned nearly the entire stock of the corporation, and whatever would benefit the company would of course benefit them.<sup>27</sup> Where, in some states, all causes of action founded on contract survive, the estate of a deceased surety on a joint, but not several, promissory note will not be discharged from liability.<sup>28</sup> If a surety in terms bind his estate it will be held

<sup>25</sup> *United States v. Archer's Ex'r*, 1 Wall. Jr. 173; disapproving *United States v. Cushman*, 2 Sumn. 426. effect, see *Ratcliffe v. Graves*, 1 Vern. 196.

<sup>26</sup> *Leffingwell v. Freyer*, 21 Wis. 392, per Dixon, C. J. To similar <sup>27</sup> *Richardson v. Draper et al.*, 87 N. Y. 337, affirming 23 Hun 188.

<sup>28</sup> *McCoy v. Payne*, 68 Ind. 327;



liable.<sup>29</sup> Judgment against all the makers of a promissory note does not relieve a surety's estate from the lien of the judgment.<sup>30</sup> Where it is proved that a principal has no estate it has been held not error to charge the estate of the surety.<sup>31</sup> But proper efforts must have been made to subject the principal's land to satisfaction.<sup>32</sup>

**§ 159. When equity will charge surety who is not liable at law—Lost bond—Misdescription—Mistake—Reading Statute into statutory bond—Reformation.**—Equity will, in many instances, afford relief against a surety where there is no remedy at law. Thus, equity will set up a lost bond against a surety. "The reason is, that the surety is not discharged by the loss of the bond, and the court only relieves against the accident by setting up the evidence of the debt."<sup>33</sup> Equity will reform a joint guardian's bond so as to hold it joint and several, where it appears clearly to have been the intention of the parties to give a joint and several bond, and relief will, in such case, be granted against the estate of a deceased surety. The court said: "When the contract does not express the agreement or intention of the parties to the injury of the obligee, and this is clearly made to appear, equity will reform the instrument, as well against sureties as principals."<sup>34</sup> Where, by mistake, property mortgaged by a

*Hudelson v. Armstrong*, 70 Ind. 99;  
*Redman v. Marvil*, 73 Ind. 593.

<sup>29</sup> *Mundorff v. Wangler*, 12 J. & S. (N. Y. Superior Ct.) 495.

<sup>30</sup> *Baskin v. Andrews*, 53 Hun 95; and see also *Smith v. Osborne*, 31 Hun 390.

<sup>31</sup> *Jones v. Degge*, 84 Va. 685.

<sup>32</sup> *Womack v. Paxton's Ex'r*, 84 Va. 9.

<sup>33</sup> *Kerney's Adm'r v. Kerney's Heirs*, 6 Leigh (Va.) 478, per Carr, J. To same effect, see *East India Company v. Boddam*, 9 Ves. 464. In *People v. Pace*, 57 Ill. App. 674, it is said that mere loss of the bond does not give the obligee the right to maintain a suit in equity; an action at law may be maintained and a copy offered in evidence. *Fisher v. Silvers*, 65 Ill. 99. In

*Philman v. Marshall*, 103 Ga. 82, 29 S. E. Rep. 598, it was held that, where the sheriff taking the bond and the magistrate with whom it was filed were both dead, and the bond was lost, the sureties were competent witnesses to prove whether it was a forthcoming or a replevy bond, notwithstanding that the plaintiff in the suit (distress for rent) had had a copy established without notice to the sureties.

<sup>34</sup> *Olmsted v. Olmsted*, 38 Conn. 309, per Butler, C. J. For case holding bond joint and several, and estate of surety chargeable, see *Besore v. Potter*, 12 Serg. & Rawle (Pa.) 154. See *Gray v. Robinson*, 90 Ind. 527, where a judgment against principal and sureties was satisfied by the sureties, without any

surety is misdescribed, equity will reform the mortgage. In this case the court said: "Where the surety is aware of, and consents to, the purpose to which his obligation is to be applied, and it is so used, though without consideration, except that advanced to the principal, equity will reform any mistake of fact, so that the obligation shall fulfill its purpose."<sup>35</sup> Where principal and sureties signed a prison-bounds bond, and which, by mistake, misrecited the judgment on which the principal was imprisoned, it was held that equity would reform the bond.<sup>36</sup> Where principal and surety signed a joint bond by mistake, the intention being to sign a joint and several bond, and the principal died, it was held the surety could, by bill in equity, compel the payment of the bond by the estate of the principal as a specialty debt.<sup>37</sup> A agrees to be bound in a bond as surety to B, and signs and seals it accordingly, but by the neglect of the clerk A's name is not inserted. The obligee shows A the condition, and his name and seal, and demands payment, and threatens to sue him unless he gives fresh security, which A agrees to do, but, after finding the mistake, refuses, not being bound at law, yet equity will compel him.<sup>38</sup> In cases such as the preceding, equity affords relief on the

knowledge of a mistake therein, and it was held equity would not correct the judgment as against them.

<sup>35</sup> *Prior v. Williams*, 3 Abb. Rep. Om. Cas. 624, per Peckham, J.

<sup>36</sup> *Smith v. Allen*, Saxton (N. J.) 43. In writing a bastardy bond a justice of the peace, by mistake, wrote the complaining witness's name "Margie Kyne" instead of "Margie Coss." Held, that the bond could be reformed and enforced: *Meininger v. Stott*, 50 Ohio St. 394, 34 N. E. Rep. 633, per Williams, J. Citing *Pomeroy Eq. Jur.*, § 866; *Story Eq.*, § 164, and the text, *supra*. In *Dale v. Gilbert*, 128 N. Y. 625, 28 N. E. Rep. 512, reversing 12 N. Y. Supp. 370, it was held that a misrecital in a bond may be cured by amendment on application by principal and sureties. In *Bascom v. Smith*, 164 Mass. 61, 41 N. E. Rep. 130, defendant

guaranteed payment for a set of patterns to be made by plaintiff for a third party under the belief that they were to be of iron and wood. In fact, they were made of wood only. Held, that defendant was liable. The court said that if a man guarantees a contract without knowing what its terms are, when he might by inquiry find out, he is bound.

<sup>37</sup> *Pride v. Boyce*, Rice's Eq. (S. C.) 275. Equity will reform an indemnity bond so as to conform to the mutual intention of all parties. *Percival v. McCoy* (Cir. C. D. Ia. W. D.), 13 Fed. Rep. 379. In *Trustees of Schools v. Otis*, 85 Ill. 179, it is held that equity will not reform an official bond as against the sureties therein.

<sup>38</sup> *Crosby v. Middleton*, Finch's Precedents, 309.

ground of accident or mistake; but where it is sought to reform an instrument against a surety on the ground of mistake, evidence of the necessary facts must be so clear as to leave no doubt. It has been said that "although an instrument may undoubtedly be reformed on parol proof, yet where, as here, the relief sought is adverse to the pre-existent equity of a surety, the evidence should be so clear as to leave the fact without a shadow of a doubt."<sup>39</sup> A devise to executors with authority to sell the real estate of the testator for the payment of his debts applies as well to a joint and several bond, executed by him as surety for his co-obligor, as to any other debts, and a court of chancery will compel a sale of the real estate, so as to pay such bond.<sup>40</sup> A law concerning the sale of school lands prescribed the form of the notes to be given for the purchase of such lands, made joint and several obligations, and specially declared that the surety should, in all respects, be liable as principal. A principal and surety signed a joint note for the purchase of such lands, and the surety died. Held, the estate of the surety was chargeable in equity for the amount of the note; the decision being placed on the ground alone that the statute made the surety liable as principal, and, being a public law, must be presumed to have been known to all the parties.<sup>41</sup> A trustee having in his hands funds arising out of property sold under a decree of court, became delinquent, and, having wasted the fund, died intestate, having before committed breaches of his bond, for which both he and his sureties would have been liable at law if he had lived. A claimant of the fund in the hands of the trustee could not place himself in a position to proceed at law on the bond, because of the death of the trustee. Held, equity would afford him relief on the bond against the sureties. There was a clear right against the sureties, which could not be enforced at law because of the accident of the death of the principal, and the fact that there was a right, and no remedy at law, was sufficient alone to give equity jurisdiction. The law on the subject was well and concisely stated by the court, as follows: "A court of equity will do nothing to extend the liability of securities beyond the clear intent and import of their contract.

<sup>39</sup> Moser v. Libenguth, 2 Rawle (Pa.) 428, per Gibson, C. J.; Smith v. Allen, Saxton (N. J.) 43.

<sup>40</sup> Berg v. Radcliff, 6 Johns. Ch. 302.

<sup>41</sup> Powell v. Kettle, 1 Gilm. (Ill.) 491.

But if to such an extent they cannot at law be held liable by reason of fraud, accident or mistake, a court of equity, to prevent a failure of justice, will interfere and enforce the execution of their contract, according to its obvious meaning and design."<sup>42</sup>

§ 160. When new promise revives liability of surety or guarantor.—If facts exist which are sufficient to discharge a surety or guarantor, and he, with full knowledge of the existence and effect of such facts, promises to pay the debt, the weight of authority is that he will be bound.<sup>43</sup> Where time had been given which would have discharged the surety on a note, and he, knowing this, paid part of the note, and promised to pay the balance, it was held he had waived any defense he might have had by reason of such giving of time.<sup>44</sup> Where the holder of a note had been guilty of such laches as would have discharged the guarantor, but the guarantor, on demand of the holder, paid him the interest due on the note, knowing and protesting he was not liable on his guaranty, it was held he had waived the laches, and continued liable on the guaranty; and this, notwithstanding the fact that he paid the interest, because of the threat of the holder that, unless he paid the interest, he would sue him for other large debts which he owed the holder.<sup>45</sup> But the surety or guarantor will not be bound by such new promise, unless he made the same with a full knowledge of the facts which would entitle him to a discharge,<sup>46</sup> and of their legal effect.<sup>47</sup> After time has been given by the creditor, which would discharge the surety on a note, his liability is not revived by a payment made on the note by him with money of the principal, although at the time of such payment he gave no intimation that the money was not his own.<sup>48</sup> It has been held that after the guarantor of a

<sup>42</sup> *Brooks v. Brooks*, 12 Gill & Johns. (Md.) 306, per Dorsey, J. But see *Edes et al. v. Garey & Lananhan*, 46 Md. 24, where an order sustaining a demurrer to a bill by residuary legatees, to enforce the personal liability of sureties on a testamentary bond for a devastavit, alleged to have been committed by an executor, was affirmed.

<sup>43</sup> *Ashford v. Robinson*, 8 Ired. Law (N. C.) 114.

<sup>44</sup> *Hinds v. Ingham*, 31 Ill. 400.

<sup>45</sup> *Sigourney v. Wetherell*, 6 Met. (Mass.) 553.

<sup>46</sup> *Gamage v. Hutchins*, 23 Me. 565.

<sup>47</sup> *Robinson v. Offutt*, 7 T. B. Mon. (Ky.) 540. Contra, *Rindskopf v. Doman*, 28 Ohio St. 516.

<sup>48</sup> *Lime Rock Bank v. Mallett*, 42 Me. 349.

note is discharged by the laches of the holder, a new promise on his part will not bind him, unless there is also a new consideration.<sup>49</sup> Where the sureties on an official bond were, in fact, not liable for the default of their principal, and without seeing the bond acknowledged they were liable and promised to pay the defalcation, but afterwards, upon inspection of the bond, were advised they were not liable, and then refused to pay, it was held that as they promised under a mistake of law they were not liable.<sup>50</sup>

**§ 161. Statute of limitations—When new promise or partial payment by principal takes case out of statute as to surety.**—If a principal and surety execute a joint, or joint and several note, bond or other obligation, a new promise or a partial payment by the principal will avoid the bar of the statute of limitations as to the surety as well as to the principal.<sup>51</sup> This is placed upon the ground that, as they are jointly liable, the admission or act of one is the admission or act of both. A written acknowledgment of the debt by the principal, within the period prescribed by the statute of limitations, will not take the case out of the statute against a guarantor for the price of goods sold the principal, because in such case the principal and guarantor are not joint debtors.<sup>52</sup> If a claim against a deceased surety, as surety, is not presented till his estate is settled, it is barred the same as any other claim, and it makes no difference that the claim had been proved against the estate of the principal, and it could not be known till that estate was settled how much of the claim it

<sup>49</sup> Van Derveer v. Wright, 6 Barb. (N. Y.) 547.

<sup>50</sup> Welch v. Seymour, 28 Conn. 387. As to liability of surety who becomes such under mistake of fact, see Miller v. Gardner, 49 Iowa 234.

<sup>51</sup> Hunt v. Bridgam, 2 Pick. 581; Perham v. Raynall, 9 Moore 566; Craig v. Calloway County Court, 12 Mo. 94; Frye v. Barker, 4 Pick. 382; Joslyn v. Smith, 13 Vt. 353; Pease v. Hirst, 10 Barn. & Cress. 122; Whitaker v. Rice, 9 Minn. 13; Caldwell v. Sigourney, 19 Ct. 37; Perkins v. Barstow, 6 R. I. 505; Zent's Ex'rs v. Heart, 8 Pa. St. 337;

Hooper v. Hooper, 81 Md. 155, 31 Atl. Rep. 508. Contra, Coleman v. Forbes, 22 Pa. St. 156; Deaton v. Deaton, 109 Ill. App. 7; Kallenbach v. Dickinson, 100 Ill. 427; Bell v. Morrison, 1 Peters (U. S.) 351; Walters v. Kraft, 23 S. C. 578; Exeter Bk. v. Sullivan, 6 N. H. 124; Bush v. Slowell, 71 Pa. St. 208; Yandes v. Lefavour, 2 Blackf. (Ind.) 371; Knight v. Clements, 45 Ala. 89; Thiese v. Donelson, 2 Humph. (Tenn.) 166; Palmer v. Dodge, 4 Ohio St. 21.

<sup>52</sup> Meade v. McDowell, 5 Binney (Pa.) 195.

would pay.<sup>53</sup> Where a surety is about to be sued, and before the statute of limitations has barred the debt he hands to the creditor for suit a note which had been executed to him by the principal as an indemnity, it is such an admission of indebtedness on his part as will start the statute running from that time as to him.<sup>54</sup> It has been held that the sureties in a judgment at law, which has been enjoined by the unconscionable litigation of the principal until it has become barred by the statute of limitations, are in privity with the principal and bound to all the legal consequences of his acts, and will not, therefore, be allowed to avail themselves of the advantage of the statute thus obtained, and they will be enjoined in equity from setting it up at law.<sup>55</sup> The statute of limitations commences running in favor of a surety or guarantor from the time he is liable to suit, and this, as already seen, may or may not be the same time the principal becomes so liable.<sup>56</sup>

<sup>53</sup> Ratcliff v. Leunig, 30 Ind. 289.

<sup>54</sup> Russell v. La Roque, 11 Ala. 352.

<sup>55</sup> Davis v. Hoopes, 33 Miss. 173.

<sup>56</sup> On this subject, see *The Governor v. Stonum*, 11 Ala. 679; *Bank v. Knotts*, 10 Rich. Law (S. C.) 543; *Sollee v. Mengy*, 1 Bailey Law (S. C.) 620; *Wofford v. Unger*, 55 Tex. 480. In *Northern Assurance Co. v. Borgelt*, Neb., Jan'y, 1903, 93 N. W. Rep. 226, suit was brought upon an insurance agent's bond, conditioned for the faithful performance of his duties as agent and for his obeying the orders of his principal, to recover a loss which the principal had been compelled to pay because the agent had disregarded instructions to cancel a certain policy. The defence was the statute of limitations and in overruling a demurrer to plaintiff's petition the court said: "A clear distinction is made between bonds conditioned to pay a certain sum of money or to do a certain act, and bonds conditioned to indemnify. A cause of action accrues upon a bond conditioned to do a certain act as

soon as there is a default in performance, whether the obligee has suffered damage or not. If, however, the bond is conditioned to indemnify, damage must be shown before the party indemnified is entitled to recover, so that a cause of action accrues, not from the date of the act which causes damages, but from the time when pecuniary loss ensues therefrom. Citing *Wilson v. Stilwell*, 9 Ohio St. 468, 75 Am. Dec. 477, and note at p. 478; *Wilson v. Stillwell*, 14 Ohio St. 464; *American Building and Loan Association v. Waleen*, 52 Minn. 23, 53 N. W. Rep. 867; *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359, and note at p. 362, which case holds that a sheriff cannot recover on an indemnity bond given him by his deputy until the sheriff has actually paid a judgment that has been recovered against him on account of a default by his deputy; *Wicker v. Hoppock*, 6 Wall (U. S.) 94, 18 L. Ed. 752; *Hicks v. Hoos*, 44 Mo. App. 371, at 579; *Terre Haute etc. R. R. v. Peoria etc. R. R.*, 81 Ill. App. 435, 455; *Jenckes v. Rice*,



It is held that where fraudulent concealment by the principal prevents the running of the statute as to time, it is likewise prevented from running against his surety.<sup>57</sup> On a guardian's bond the statute begins to run at the date of the breach.<sup>58</sup> A suit on the guaranty of a note is distinct from a suit on the note and is governed by a different statute of limitations.<sup>59</sup> The statute begins to run against the surety's right to reimbursement or subrogation from the date he pays the princi-

Iowa, Feb. 1903, 93 N. W. Rep. 384. See also *City of Lincoln v. First National Bank*, Neb., Feb., 1903, 93 N. W. Rep. 698, holding that the statute of limitations does not begin to run against a lot owner's liability over to the city's until the city has actually paid damages that has been recovered against it on account of a defect in the sidewalk in front of the lot. *Sherman v. Spalding*, Mich., Feb., 1903, 93 N. W. Rep. 613. See also note to *Scott v. Nichols*, 61 Am. Dec. 503, at 504.

<sup>57</sup> In *Lieberman v. First National Bank*, 2 Pennewill (Del.) 416, 45 Atl. Rep. 901, the teller of a bank being in default \$4,000 on November 1, 1879, persuaded Lieberman to become surety on his official bond, and while that bond was in force abstracted \$11,650 more, and on July 6, 1885, persuaded Lieberman again to act as his surety on a like bond, and, while the latter bond was in force and before February 16, 1893, abstracted \$27,750 more. All of those defalcations were wholly unknown and unsuspected until February, 1893. Held, that fraudulent concealment by the teller of his embezzlements prevented the running of the statute of limitations as to him, and that the same rule applied to his surety and that judgments by confession which had been entered upon both bonds should not be vacated. In *Eising v. Andrews' Ex'r*, 66 Conn. 58, 33 Atl. Rep. 585, defendant's testator was surety on the

bond of plaintiff's collector, conditioned that the collector should account for all moneys coming into his possession as such. After the surety's death the collector collected and embezzled \$2,000 and fraudulently concealed his embezzlement so that it was not known to plaintiff until after the statute of limitations had barred all causes of action accruing after the death of the deceased. It was held, under a provision in the statute, that the cause of action did not accrue until plaintiff's discovery of such fraudulent concealment, and that, suit having been begun within four months thereafter, the surety's estate was liable.

<sup>58</sup> *State v. Parsons*, 147 Ind. 579, 47 N. E. Rep. 17.

<sup>59</sup> In *Carpenter v. Thompson*, 66 Conn. 457, 34 Atl. Rep. 105, on her note reading "six years after date I promise to pay to Elizabeth Thompson, heirs or assigns, ten thousand dollars without interest, value received," defendant afterwards endorsed the following: "Pay to the order of F. B. Carpenter. [Sg'd] Elizabeth Thompson." Held, that the note was not negotiable and that the defendant's contract was one of special guaranty and that a suit on the guaranty was not a suit on the note and was not governed by the same provision in the statute of limitations as a suit on the note would have been.



pal's debt.<sup>60</sup> The United States suing upon a bond, stands upon the same footing as an individual except that neither laches nor the statute of limitations can be pleaded against it.<sup>61</sup>

§ 162. **Contract of suretyship, by what law governed.**—As a general rule the liability of sureties and guarantors depends upon and is governed by the law of the place of their contract.<sup>62</sup> Thus, in an action against a surety on a note in New Hampshire, the note having been executed and made payable in Vermont, the law relating to sureties in the latter state is to be applied and by that law they are governed.<sup>63</sup> But if the contract was entered into with the intention that it shall operate and be acted on in a state other than the one in which it was executed, the surety or guarantor will be held to have contracted with reference to the laws of such state, and he will be liable accordingly.<sup>64</sup> As in the case of other contracts the presumption is that the common law prevails in other states of the Union.<sup>65</sup>

<sup>60</sup> In *Loewenthal v. Coonan*, 135 Calif. 381, it was held that when the surety on mortgage notes pays them his right to foreclose the mortgage accrues and the statute of limitations begins to run against him at that time and not at the maturity of the notes. In *Ryland v. Commercial Bank of San Jose*, 127 Calif. 525, 59 Pac. Rep. 989, it was held that the statute of limitations did not begin to run against the sureties' suit for reimbursement until they had paid the principal's debt; the court said: "The statute could not be set in motion against the sureties until a liability to them had arisen, and no liability arose until they paid the debt of the principal or some part of it." (p. 527.)

<sup>61</sup> *United States v. Ingate* (Ala.), 48 Fed. Rep. 251; *United States v. Coal Co.*, 18 Fed. Rep. 278. Death of surety on revenue collector's bond: Claim need not be presented against his estate as required by California statute where deceased

resided. *Pond v. U. S.*, 111 Fed. Rep. 989-995. "Neither statute of limitations nor laches will bar the government of the U. S. as to any claim for relief in a purely governmental matter." Citing cases.

<sup>62</sup> *Long v. Templeman*, 24 La. Ann. 564. And a subsequent change of the principal's domicile does not alter the rule. *Long v. Templeman*, *Ibid*; *McCormick Harvesting Machine Co. v. Laster*, 70 Ill. App. 425.

<sup>63</sup> *Howard v. Fletcher*, 59 N. H. 151. The right of a surety to discharge his liability by notice to the creditor to sue the principal, held determined by the law of the place of the contract. *Tenant v. Tenant*, 110 Penn. St. 478; *Parr's Banking Co., Lim., v. Yates*, L. R. 2 Q. B. 1898, 460.

<sup>64</sup> *Frierson v. Williams et al.*, 57 Miss. 451; *Milliken v. Pratt*, 125 Mass. 374.

<sup>65</sup> *Patillo v. Alexander*, 96 Ga. 60, 22 S. E. Rep. 646, cited fully in note 71, § 125, *supra*.

## CHAPTER IV.

### OF THE LIABILITY OF THE SURETY WHEN THE PRINCIPAL IS DISCHARGED, OR WAS NOT ORIGINALLY BOUND.

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| <p>§ 163. When surety not liable if principal not bound—General principles.</p> <p>164. Discharge of principal generally releases surety.</p> <p>165. Surety not discharged by release of principal when remedies against surety reserved, when he is fully indemnified, etc.</p> <p>166. Miscellaneous cases of discharge of surety when principal not bound—Void obligations of municipal corporation — Statute of Limitations as to acts of officials.</p> <p>167. When discharge of principal, after judgment against surety, releases surety.</p> | <p>§ 168. Surety not discharged if principal released by act of law—Bankruptcy of principal.</p> <p>169. Whether surety bound when principal does not sign the obligation.</p> <p>170. Same continued — Effect where bond is joint and several or several—Where principal is already bound.</p> <p>171. When surety bound for contract of infant or married woman which is not binding on them.</p> <p>172. Discharge of surety does not release principal.</p> <p>173. When surety discharged by mental or physical incapacity of principal.</p> |
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§ 163. When surety not liable if principal not bound—General principles.—The obligation of a surety or guarantor is usually accessory to that of the principal, and, as a general rule, wherever there is no principal there can be no surety; and whatever discharges the principal releases the surety. This is not, however, universally true. With reference to this it has been well said that “A surety is not entitled to every exception which the principal debtor may urge. He has a right to oppose all which are inherent to the debt; not those which are personal to the debtor. Pothier distinguishes them into exceptions in personam and exceptions in rem. The latter, which go to the contract itself, such as fraud, violence, or whatever entirely avoids the obligation, may be pleaded by the surety; but the former, which are grounded on the insolvency or partial solvency of the debtor, or which result

from a cession of his property, or are the consequence of his minority, cannot be opposed to the creditor."<sup>66</sup> Where a statute prohibited the making of a particular kind of note by a bank, it was held that such a note was void, and a guaranty of the note was likewise void.<sup>67</sup> Where property of the principal sufficient to satisfy the debt was levied on, it was held that such levy satisfied the debt as to the principal; and consequently as to the surety. The court said: "It would be as difficult for me to conceive of a surety's liability continuing after the principal obligation was discharged as of a shadow remaining after the substance was removed."<sup>68</sup> A justice of the peace required two parties who were before him for examination to enter into a joint recognizance with surety when he had no right to require a joint obligation from both, but had power only to require a several recognizance from each. Such a joint recognizance was given, and it was held that it was void as to the principals and consequently as to the surety.

<sup>66</sup> *Baldwin v. Gordon*, 12 Martin (La.) O. S. 378, per Porter, J. See also *State v. Bugg*, 6 Rob. (La.) 63; *Jarrett v. Martin*, 70 N. C. 459; *Phillips v. Wade*, 66 Ala. 53; *Bean v. Chapman*, 62 Ala. 58; *Norris v. Pollard*, and *Morgan v. Pollard*, 75 Ga. 358. In *Fuller v. Aylesworth* (Mich.) 75 Fed. Rep. 694, 21 C. C. A. 505, 43 U. S. App. 657, a judgment was recovered against Gratiot county for the cost of drainage ditches which benefitted only three townships, and with the judgment, went a writ of mandamus requiring the levy of the amount on the three townships in specified proportions. A supersedeas bond having been given, conditioned that the county would prosecute its writ of error with effect and pay such judgment as should be rendered against it, it was held that, immediately on affirmance, the sureties became liable for the full amount of the judgment without waiting for the county to have time to raise the money by taxation. Although it was true that

the townships alone were really liable and the county was not liable as such but only as the instrumentality through which payment was enforced, it was held that the sureties could not escape on the plea that they should not be held liable when their principal, the county, was not. The principal must be considered as bound in the same representative capacity in which the judgment was rendered against it.

<sup>67</sup> *Swift v. Beers*, 3 Denio 70.

<sup>68</sup> *Farmers' and Mechanics' Bank v. Kingsley*, 2 Doug. (Mich.) 379. See also *Stull v. Davison*, 12 Bush (Ky.) 167; *Evans v. Raper*, 74 N. C. 639. In *Thomas v. Wason*, 8 Colo. App. 452, 46 Pac. Rep. 1079, judgment was obtained against the principal on an injunction bond for \$1,130, execution issued and levy made upon \$4,300 of the principal's money. Afterwards, without the surety's consent, the judgment was vacated and a new judgment entered against principal and sureties. Held, the sureties were discharged.

The court said: "It is a corollary, from the very definition of the contract of suretyship, that the obligation of the surety being accessory to the obligation of the principal debtor or obligor, it is of its essence that there should be a valid obligation of such principal, and that the nullity of the principal obligation necessarily induces the nullity of the accessory. Without a principal there can be no accessory. Nor can the obligation of the surety, as such, exceed that of the principal."<sup>69</sup> But a guaranty of a note, described therein by the name of its maker, its date, amount and day of payment, and which is shown to the guarantor, and a commission paid to him at the time of signing the guaranty, binds him to pay the note upon non-payment thereof by the maker, after the usual demand and notice, although the note is made payable to the maker's own order, and never indorsed by him, and the want of such indorsement is not known to either party till after the day of payment. He had agreed to guaranty that particular instrument, and was bound by his obligation.<sup>70</sup> It was agreed between the agent of a railroad company and the plaintiff that no appeal should be taken from an award to be made in a pending arbitration between the company and the plaintiff, but both parties should abide the award. Thereupon the president of the company, together with the agent, personally guaranteed to the plaintiff the performance by the company of said agreement. Held, the guarantors were liable in case of a breach of the agreement, even if the latter was not binding on the company, and the guarantors were estopped from denying the existence of the company.<sup>71</sup> Other cases where the surety has been held released because the principal is not bound are referred to in a note.<sup>72</sup>

<sup>69</sup> *Ferry v. Burchard*, 21 Conn. 597, per Storrs, J. Holding that because bond is void as to principal because of duress, it is not void as to surety, who was under no duress, see *Jones v. Turner*, 5 Litt. (Ky.) 147. The sureties on a guardian's bond are not liable thereon if the court appointing the guardian had no jurisdiction. *Crum v. Wilson, Adm'r, et al.*, 61 Miss. 233.

<sup>70</sup> *Jones v. Thayer*, 12 Gray 443.

<sup>71</sup> *Mason v. Nichols*, 22 Wis. 376.

<sup>72</sup> *Dupee v. Blake*, note 8, § 165, post. In *Jack v. Sinsheimer*, 125 Calif. 563, 58 Pac. Rep. 130, defendant guaranteed payment of the penalty of \$1,000 in a lease of certain premises for non-payment of rent. The penalty clause was held void and it was held also that the guarantor was not liable for any of the unpaid rent. He had guaranteed the penalty, not the rent. The surety on a note given for the price of a chattel may show by way

**§ 164. Discharge of principal generally releases surety.—**

As a general rule, if the principal is released by the creditor, without reservation, the surety is also thereby discharged. Thus, a joint judgment was obtained against the principals and sureties on a note. The creditor agreed with one of the principals to discharge him from the judgment if he would give security for the payment of about one-fourth of the amount thereof, and the security was accordingly given. Held, the sureties were thereby discharged. The court said that if in such a case the surety was held liable, "he could not recover over against the principal, because he is discharged from the debt and owes the creditor nothing, and the surety could not recover for money paid to the use of the principal, as he owes nothing; and when the surety makes the payment, it cannot be for the use of the principal debtor."<sup>73</sup> A creditor agreed to

of defence the breach of a parol warranty of the thing sold. The measure of damages for breach of warranty is the difference between the market value of the thing sold and its value as it had been warranted, and if such damages exceed the amount of the note the surety is discharged. *Crist v. Jacoby*, 10 Ind. App. 688, 38 N. E. Rep. 543. See also *Ohio Thresher & Engine Co. v. Hensel*, 9 Ind. App. 328, 36 N. E. Rep. 716, § 22, *supra*. Parol evidence of breach does not vary the writing. "The warranty was made as a part of the contract of sale. The note is not the contract of sale." In *Jenkins v. City of Danville*, 79 Ill. App. 339, which was a suit on the bond of a saloon-keeper to recover from his sureties for a breach—keeping open on Sunday, it was held that the fact that the principal was fined for that offence and had paid his fine was a complete defence. The bond was conditioned that the principal "shall observe and obey all laws and ordinances now in force or such as may hereafter be in force regulating and governing keepers of dram

shops," and contained a stipulation that "any breach of its conditions shall work a forfeiture of the whole penalty thereof." The court, Burroughs, J., said that "inasmuch as the city had submitted the same cause of action, i. e., the right to recover from Jenkins a penalty, and how much, for keeping his dram shop open on the particular Sunday mentioned in this declaration to a court of competent jurisdiction and secured an adjudication thereon and received the fruits thereof, it cannot again open the same matter. \* \* As the liability of the sureties on the bond was secondary, and that of Jenkins the principal primary, the judgment \* \* against the principal was available to them as well as to him, under the doctrine of *res judicata*." In *Copeland v. Leonard*, 113 Ala. 605, 20 So. Rep. 980, sureties on a detinue bond were held released by a compromise, the principal giving back part of the goods and the suit being dismissed.

<sup>73</sup> *Trotter v. Strong*, 63 Ill. 272; *Brown v. Ayer*, 24 Ga. 288. See, also, *Anthony v. Capel*, 53 Miss. 350; *State v. Parker*, 72 Ala. 181; *Farr*

accept from the principal 5s. in the pound in full of his demand, upon having a collateral security for that sum from a third person. He was induced to agree to this by the representation of the agent of the principal that a surety would continue liable for the residue of the debt. Held, the surety was discharged. The representations, being as to the legal effect of the instrument, were immaterial, and did not avoid it.<sup>74</sup> A was indebted to B and others, and C was surety for the debt due B. Afterwards A became bankrupt, and all his creditors signed a composition deed, agreeing to accept 7s. in the pound, in full payment of their claims, in drafts accepted by C as surety. B added before his name to the composition deed the words, "Without prejudice to any additional security we may hold." Held, notwithstanding the reservation, B could not enforce C's original liability. If all the creditors had held securities from C for the full amount due them, then such a reservation would have made the composition nugatory. Moreover, to allow B to enforce this liability might operate to the prejudice of the other creditors.<sup>75</sup> Where the principal's contract is forfeited the liability of the surety is at an end.<sup>76</sup>

v. Bach, 13 Ind. App. 125, 41 N. E. Rep. 393; Michener v. Springfield Engine & Thresher Co., 142 Ind. 130, 40 N. E. Rep. 679.

<sup>74</sup> Lewis v. Jones, 4 Barn. & Cres. 506. That the surety on a bond may be released by parol. Tuson v. Crosby, 172 Mass. 478, 52 N. E. Rep. 744. Citing inter alia as applicable in principle: Hastings v. Lovejoy, 140 Mass. 261, 264, 265, 2 N. E. Rep. 776, where it was held that a verbal agreement to accept less rent than a written lease provided for might be urged as defense to an action on the lease. In Crook v. Lipscomb, Tex. Civ. App. Dec. 1902, 70 S. W. Rep. 993, the appellee's release of part of several appellants from a justice's judgment released the sureties on the appeal bond who did not consent thereto.

<sup>75</sup> Grundy v. Meighan, 7 Irish Law Rep. 519.

<sup>76</sup> In Glassell v. Coleman, 94

Calif. 260, 29 Pac. Rep. 508, defendant guaranteed payment of \$25,000 of the price of a tract of land bought by Wilson from plaintiff Glassell. After that portion of the price had become due Glassell, who had not yet given a deed, declared the contract forfeited, and brought suit against defendant on his guaranty. Held, that by forfeiting the contract plaintiff deprived himself of all right to collect the price and could collect only damages for breach of the contract. Defendant had guaranteed part of the price but he had not guaranteed payment of such damages and therefore could not be holden. Harrison, J., for the court, put the matter thus (p. 266), "Upon the election by the plaintiff to rescind the contract by claiming a forfeiture by Wilson of all his rights under the contract, the contract itself and each of its provisions or terms ceased to be a sub-



§ 165. **Surety not discharged by release of principal when remedies against surety reserved, when he is fully indemnified, etc.**—If the creditor, at the time he releases the principal, reserves his remedies against the surety, such release amounts to a covenant not to sue only, and does not discharge the surety.<sup>1</sup> This has been held where the creditor by mistake executed an absolute release to the principal, but the agreement verbally was that the creditor's rights against the surety should be reserved.<sup>2</sup> By a mortgage deed the debtor covenanted to pay the principal and interest of a debt, and a surety covenanted to pay the interest. The principal afterwards by deed assigned his property to a trustee on trust, to sell and divide the proceeds among his creditors. The creditors released the debtor from the debts due them respectively, but there was a proviso in the deed of release that nothing therein should affect any right or remedy which any creditor might have against any other person in respect of any debt due by the principal. Held, the surety was not discharged. The court said: "The release cannot be construed to be absolute, because then no rights could be reserved in any case, and the courts have therefore held that such a release is not to be con-

sisting or enforceable obligation against Wilson. The only right of action against him then remaining to the plaintiff was for damages for his breach of the contract. The plaintiff could not have a right of action on the contract, and at the same time one for its breach. An action for damages for the breach of a contract necessarily implies that the contract has been terminated. Wilson's liability to the plaintiff upon his agreement to pay the purchase price for the land ceased with the plaintiff's rescission of his right to receive the land upon such payment. \* \* The plaintiff had no right of action on the note [for purchase money guaranteed by defendant] for any damages sustained from Wilson's breach of his agreement to purchase. Wilson's liability for such damages \* \* was independent of

and inconsistent with any liability on the note. \* \* We are of the opinion that the complaint fails to state a cause of action against the respondent, and that the Court below correctly sustained their demurrer."

<sup>1</sup> *Bateson v. Gosling*, Law Rep. 7 Com. Pl. 9; *Hall v. Thompson*, 9 Up. Can. (C. P.) 257. See, also, *Wood v. Brett*, 9 Grant's Ch. 452; *Bell v. Manning*, 11 Grant's Ch. 142; *Boatmen's Savings Bank v. Johnson*, 24 Mo. App. 316; *Union Bank v. Beech*, 3 Hurl. & Colt. 672. To contrary effect, see *Webb v. Hewitt*, 3 Kay & Johns. 438. The consent of the surety to the release of the principal prevents such release operating as a discharge of the surety. *Osgood v. Miller*, 67 Me. 174.

<sup>2</sup> *Bank of Montreal v. McFaul*, 17 Grant's Ch. 234.



strued as absolute, but only as a covenant not to sue. That being so, the remedy is gone as between the debtor and creditor, inasmuch as the creditor cannot sue the debtor, but as against all other persons the rights of the creditor are reserved.''<sup>3</sup> Judgment was recovered against a surety, and a separate judgment was recovered against the principal, which included also other claims. The creditor afterwards offered to give the control of the judgment against the principal to the surety, but the surety refused it. Afterwards the creditor agreed with the principal that he never would enforce the judgment against him, and assigned the judgment against the principal to a third person for the principal's benefit, but he reserved the right to proceed on the judgment against the surety. Held, the surety was not discharged.<sup>4</sup> A, B and C executed a joint and several bond as guardians, with T as surety. The ward, after coming of age, executed a release to A, adding: "But this release is not to apply to or affect my claims against B, my active guardian, and whose account remains unsettled." Held, in equity, that the release as to A was good, and that it was also a good defense to T, so far as he was surety for A, but that T remained bound for B and C.<sup>5</sup> If, before the release of the principal, the surety has paid a part of the debt and secured the remainder, such release will not discharge such surety.<sup>6</sup> A surety who is fully indemnified is not discharged by the release of the principal; in such case the surety himself occupies the position of a principal.<sup>7</sup> Where there is a satisfaction of the creditor's claim against the principal the surety is released even though the creditor's right to proceed against the surety is expressly reserved.<sup>8</sup>

<sup>3</sup> Green v. Wynn, Law Rep. 4 Ch. App. Cas. 204, per Lord Hatherly, C.; affirming Green v. Wynn, Law Rep. 7 Eq. Cas. 28.

<sup>4</sup> Hubbell v. Carpenter, 5 N. Y. 171.

<sup>5</sup> Kirby v. Turner, 6 Johns. Ch. 242; Kirby v. Turner, Hopkins' Ch. 309.

<sup>6</sup> Hall v. Hutchons, 3 Mylne & Keen 426.

<sup>7</sup> Moore v. Paine, 12 Wend. 123. He holds the money for the benefit of the creditor, to whom he occu-

pies the position of a debtor. Crim et al. v. Fleming, 101 Ind. 154.

<sup>8</sup> In Dupee v. Blake, 148 Ill. 453, 35 N. E. Rep. 867, reversing, 50 Ill. App. 155, appellants were sued in debt as sureties on a bond conditioned that their principal, a warehouseman, would obey the laws of Illinois and the rules of the Chicago Board of Trade. The breach assigned was that the principal had obtained \$20,000 from a bank upon the principal's note with fraudulent warehouse receipts as collateral.

§ 166. **Miscellaneous cases of discharge of surety when principal not bound—Void obligations of municipal corporation—Statute of Limitations as to acts of officials.**—Certain parties, professing to be the representatives of a school district, made a note with sureties, and raised money on it to build a school-house. The district had no power to borrow money for such a purpose, and it was held that it was not liable on the note, but that the sureties were liable thereon.<sup>9</sup> It has been held that the discharge of one of two joint guardians by the orphans' court does not discharge the surety on their official bond. This was put on the ground that the court had the power to do this when the surety became bound, and he must be presumed to have consented that it might be done.<sup>10</sup> A surety concurs with the principal in suggesting to the creditor, who is pressing for his money, to accept a transfer of a mortgage, which the principal knows to be fictitious, but the surety believes to be genuine. The creditor, believing the mortgage to be genuine, accepted it, released the surety, and erased his name from the securities. Upon the faith of this release, the friends of the surety advanced him money for the purpose of relieving him from all other liabilities. Upon discovery of the fraud, it was held that the creditor was entitled to be restored to all his rights against the surety, in the same manner as if he had never been released, nor his name erased from the securities.<sup>11</sup> The period of limitation to actions on bonds was fifteen years, and against officers for breaches of official duty, one year. Suit was brought on the official bond of an auditor against his sureties, for dereliction of duty on the part of the auditor, more than a year after he went out of office. Held, the statute was a bar in favor of the sureties.<sup>12</sup>

For a valuable consideration, the bank released the principal from all liability on the note, stipulating that it was not intended "to in any way release or impair the obligation of the parties to said bond." Held, that full satisfaction having been given for the only breach assigned, the sureties on the bond were discharged.

<sup>9</sup> *Weare v. Sawyer*, 44 N. H. 198. So the sureties on an attachment bond given by a county will be lia-

ble thereon, even though the bond be not binding on the county. *State v. Fortinberry*, 54 Miss. 316.

<sup>10</sup> *Hocker v. Wood's Ex'r*, 33 Pa. St. 466.

<sup>11</sup> *Scholefield v. Templer*, 4 De Gex & Jones, 429, affirming *Scholefield v. Templer*, Johns. (Eng. Ch.) 155.

<sup>12</sup> *State v. Blake*, 2 Ohio St. 147.

If the debt of the principal is barred a mortgage given by his surety to secure it is unenforceable. *Bridge's*

If the creditor sues the principal and takes judgment for less than the amount due, and such judgment is satisfied, he cannot maintain a suit against the surety for the remainder of

*Adm'r v. Blake*, 106 Ind. 332. In *Auchampaugh v. Schmidt*, 70 Iowa 642, the surety on a note made in Illinois, who resided in Iowa, was sued in Iowa. His defense was that an action upon the note against the principal, a resident of Illinois, was barred by the Illinois statute of limitations. The reply was that the Iowa statute of limitations did not yet bar a suit against the surety. Held, by a divided court, that the surety was not liable. The majority opinion argued that the statute of limitations was a statute of repose, the principal was not any longer under obligation to preserve the evidence of his defense. Nor should the surety be if the principal is not. "Again when a surety pays a debt it is his right to look to the principal for reimbursement. But a surety paying a debt after it had become barred against the principal would be remediless." Reed, J., dissenting, said that the statute did not begin to run against the surety's right to reimbursement until he had been forced to pay the debt; moreover, the principal was released by act of the law and such release constituted no defence for the surety. *Allen v. Stovall*, Tex. Civ. App., Mch. 1901, 62 S. W. Rep. 87. It is held no defense for the surety that the claim has not and cannot be presented against the estate of the deceased principal. *Howard v. United States*, 42 C. C. A. 169, 102 Fed. Rep. 77, affirming 93 Fed. Rep. 719. Compare *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. Rep. 641. Note 57 to § 150 supra. In *County of Sonoma v. Hall*, 132 Calif. 589, 62 Pac. Rep. 257, 312,

and 65 Pac. Rep. 12 and 459, a county recorder and his sureties being sued on his official bond to recover fees collected and not accounted for, it was held that a statute which barred suit against the principal after three years could be availed of, also, by the sureties, although an action on the bond would not be barred for four years, and suit was begun within four years. "The gist of the action is the failure of Hall to pay the monies to the county," said the Court. "When he failed to do so, he committed a breach of the bond. The defendants other than Hall are made defendants for the purpose of securing a judgment against them, in order to collect the amount of the damages caused by the breach. The bond is not the cause of action but collateral thereto, and a means of which the county might avail itself. If the defendant Hall had, instead of giving the bond, given a mortgage upon real estate, properly conditioned, as indemnity for any breach of his official duty, the mortgage would have been an instrument in writing, but it could not be held to give a cause of action to the county after the time had run for commencing an action for the breach. Surely, the sureties cannot be in a worse position than the principal would have been if sued independently of the bond. If defendant Hall could escape liability by reason of the statute, the other defendants are certainly in no worse position. The bond did not impose upon Hall any duties other than or different from those created by the statute. It

the debt.<sup>13</sup> A testator appointed, as his executors, two persons who were indebted to him on a bond—one as principal, the other as surety. Held, the bond was discharged by the appointment of the principal as executor, and thereby became *functus officio* as to the surety.<sup>14</sup>

§ 167. **When discharge of principal, after judgment against surety, releases surety.**—If the principal is discharged because of matters inherent in the transaction, even after judgment against the surety, the latter will be exonerated thereby. Thus, a sheriff and his sureties were sued on his official bond for his non-feasance, and severed in their defenses. Judgment was rendered against the sureties on demurrer, and the next day the issue was tried against the sheriff and he was found not guilty. Held, the sureties might therefore maintain a bill to perpetually enjoin the judgment against them. The court said the rights of the surety were the same after as before judgment. When the liability of the principal ceases, that of the surety should cease also. The principle was controlled even though the sureties knew all the facts before the judgment against them, except the discharge of the principal. That was a fact which occurred after the judgment, and

created no liability upon the sureties, so long as Hall performed his duties as required by the statute. The liability arose only when Hall neglected to make the payment. The bond was collateral security for the liability.” (p. 594.) In *Bernd v. Lynes*, 71 Conn. 733, defendant indorsed on a note over his signature the words: “For value received I hereby guarantee the payment of the within note until paid.” Held, that the statute of limitations having run as to the maker, the words “until paid” in the guaranty did not prevent the statute from running in favor of the guarantor also. Quoting from *Eising v. Andrews*, 66 Conn. 58, 65, 33 Atl. Rep. 585, the Court said that “A course of action cannot exist against a surety, as such, unless a cause of action existed against his principal.”

<sup>13</sup> *Couch v. Waring*, 9 Conn. 261.

<sup>14</sup> *Eichelberger v. Morris*, 6 Watts (Pa.) 42. Where an instrument guarantied certain notes, the amount of which was carried out and footed up, it was held the guarantor was liable for the full amount, although the principal was entitled to a reduction as against the creditor. *James v. Long*, 68 N. C. 218. Holding that the accommodation drawer of a note is not released by the release of the payee, where the holder did not know of the suretyship, see *Carstairs v. Rolleston*, 1 Marsh. 207. Holding that the accommodation acceptor of a bill of exchange is not discharged if the holder, who did not know of the suretyship when he took the draft, after learning that fact releases the drawer, see *Howard Banking Company v. Welchman*, 6 Bosw. (N. Y.) 280.

was the fact which discharged them.<sup>15</sup> In a suit against a sheriff and the sureties of his official bond, judgment was recovered against all of them. The sheriff alone appealed, and on a final trial was acquitted. Held, the judgment against the sureties could not afterwards be enforced.<sup>16</sup> G sold B and W negroes introduced into the state in violation of law. B and W executed a note in part payment for the slaves, which M indorsed. G sued B and W at law on the note, and they set up the illegality of the consideration thereof and were discharged. G at the same time sued M, the indorser, who, being ignorant of the facts concerning the consideration, made no defense, and judgment was had against him. Held, M could sustain a bill for perpetual injunction as to the judgment against him, on the ground that his principal had been discharged, and this although he might have ascertained the facts as to the consideration by inquiry.<sup>17</sup> A bought slaves and gave his notes with B as surety for the price. Having cause to rescind the sale, A brought suit to procure a rescission thereof. Pending such suit the vendor brought suit against A and B on the note, and recovered judgment against B by default. A afterwards, in his rescission suit, obtained a decree canceling the notes. Held, the effect of that decree was to discharge B.<sup>18</sup> The principal in a bond for the payment of money was sued alone for a breach thereof, and upon pleas of payment and accord and satisfaction there was a verdict and judgment in his favor. Held, this was not a defense to a surety who was afterwards sued on the same bond. The court said the judgment would not have been conclusive against the surety if it had been against the principal, and should not be conclusive in his favor when in favor of the principal.<sup>19</sup> The fact that the discharge of the principal should in such case of itself release the surety seems to have been overlooked.

**§ 168. Surety not discharged if principal released by act of law—Bankruptcy of principal.**—The discharge of the principal by the act of the law, in which the creditor does not partici-

<sup>15</sup> Ames v. Maclay, 14 Iowa 281.

<sup>18</sup> Dickason v. Bell, 13 La. Ann.

<sup>16</sup> Beall v. Cochran, 18 Ga. 38.

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<sup>17</sup> Miller v. Gaskins, 1 Smedes & Mar. Ch. (Miss). 524.

<sup>19</sup> State Bank v. Robinson, 13 Ark. (8 Eng.) 214.

pate, will not release the surety. A familiar illustration of this rule is that of the discharge of the principal in bankruptcy or under insolvent laws, in which case the surety is generally held not to be discharged thereby.<sup>20</sup> A creditor pending an action against a surety who contested his liability proved the debt under a commission of bankruptcy against the principal, and by his signature enabled the bankrupt to obtain his certificate, though the surety had given him notice not to sign it. Held, the surety was not discharged.<sup>21</sup> A state statute provided that "The obligation of the surety is accessory to that of his principal, and if the latter from any cause becomes extinct, the former ceases of course." A principal having been discharged in bankruptcy, it was held that the statute was only an affirmation of the common law, and the words "from any cause" meant any cause dependent on the act or negligence of the creditor, and that the surety was not discharged. The court said: "The discharge of the principal which discharges a surety must be a discharge by some act or neglect of the creditor, and a discharge by operation of law being, as it is, against the consent and beyond the power of the creditor, does not discharge the surety."<sup>22</sup> Judgment having been recovered against a debtor, he gave bond with surety that the

<sup>20</sup> *Alsop v. Price*, 1 Doug. (Eng.) 160; *Garnett v. Roper*, 10 Ala. 842; *Cowper v. Smith*, 4 Mees. & Wels. 519; *Kane v. Ingraham*, 2 Johns. Cas. 403; *Seaman v. Drake*, 1 Caines' Rep. 9; *Inglis v. Macdougall*, 1 Moore 196; *Claffin v. Cogan*, 48 N. H. 411; *Moore v. Wallers' Heirs*, 1 A. K. Marsh. (Ky.) 488; *Jones v. Hagler*, 6 Jones' Law (N. C.) 542; *Bank v. Simpson*, 90 N. C. 467; *Wolf v. Stix*, 99 U. S. 1; *Wilson v. Field*, 27 Hun (N. Y.) 46; *Lackey v. Steere*, 121 Ill. 598; *Steele v. Graves*, 68 Ala. 21; overruling *Jones v. Knox*, 46 Ala. 53; *Smith v. Gilham*, 80 Ala. 296; *McCombs v. Allen*, 18 Hun (N. Y.) 190; *Serra 'E Hijo v. Hoffman & Co.*, 30 La. Ann. 67; *Robinson v. Soule*, 56 Miss. 549; *Jones v. Hawkins*, 60 Ga. 52; *Cochrane v. Cushing*, 124 Mass. 219. But

see, contra, *Choate v. Quinichett*, 12 Heisk. (Tenn.) 427; *Rountree v. Rutherford*, 65 Ga. 444; *Rutherford v. Rountree*, 67 Ga. 725. See also, *Levy v. Wagner*, Tex. Civ. App. May 1902, 67 S. W. Rep. 112, holding that the payee of a note does not owe to the surety the duty of proving it as a claim against the estate of the bankrupt maker. Note dissenting opinion in *Auchampaugh v. Schmidt*, 70 Iowa 642, note to § 166 supra.

<sup>21</sup> *Browne v. Carr*, 2 Russ. 600.

<sup>22</sup> *Phillipps v. Solomon*, 42 Ga. 192, per McKay, J. A composition with creditors under the bankrupt act does not discharge the sureties, and the remedy against them remains. *Fisse v. Einstein*, 5 Mo. App. 78.



judgment should be paid within nine months. The debtor was afterwards arrested by virtue of the judgment, and discharged under the insolvent law. Held, the surety was not thereby released. The court said: "That the arrest on a *capias ad satisfaciendum* is in itself a satisfaction of the debt is a position not to be maintained unless the plaintiff consented to the discharge; then, indeed, the debt is gone. \* \* Here the plaintiff gave no consent to the discharge of \* \* (the principal). It was effected by act of law, which, like the act of God, injures no man."<sup>23</sup> The lien of a mortgage given by a surety to secure a debt of the principal is not released by the latter's discharge in bankruptcy.<sup>24</sup> And this is true where the mortgage is given by a wife on her separate property to secure the husband's debts. The discharge of the husband in bankruptcy does not release the wife.<sup>25</sup> Under exceptional circumstances a court of chancery may relieve the surety from a liability resulting from the voluntary bankruptcy of his principal, contrary to the principal's promise, and where to hold the surety liable would be to permit others to take an unconscionable advantage over him.<sup>26</sup> It has been held that bank-

<sup>23</sup> *Sharpe v. Speckenugle*, 3 Serg. & Rawle (Pa.) 463, per Tilghman, C. J.

<sup>24</sup> *Post, Adm'r v. Losey*, 111 Ind. 74.

<sup>25</sup> *Burtis, Adm'r v. Wait*, 33 Kan. 478.

<sup>26</sup> In *Elder v. Prussing*, 101 Ill. App. 655, an attachment against Chapman had been released upon Prussing's entering into a recognizance conditioned to pay any judgment that might be obtained against Chapman. Thereafter Chapman was discharged in bankruptcy and filed a plea in the attachment suit setting up such discharge whereupon plaintiff asked for judgment against Chapman with a perpetual stay of execution so that he might proceed against the surety, which form of judgment the trial court announced its willingness to enter. Prussing then filed his bill setting up that Chapman had a meritorious defense

to the attachment suit and that he had become such surety upon Chapman's express agreement to make his defense, that he had received no consideration and was without indemnity and that Chapman was a non-resident, having gone to Europe, so that a personal judgment against him would be worthless, and prayed for an injunction restraining plaintiff from taking such judgment against Chapman, by which, of course, his surety would be bound, without a trial on the merits. Held, on appeal from an order granting such temporary injunction, that the surety was entitled to the relief sought. The Court, Windes, J., was unable to find any precedent, in its facts like the case at bar, but grounded its decision on the fact that to permit such a judgment to be taken against Chapman, the bankrupt, would be to give the attachment plaintiff an unconscionable



ruptcy of the principal releases the surety on a bond given by him to secure his release after arrest upon a *capias*.<sup>27</sup>

§ 169. **Whether surety bound when principal does not sign the obligation.**—As to whether the surety is bound when the principal, who is named in the instrument, does not sign it, there is great conflict of authority. It has been held that in such case the surety is not liable, and in holding this with reference to the bail bond in a civil suit, the court said: “Now we think it essential to a bail bond that the party arrested should be principal. It is recited that he is, and the instrument is incomplete and void without his signature. The remedy of the sureties against the principal would wholly fail, or be much embarrassed, if such an instrument as this should be held binding. Suppose they wish to arrest the principal in some distant place, or in some other state, what evidence would they carry with them that they were his bail? There is nothing to estop him from denying the fact, nor any proof that it was true.”<sup>28</sup> Where in the body of a county treasurer’s

advantage over the bankrupt’s surety by preventing him from making the defense which he seeks to make, and on the further ground that the plea of bankruptcy by Chapman was a fraudulent violation of his agreement with his surety to contest the suit.

<sup>27</sup> In *Bryant v. Kinyon*, 127 Mich. 152, 86 N. W. Rep. 531, the principal bought a lot of wood, title to remain in the vendor until paid for, sold it and appropriated the proceeds. The vendee had been arrested upon a *capias* and after his release upon bail, he was discharged in bankruptcy under the National Bankruptcy Act of 1898. Held, that the surety on his bond was released, because, in the words of Hooker, J.: “There can be no liability unless a judgment is procured in the action against the principal and that can never be, for the reason that he is released by his discharge.”

<sup>28</sup> *Bean v. Parker*, 17 Mass. 591, per *Parker, C. J.*; *Bunn v. Jetmore*,

70 Mo. 228, 35 Am. Rep. 425. To same effect, with reference to surety on prison-bonds bond, *Curtis v. Moss*, 2 Rob. (La.) 367; with reference to surety on bond of a county treasurer, *People v. Hartley*, 21 Cal. 585; with reference to surety on bond of town treasurer, *Johnston v. Kimball Township*, 39 Mich. 187; with reference to surety on an appeal bond, *State v. Austin*, 35 Minn. 51. Appeal bond from J. P., signed by surety but not by principal, held that judgment in the circuit court must be vacated and appealing party ordered to file a new bond. *Lyman v. Williams*, 84 Ill. App. 82. In *Weir v. Mead*, 101 Calif. 125, 35 Pac. Rep. 567, an administrator’s bond was made a joint bond as between the principal and the sureties and a several bond as to each of the sureties. The principal failed to sign it. Held, that the sureties were not bound. Quoting *Field, C. J.*, in *City of Sacramento v. Dunlap*, 14 Calif. 421, the Court said: “The

official bond his name was recited, but he neither signed nor sealed it, the sureties who signed it were held liable. The court said the treasurer was liable to the county without any bond, even though he did not sign the bond. They might not be able to produce the bond as evidence, but this was no greater inconvenience than if the bond had been lost. The words of the statute which provided for giving bond with surety might

liability of the sureties is conditional to that of the principal. They are bound if he is bound and not otherwise. The very nature of the contract implies this. The fact that their signatures were placed to the instrument can make no difference in its effect. It purports on its face to be the bond of three. Some one must have written his signature first, but it is to be presumed upon the understanding that the others named as obligors would add theirs. Not having done so it was incomplete and without binding obligation on either," and declined to follow *Trustees of Schools v. Sheik*, 119 Ill. 579, 8 N. E. Rep. 189, in which state, by statute, "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." See also *Gay v. Murphy*, 134 Mo. 98, 34 S. W. Rep. 1091; *Martin v. Hornsby*, 55 Minn. 187, 56 N. W. Rep. 751. In *King v. Thompson* (Ohio), 110 Fed. Rep. 319, 49 C. C. A. 59,—a proceeding in which the lien of a mortgage of a reorganized railway company was postponed to the lien of a judgment for personal injuries recovered prior to such reorganization,—a trust company which had joined in the appeal failed to join in the execution of the appeal bond. It was held that the bond was sufficient nevertheless. "The bond is signed by one of the appellants, with sufficient sureties thereon and was duly approved by

the circuit judge allowing the appeal," said Day, J. "The statutory obligation is fulfilled when good and sufficient security is taken." Citing *McClellan v. Pyeatt*, 1 C. C. A. 241, 49 Fed. Rep. 259. The rule stated in the text has been followed with reference to surety on bond of a treasurer of a corporation, *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460; and with reference to the surety on an administrator's bond, *Wood v. Washburn*, 2 Pick. 24. Contra, *Parker v. Bradley*, 2 Hill (N. Y.) 584; *Miller v. Tunis*, 10 Up. Can. (C. P.) 423. And a recognizance unsigned by the principal was held not void as to the surety. *Tillson v. State*, 29 Kan. 452. In *North St. Louis Building & Loan Association v. Obert*, Mo. Sup. Oct. 1902, 69 S. W. Rep. 1044, an action on a fidelity bond issued by a surety company, the Court said there was much force in plaintiff's argument that the bond was issued for profit and therefore must be construed most strongly against the surety as an insurer but that it was not sustained by the theory of plaintiff's petition in which the instrument was declared upon as a bond executed by a principal and a surety. It was accordingly held that the failure of the principal to join in the execution of the bond released the surety. Following *Brenn v. Jetmore*, 70 Mo. 228, 35 Am. Rep. 425, in which case the court said that signature by the principal "would

well be construed to mean giving bond by surety.<sup>29</sup> One who has by an instrument indorsed on a lease guarantied the fulfillment of the covenants of the lease by the lessees, naming them, is bound by his guaranty, although the lease is executed by only one of the lessees, where it appears that both lessees occupied the demised premises, and had possession of all the property mentioned in the lease for the whole term.<sup>30</sup> It has been held that a bond given for the purpose of obtaining a dissolution of an attachment of partnership property, and executed in the name of the firm by only one of two partners named as principals therein, cannot be enforced against the surety without evidence of the assent of the other partner to its execution.<sup>31</sup> But where one member of a firm signed the firm name to a note under seal, which consequently did not bind the other member, it was held that a surety on the note was not, for that reason, discharged.<sup>32</sup> Where a surety signed a bond which purported to have been signed by the principal, but had not in fact been signed by him nor by his authority, it was held the surety was not discharged, unless he delivered the bond as an escrow.<sup>33</sup> Principal and surety entered into a recognizance for the appearance of the principal at the March term of the court to answer an indictment. The principal did not appear, and the surety alone, at the March term,

authorize the plaintiff to sue and recover in one judgment against him as well as the surety, and such judgment would obviate the necessity of another suit by the surety on the collateral agreement." That the principal, being already bound, need not sign an appeal or a garnishment release bond, see *Maddox v. American Trust Co.*, 109 Ga. 787, 35 S. E. Rep. 155.

<sup>29</sup> *State v. Bowman*, 10 Ohio 445. To same effect, where a bond was conditioned that the principal should pay for such goods as he should purchase, see *Williams v. Marshall*, 42 Barb. (N. Y.) 524. Where a bond provided for the payment by each of several sureties of \$1,000, it was held that the bond showed an obligation on behalf of each surety to pay the sum of \$1,000, and on behalf of

the principal to pay the aggregate of all the sums. *People v. Breyfogle*, 17 Cal. 504.

<sup>30</sup> *McLaughlin v. McGovern*, 34 Barb. (N. Y.) 208. A bond executed to a municipal corporation by sureties to secure the performance of a lease by the lessee is valid though not executed by the lessee. *Mayor v. Kent*, 25 J. & S. (N. Y. Sup. Ct.) 109.

<sup>31</sup> *Russell v. Annable*, 109 Mass. 72; *Dole Bros. v. Cosmopolitan Preserving Co.*, 167 Mass. 481, 46 N. E. Rep. 105.

<sup>32</sup> *Stewart v. Behm*, 2 Watts (Pa.) 356.

<sup>33</sup> *Loew v. Stocker*, 68 Pa. St. 226. To similar effect, with reference to a promissory note, see *Chase v. Hathorn*, 61 Me. 505.

entered into a recognizance for the appearance of the principal at the May term. No default was entered on the first recognizance. The principal did not appear at the May term. Held, the surety was liable on the last recognizance. He would not have been liable but for the previous recognizance; because, otherwise, the surety might control the person of the principal without his consent. But in this case, the principal, having entered into the first recognizance, could not make this objection, and the surety could not complain because, by entering into the last recognizance, he saved a forfeiture of the first.<sup>34</sup>

**§ 170. Same continued—Effect where bond is joint and several or several—Where principal is already bound.**—The liability of sureties on a recognizance,<sup>1</sup> replevin bond,<sup>2</sup> school treasurer's bond,<sup>3</sup> bond of indemnity,<sup>4</sup> attachment bond,<sup>5</sup> bond to prevent attachment,<sup>6</sup> appeal bond,<sup>7</sup> constable's bond,<sup>8</sup> and bond to secure the performance of a lease<sup>9</sup> is not affected because of the principal's failure to sign the obligation or have his name inserted therein. And if a surety in such cases pays the obligation, his right to indemnity from the principal remains the same as though the principal had signed.<sup>10</sup> There is no presumption that sureties have waived their principal's signature when he has not signed with them.<sup>11</sup> There are many

<sup>34</sup> *Combs v. The People*, 39 Ill. 183. Holding that several persons who execute a bond may show by parol that they are all sureties for a person who did not sign the bond, see *Artcher v. Douglass*, 5 Denio, 509.

<sup>1</sup> *State v. Peyton et al.*, 32 Mo. App. 522; *Irwin v. State*, 10 Neb. 325.

<sup>2</sup> *Cahill's Appeal*, 48 Mich. 616.

<sup>3</sup> *Trustees of Schools v. Sheik*, 119 Ill. 579, reversing 16 Brad. (Ill. App.) 49.

<sup>4</sup> *Bollman v. Pasewalk*, 22 Neb. 761.

<sup>5</sup> *Adams v. Kellogg*, 63 Mich. 105.

<sup>6</sup> *McIntosh v. Hurst*, 6 Mont. 287; *Pierce v. Miles*, 5 Mont. 549. This under statute.

<sup>7</sup> *Johnson v. Johnson*, 31 Ohio St.

131. This by statute. *Supreme Council Catholic Benevolent Legion v. Boyle*, 15 Ind. App. 342, 44 N. E. Rep. 56. *Inhabitants of Wellesley v. Washburn*, 156 Mass. 359, 31 N. E. Rep. 8; *Florida Orange Hedge Fence Co. v. Branham*, 27 Fla. 326, 8 So. Rep. 841; *Lindsay v. Price*, 33 Tex. 280; *San Roman v. Watson*, 54 Tex. 254 and cases there cited.

<sup>8</sup> *Rader v. Davis*, 5 Lea (Tenn.) 436.

<sup>9</sup> *Mayor v. Kent*, 25 J. & S. (N. Y. Sup. Ct.) 109.

<sup>10</sup> *Trustees of Schools v. Sheik et al.*, 119 Ill. 579, reversing 16 Brad. (Ill. App.) 49; *Harnsberger v. Yancey*, 33 Gratt. (Va.) 527.

<sup>11</sup> *Hall v. Parker*, 39 Mich. 287, holding that if a bond can be charged against sureties without

cases holding that where the principal is already bound, as by a contract referred to or a judgment appealed from, or where the bond is several or joint and several, the liability of the surety is not affected by the failure of the principal to sign the bond.<sup>12</sup>

their principal's signature, it can only be by positive proof that they had delivered it to become operative as against themselves alone.

<sup>12</sup>Florida Orange Hedge Fence Co. v. Branham, 27 Fla. 326, 8 So. Rep. 841, and cases there cited, holding that an appeal or supersedeas bond is binding though not signed by some of the appellants. Fuller v. Aylesworth, 75 Fed. Rep. 694, 21 C. C. A. 505, at 512, 43 U. S. App. 657; Brockett v. Brockett, 2 How. (U. S.) 238, Story, J. Lovejoy v. Isbell, 70 Conn. 557, 40 Atl. Rep. 531. In McClellan v. Pyeatt, 49 Fed. Rep. 259, 1 C. C. A. 241, at 243, 4 U. S. App. 98, a motion to dismiss appeal because only one of several plaintiffs in error had signed the appeal bond was denied. In Smith v. Atkinson, 18 Colo. 255, 32 Pac. Rep. 425, it was held that the principals need not sign an injunction bond where it is joint and several; "their liability depended not upon the undertaking but upon the antecedent wrongful suing out of the writ of injunction." In Wile v. Koch, 54 Ohio St. 608, 44 N. E. Rep. 236, it was held that where an appellant's name is omitted from the official bond, parol evidence is admissible to identify the appellant. In Kurtz v. Forquer, 94 Calif. 91, 29 Pac. Rep. 413, sureties on a joint and several bond conditioned for the performance of a building contract, delivered the bond to the obligee. It was never signed by the principal. Held, the sureties were bound, nevertheless. In Maddox v. American Trust Co., 109 Ga. 787, 35 S. E. Rep.

155, Maddox garnisheed money of E. S. Morris & Co. in the hands of the Trust company. A bond given by Morris & Co. recited that "N. W. Murphy, as principal and as a member of the firm of E. S. Morris & Co." and sureties named were bound unto Maddox in a certain amount and the bond was conditioned to be void "if the said N. W. Murphy shall pay to the said J. J. and J. E. Maddox the amount which may be recovered and all costs therein in said garnishment." Held, that the bond was sufficient. Murphy's signature was equivalent to "E. S. Morris & Co. by N. W. Murphy." The Court (p. 789) did "not think it was absolutely necessary for E. S. Morris & Co. to sign the bond at all. It is true that the statute gives to the plaintiff the right at the proper time 'to enter up judgment upon such bond against the principal and securities as judgment may be entered against securities on appeal,' but, in so far as such a judgment affects the principal, there is really no need for it, for the plaintiff must already have obtained a judgment against him before he could enter a judgment on the bond." In State v. Buchanan, 1 Martin's Chancery Dec. (Ark.) 227 (1895), the official bond of the Treasurer of the State Lunatic Asylum was signed by the sureties but not by the principal; held that inasmuch as the bond was, by statute, joint and several, and the principal was bound anyhow, the sureties were not released by this defect, though they would be if the

§ 171. When surety bound for contract of infant or married woman which is not binding on them.—Where a party becomes the surety of a married woman, an infant, or other person incapable of contracting, he is bound, although the principal is not. With reference to this it has been said that: “Fraud, illegality, or mistake, which may rescind the contract of the principal, induces the discharge of the sureties; but if the invalidity of the contract rests upon reasons personal to the principal, in the nature of a privilege or protection, the principal acquires a personal defense against the contract,” but the contract subsists, and the sureties may be charged thereon. The disability of the principal may be the very reason why the surety was required.<sup>18</sup> An infant bought a tract of land and gave his note with sureties for the purchase money. On coming of age

principal were not holden. Citing to this point: *City of Deering v. Moore*, 86 Me. 181, 29 Atl. Rep. 988; *Cockrill v. Davie*, 14 Mont. 131, 35 Pac. Rep. 958; *Pima County v. Snyder (Ariz.)*, 44 Pac. Rep. 297. In Massachusetts it is held that where the principal's name does not appear on his bond as treasurer of a private corporation, it is a question of fact to be determined by evidence whether or not the parties signing as sureties intended to make themselves bound whether the principal signed the bond or not, and the burden of proof is on the plaintiff. It was so held in *Goodyear Dental Vulcanite Co. v. Bacon*, 151 Mass. 460, and the surety testifying that he did not understand that he was to be bound unless the principal signed the bond there was a finding for defendant. In *St. Louis Brewing Assn. v. Hayes*, 97 Fed. Rep. 859, 38 C. C. A. 449, the principal failed to sign a bond which he gave to his employers containing his name as principal and signed by three sureties and conditioned for the prompt payment by him for beer sold and delivered to him under his contract. Held, that inas-

much as he had already signed the contract the performance of which was guaranteed by his sureties, his failure to sign the bond was immaterial. “The signing of the bond by the principal,” said the court, “would not change his liability in any way nor vary the measure of evidence required to fix his liability. No breach of the bond could be shown without first proving a debt of the principal to the payee in the bond. This evidence was required whether the principal signed the bond or not.” Citing and following *Williams v. Marshal*, 42 Barb. 524.

<sup>18</sup> *Smyley v. Head*, 2 Rich. Law (S. C.) 590, per Frost, J.; *St. Albans Bank v. Dillon*, 30 Vt. 122; *Kimball v. Newell*, 7 Hill 116; *Nabb v. Koontz*, 17 Md. 283; *Davis v. Statts*, 43 Ind. 103; *Weed Sewing Machine Co. v. Maxwell*, 63 Mo. 486.; *Yale v. Wheelock*, 109 Mass. 502; *Jones v. Crosthwaite*, 17 Iowa 393; *Lee v. Yandell et al.*, 69 Tex. 34; *Winn v. Sanford*, 145 Mass. 302; *Wiggins' Appeal*, 100 Pa. St. 155; *Lobaugh v. Thompson*, 74 Mo. 600.



he disaffirmed the sale. Held, the sureties were discharged thereby. The court said: "As a general proposition, it is undoubtedly correct that infancy does not protect the indorsers or sureties of an infant, or those who have jointly entered into his voidable undertaking. But the cases in which this principle has been decided are clearly distinguishable from the present one. Here the undertaking of the sureties goes to the whole consideration. \* \* By the disaffirmance of the contract the plaintiff gets back his land, and the consideration which upheld the contract is extinguished. It would be a strange doctrine which would give him back his land and allow him to recover from the sureties the purchase money also."<sup>14</sup> It has been held that the surety on a building contractor's bond is liable although the building contract is not enforceable by reason of the incapacity of the other party thereto to enter into it.<sup>15</sup>

**§ 172. Discharge of surety does not release principal.**—If the creditor release the surety he does not thereby discharge the principal. The reason why the discharge of one joint debtor discharges all is that the responsibility of the one not released is thereby increased. This reason does not apply to the case of the discharge of the surety, for the surety is not liable to the principal, but the principal is bound to indemnify the surety. The discharge of the surety is nothing beyond what the principal himself was bound to effect, and therefore no injustice is done him.<sup>16</sup>

<sup>14</sup> *Baker v. Kennett*, 54 Mo. 82, per Wagner, J.; *Patterson v. Cave*, 61 Mo. 439. See, also, on this subject, *Kuns' Ex'r v. Young*, 34 Pa. St. 60.

<sup>15</sup> In *City of Unionville v. Martin*, Mo. App. Apl. 1902, 68 S. W. Rep. 605, a city, without lawful authority to do so, contracted with the principal defendant to build an artesian well for a certain amount, payable in instalments, and took from him a bond conditioned for the completion of the work and refunding of the money paid in the event of his failure to complete the work.

Held, that although the city could successfully maintain a plea of ultra vires to a suit against it on the contract it was not estopped from recovering from the sureties on the contractor's bond the money it had paid to the contractor. Following, *City of St. Louis v. Davidson*, 102 Mo. 149, 14 S. W. Rep. 825, 22 Am. St. Rep. 764.

<sup>16</sup> *Mortland v. Himes*, 8 Pa. 265; *Bridger v. Phillips*, 17 Tex. 128; *McIlhenny Co. v. Blum*, 68 Tex. 197; *Burson v. Kincaid*, 3 Pen. & Watts (Pa.) 57; *Carrol et al. v. Corbitt*, 57 Ala. 579.



marks of a learned judge, made in deciding whether a guaranty was continuing or not: "It is obvious that we cannot decide that questions upon the mere construction of the document itself, without looking at the surrounding circumstances to see what was the subject-matter which the parties had in their contemplation when the guaranty was given. It is proper to ascertain that for the purpose of seeing what the parties were dealing about; not for the purpose of altering the terms of the guaranty by words of mouth passing at the time, but as part of the conduct of the parties, in order to determine what was the scope and object of the intended guaranty. Having done that, it will be proper to turn to the language of the guaranty to see if that language is capable of being construed so as to carry into effect that which appears to have been really the intention of both parties."<sup>20</sup> Where a guaranty is, from its terms, clearly not a continuing one, but is limited to one transaction, parol evidence of the previous dealings or of the dealings contemplated between the creditor and the principal, or that the guarantor had previously agreed to give the plaintiff a guaranty for future advances, and that the goods were sold relying on such guaranty, or that the relations of the principal parties were well known to the guarantor, is not admissible to show the guaranty to be a continuing one, for that would be to contradict the instrument and not explain an am-

anty and that its terms were so clear and unambiguous that parol evidence as to surrounding circumstances was not admissible to aid in construing it: "I, William Padian, hereby guaranty to the Henry McShane Company, Limited, the payment by John P. Wieggers, plumber, to them for any and all materials which they may deliver to John P. Wieggers, I not to be liable for any balance exceeding \$500 which may become due."

<sup>20</sup> Per Willes, J., in *Heffield v. Meadows*, Law Rep. 4 Com. Pleas 595; *White's Bank v. Myles*, 73 N. Y. 335. In *Mathews v. Phelps*, 61 Mich. 327, it is held that when the amount of the guarantor's liability is limited, and the time is not, it

will be held to be a continuing guaranty. And in *Wright v. Griffith*, 121 Ind. 478, it is held that unless the words in which the guaranty is expressed fairly imply that the liability of the guarantor is limited, it is regarded as continuing until revoked. *Henry McShane Co. v. Padian*, note 19, § 174. In *Cheshire Beef Co. v. Thrall*, 72 Vt. 9, 47 Atl. Rep. 160, defendant wrote the following: "Rutland, Vt., Oct. 31, 1895. This is to certify that I, George C. Thrall, of Rutland, Vt., will be responsible to the amount of \$700 to the Cheshire Beef Co. for goods purchased by Judson H. Grant of Rutland, Vt. In case of failure of said Grant to meet this obligation, I guarantee

biguity.<sup>21</sup> As the terms of guaranties, and the circumstances under which they are given, differ in almost every case, no definite rules for determining whether a guaranty shall be considered a continuing one or not can be given. The only way to illustrate the subject is to refer to facts of decided cases, and this course will be pursued.

**§ 175. Continuing guaranties—Instances.**—A guaranty was as follows: “Mr. J. B. Maynard being about to commence the retailing of dry goods at Connelton, Ind., and desiring to open a credit with the firm of James Lowe & Co., of the city of Louisville, I hereby undertake and contract with said Lowe & Co. to become responsible to them for the amount of any bill or bills of merchandise sold by them to said Maynard, agreeably to the terms of sale agreed upon between the parties, without requiring said Lowe & Co. to prosecute suit against said Maynard therefor.” Held, to be a continuing guaranty and not confined to the first few bills bought by Maynard upon commencing business.<sup>22</sup> When the writing was: “In consideration of your supplying Mr. John McGuire supplies of, etc., out of your store for his business, we agree to become responsible for the payment of \$200 for such goods, and guaranty the payment of that amount, whether the same be due

its payment. (Signed.) Geo. C. Thrall, Surety.” Grant, whose previous account had been paid at the date of this guaranty, bought within the next four months goods to the amount of \$3,212 and paid \$2,528 on account. Held, that the surety’s liability was restricted to the first \$700 worth of goods. The Court said that there was no presumption that the guaranty was a continuing one, the burden of proving that it was continuing was on the obligee. In *Sherman v. Mulla*, 174 Mass. 41, 54 N. E. Rep. 345, defendant wrote to plaintiff: “I, the undersigned, agree to be holden for stock delivered to A. E. Coffin to the amount of two hundred dollars (\$200) and agree to pay the same.” Within the next six months plaintiff sold \$900 worth of stock to Coffin, of which Coffin paid all

but \$271. Held that defendant’s liability was for the first \$200 of stock sold to Coffin, and, that having been paid for, his liability ceased. The Court said that “the presumption is that a guaranty of a single transaction or of limited transactions was intended, rather than a continuing guaranty.” Citing and following *Cremer v. Higginson*, 1 Mason 323, 6 Fed. Cas. 797, Case No. 3383, per Story, J.

<sup>21</sup> *Boston & Sandwich Glass Co. v. Moore*, 119 Mass. 435. Where a guaranty is, by its terms, a continuing guaranty parol evidence is not admissible to limit it to goods sold within a certain period: *Indiana Bicycle Co. v. Tuttle*, Conn. Mch. 1902, 51 Atl. Rep. 538.

<sup>22</sup> *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 150.

on note or book account to you for said" \* \* it was held to be a continuing guaranty.<sup>23</sup> A writing was as follows: "To whom it may concern: The bearer, M R, son of the subscriber, is about to establish a store in Portland, of books and stationery, and now goes on to Boston to obtain an assortment of stock for that purpose. He will commence on a limited scale, with the intention of enlarging the business next spring. He wishes to purchase school books, etc., upon a credit of four or six months, and miscellaneous books, paper, etc., on commission. For the faithful management of the business and punctual fulfillment of contracts relating to it, the subscriber will hold himself responsible." Held, a continuing guaranty for such purchases as the son might make.<sup>24</sup> The following was held to be a continuing guaranty: "In consideration of your agreeing to supply goods to K at two months' credit, I agree to guaranty his present or any future debt with you to the amount of £60. Should he fail to pay at the expiration of the above credit, I bind myself to pay you within seven days of receiving notice from you."<sup>25</sup> The defendant's son being indebted to the plaintiffs for coals supplied on credit, and the plaintiffs refusing to continue to supply coals unless a guaranty was given them, the defendant gave this guaranty: "In consideration of the credit given by the H. G. C. Co. to my son for coal supplied by them to him, I hereby hold myself responsible as a guaranty to them for the sum of £100, and in default of his payment of any accounts due, I bind myself by this note to pay to H. G. C. Co. whatever may be owing to an amount not exceeding the amount of £100." Held, a continuing guaranty. The court said: "The question in these cases depends not merely on the words; but, when the words are at all ambiguous, requires a consideration of the circumstances to aid the construction.

\* \* The words 'whatever may be owing' \* \* seem not suitable to a specific and ascertained sum already due, but have a direct and proper application to what might afterwards become due."<sup>26</sup> A letter contained the following: "I

<sup>23</sup> Fennell v. McGuire, 21 Up. Can. (C. P.) 134.

<sup>26</sup> Wood v. Priestner, Law Rep. 2 Exch. 66, per Kelly, C. B.; affirmed,

<sup>24</sup> Mussey v. Rayner, 22 Pick. 223.

Wood v. Priestner, Law Rep. 2

<sup>25</sup> Martin v. Wright, 6 Adol. & Ell. (N. S.) 917.

do recommend my friend, Mr. J. B. Scudder, of the parish of East Baton Rouge, a planter, and any funds that he may raise, or acceptances, in case he does not pay, I feel bound to pay." Held, a continuing guaranty; the guarantor and Scudder being both planters, and the circumstances showing that a continuing guaranty was intended.<sup>27</sup> This is a continuing guaranty: "I hold myself accountable to you for any goods Mr. Francis Murphy may purchase of you to the amount of £250 currency."<sup>28</sup> Also the following: "Sir, you can let J. L. Day have what goods he calls for, and I will see that the same are settled for."<sup>29</sup>

**§ 176. Continuing guaranties—Instances.**—A bought from B certain hides, but before they were delivered, B having heard that A had transferred his property, refused to deliver the hides until C would become responsible therefor. C, learning this, telegraphed to B: "We agree to be answerable for the skins," and afterwards wrote, vouching for A's honesty, and concluding: "What you have heard was done to protect him from a dishonorable tradesman, and will in no way, we hope, be to the injury of his creditors. Having every confidence in him, he has but to call upon us for a cheque, and have it with pleasure, for any account he may have with you, and when to the contrary we will write you." Held, the letter was a continuing guaranty unlimited in amount. The court said: "It was calculated to induce the plaintiffs to give credit to a man to whom they would not otherwise have given it."<sup>30</sup> One Tully, being about to go into business, and desiring credit, a relative of his wrote to certain merchants as follows: "Please let Mr. P. Tully have the paints, oils, varnishes, etc., he wants. I will be security for the amount for what he will owe you." Held, a continuing guaranty.<sup>31</sup> The material part of the guaranty was: "I will guaranty their engagements, should you think it necessary, for any transaction they may have with your house." Held, the guaranty was a continuing one, and in force till countermanded by the guarantor.<sup>32</sup> "I do hereby

<sup>27</sup> Menard v. Scudder, 7 La Ann. 385.

<sup>28</sup> Ross v. Burton, 4 Up. Can. (Q. B.) 357.

<sup>29</sup> Hotchkiss v. Barnes, 34 Conn. 27.

<sup>30</sup> Nottingham Hide Co. v. Bottrill, L. R. 8 Com. Pl. 694, per Keating, J.

<sup>31</sup> Boehme v. Murphy, 46 Mo. 57.

<sup>32</sup> Grant v. Ridsdale, 2 Harr. & Johns. (Md.) 186.

agree to guaranty the payment of goods to be delivered, in umbrellas and parasols, to \* \* according to the custom of their trading with you, in the sum of £200," is a continuing guaranty.<sup>33</sup> The following is a continuing guaranty: "I hereby agree to guaranty the payment to A for any goods which may be purchased of him by B, not, however, binding myself to become responsible for a larger sum than \$500, except by another special agreement, the above guaranty to remain in force until it is withdrawn by me."<sup>34</sup> The following is a continuing guaranty: "Whereas, W C is indebted to you, and may have occasion to make further purchases from you; as an inducement to you to continue your dealings with him, I undertake to guaranty you in the sum of £100, payable to you in default on the part of the said W C for two months."<sup>35</sup> A and B executed a bond to C in the penal sum of \$1,500, conditioned "to pay or cause to be paid to C all sums or sum of moneys, responsibilities, debts and dues which B might owe C, equal to the sum of \$1,500, either contracted or which might thereafter be contracted." Held, this was a continuing guaranty, and covered indebtedness of B to the extent of \$1,500, although part of the debts contracted by B under the guaranty had been paid by him. Held, also, that notes of B made to a third party, and by such third party indorsed to C, were within the terms of the guaranty. The court said: "Such a debt is a debt due to \* \* (C) as much as any other. This is the criterion the parties have chosen to adopt, and it is not for the court to restrict it."<sup>36</sup>

**§ 177. Continuing guaranties—Instances.**—Where guarantors of a bank, selected as a state depository for canal tolls, executed a bond to the state that the bank shall "well and faithfully account for and pay over all moneys deposited with it, or for which it shall in any way become liable," and also "account for and pay over all moneys now on deposit in said bank, or due or to become due therefrom to the people." it was held in an action on such guaranty that the guarantors were bound for the continuing security of the deposit existing at the time of the execution of said bond, as well as for subse-

<sup>33</sup> Hargreave v. Smee, 6 Bing. 244; Id., 3 Moore & Payne, 573.

<sup>35</sup> Allan v. Kenning, 9 Bing. 618; Id., 2 Moore & Scott 768.

<sup>34</sup> Melendy v. Capen, 120 Mass. 222.

<sup>36</sup> Lewis v. Dwight. 10 Conn. 95, per Williams, J.

quent deposits.<sup>37</sup> The following writing: "Messrs. G. Bros.—Please let my daughter, Mrs. W. E. H., have what goods she wants, and I will stand good for the money to settle the bills. You will find the pay part all right with her, I think," was held to be a continuing guaranty.<sup>38</sup> A written agreement signed by a guarantor, in terms guarantying payment "for all goods F F, of N, and H F, of M, may buy from B. Young & Son," was construed to be a continuing guaranty.<sup>39</sup> The following letter, viz.: "I have to-day seen Chas. E. Grayson, and upon consulting with him I am willing to become his security to the amount of \$500 worth of goods, instead of \$250 as heretofore, provided you extend to him a credit of \$500 worth of goods additional, on his own individual account or responsibility," was held a continuing guaranty.<sup>40</sup> A letter of credit given to a bank in the following language, "Please discount for Mr. C. to the extent of \$4,000. He will give you customers' paper as collateral. You can also consider me responsible to the bank for the same," was held to be a continuing guaranty, and that the writer's liability did not cease with the discount and payment of the sum stated.<sup>41</sup> Other instances of continuing guaranty, with attendant facts and circumstances that illustrate other sections, are given in a note.<sup>42</sup>

<sup>37</sup> *People v. Lee et al.*, 104 N. Y. 441. See, also, *Merchants' Nat. Bank v. Hall*, 18 Hun 176.

<sup>38</sup> *Wright v. Griffith et al.* 121 Ind. 478. New bond taken every year from a state depository of canal funds; held, that the sureties of the preceding years remained liable. *Barnes v. Cushing*, N. Y. 1901, 61 N. E. Rep. 902, reversing 59 N. Y. Supp. 345; *People v. Lee*, 104 N. Y. 441, 10 N. E. Rep. 884; *People v. Cushing*, 36 Hun 483. See also *Merchants' Nat. Bank v. Hall*, 18 Hun 176.

<sup>39</sup> *Young v. Brown*, 53 Wis. 333.

<sup>40</sup> *Gardner, Adm'r v. Watson*, 76 Tex. 25, 13 S. W. Rep. 39.

<sup>41</sup> *White's Bank v. Myles*, 73 N. Y. 335.

<sup>42</sup> In *Conduit v. Ryan*, 3 Ind. App. 1, 29 N. E. Rep. 160, defendant

signed the following: "I hereby guaranty the payment when due of all bills of goods sold, or that may be sold on or after this date by Conduit to Black." Held, a continuing guaranty binding until the guarantor, by notice, revoked it. In *Columbia Electrical Supply Co. v. Kemmett*, 87 N. J. Law 18, 50 Atl. Rep. 663, defendant wrote to plaintiff: "We \* \* herewith guarantee the account of Mr. Paul Dreher \* \* to the amount of \$500. We are willing to make monthly settlement for the electrical supplies purchased by him. Such payments to be made every 15th of the month for the month previous." Held, that this was a continuing guaranty of payment, not dependent on punctual payment being made by the principal on the 15th of each



**§ 178. When guaranty not exhausted by the advance of the amount mentioned therein.**—A bond was conditioned to indemnify and save harmless the obligee for “such sums as they in their banking business should within ten years advance or

month, not conditioned on the amount of sales not exceeding \$500, and not released by the creditor's failure to notify the guarantor of the dishonor of the principal's check given in payment. In *Celluloid Co. v. Haines*, 176 Mass. 415, 57 N. E. Rep. 691, plaintiff wrote defendant's firm: “If he [the defendant] will give us his written guaranty to pay bills of one month upon the 15th of succeeding month \* \* we will accept it and extend credit to extent of \$200.” Defendant replied: “As you have requested me to have me guaranty the payment of the W. J. D. Co.'s account by the middle of the month, I hereby agree to pay the current month's account of the W. J. D. Co. on the 15th of the following month if not paid by them before.” Held, that this was a continuing guaranty and that defendant was bound for an arrearage several months later. In *Singer Manufacturing Co. v. Reynolds*, 168 Mass. 588, 47 N. E. Rep. 438, defendant signed a guaranty of an employee of plaintiff, stating therein that it “is expressly intended as a continuing guaranty” that the employee had entered the employment of plaintiff “for the transaction of such business as they may entrust to him,” and conditioned that he would perform his duties “by virtue of his said employment, or otherwise, and whether under or in the absence of any present or future contract, agreement or understanding, verbal or written, or any change whatever therein, either with or without notice to” the surety. Held, that the surety was

bound notwithstanding a change in the manner of paying the employee from salary to salary and commissions. In *Taussig v. Reid*, 145 Ill. 488, 32 N. E. Rep. 918, it was held that the following was a continuing guaranty: “Reid, Murdoch & Fischer, Chicago: Chicago, January 14, 1887. For value received, I hereby guarantee the prompt payment at maturity of any indebtedness owing to Reid, Murdoch & Fischer by Mrs. \* \* Zuckerman \* \* for goods purchased or which may be purchased hereafter of them, to the amount of \$1,500, with interest on all the above indebtedness, according to the tenor and effect thereof, at the rate of eight per cent per annum, and I agree to pay all costs or expenses paid or incurred in collecting the same. (Signed.) E. Kohn, Wm. Taussig.” In *Doyle v. Nichols*, 15 Colo. App. 458, Harbaugh, starting a boarding house, at Colorado Springs, referred his grocer to defendant Doyle, who wrote to the grocers “to give him supplies for thirty days and render bill at end of month,” and two months later wrote to plaintiffs, who complained that the first guaranty had run out: “Kindly furnish Harbaugh with groceries and oblige. James Doyle.” Held that even if Doyle was liable only as guarantor, his guaranty was a continuing one and that he was liable for groceries furnished until notice was given to plaintiffs that he would be no longer liable. In *Ferst v. Blackwell*, 39 Fla. 621, 22 So. Rep. 892, defendant caused the following paper to be delivered to plain-



pay, or be liable to advance or pay, for or on account of their accepting, discounting, etc., any bill of exchange, etc., which A B should from time to time draw upon or make payable, etc., at their house; and also other sums which they, within the period aforesaid, should otherwise lay out, pay, etc., on the credit of A B or on his account, and also all such wages and allowances for advancing, paying, etc., such bills, etc., not exceeding £5,000 in the whole, together with interest on such advances." Held,<sup>43</sup> a continuing guaranty and not exhausted

tiffs: "Live Oak, Fla., April 16, 1887. I hereby agree and promise to pay to M. Ferst & Co. of Savannah, Ga., all bills of goods that may be ordered or purchased by E. J. McDaniel, not to exceed \$1,000 at any one time, until this guaranty is withdrawn, by notice to them in writing or in person. I mean by this that Mr. E. J. McDaniel is not to owe M. Ferst & Co. for over the amount above named at any one time and bind me therefor. (Signed.) B. B. Blackwell." Upon receiving the paper plaintiffs' agent said to defendant: "That is all right, the groceries will be shipped on this." Held, that this was sufficient evidence of acceptance, being uncontradicted, and that "treating the paper as a continuing guaranty, no duty devolved upon the plaintiffs to notify defendant of particular purchases under it; nor, in the absence of a stipulation to that effect in the agreement, to render statements of McDaniel's account to defendant. Their whole duty would be performed by notifying defendant of the amount due, within a reasonable time after all transactions with McDaniel based upon the guaranty were closed, and even then if no injury resulted to defendant from a failure to give such notice, the admission would not bar recovery." In *Sullivan v. Arcand*, 165 Mass. 364, 43 N. E. Rep. 198, suit was brought on

the following: "Fall River, March 17, 1890. I hereby agree to hold myself responsible for all goods bought by A. P. Gagne or Mark A. Sullivan. (Signed) George E. Arcand." Held, that it was competent for plaintiff to show that at that date Gagne was a painter and plaintiff a dealer in painters' supplies, that Gagne desired to purchase goods and bought goods, for the first time, immediately after the execution of the guaranty and at various times thereafter, and that defendant had notice of the dealings between plaintiff and Gagne, and of the state of Gagne's account while the indebtedness sued on was being incurred. Held, also, that in view of the surrounding circumstances, the writing was a continuing guaranty and bound defendant for the unpaid balance of Gagne's account. In *Tapper v. New Home Sewing Machine Co.*, 22 Ind. App. 313, 53 N. E. Rep. 202, defendant wrote: "I hereby guaranty the payment \* \* until notice from me \* \*." Held, a continuing guaranty and no acceptance necessary. Other cases of continuing guaranty: *Wells v. Ritchie*, 6 Ont. Qu. B. Rep., O. S. 13; *Ross v. Burton*, 4 U. C. R. (Q. B. Ontario) 357; *Fennell v. McGuire*, 21 Com. Pl., Ont., 134; *Rainey v. Dickson*, 8 Gr. Ch. Rep., Ont., 450.

<sup>43</sup> *Williams v. Rawlinson, Ryan & Moody*, 233.

by the first advance of £5,000.” Where the instrument was as follows: “Sir, I hereby guaranty the payment of any amount of goods you may give to B, not exceeding £40 sterling,” it was held to be a continuing guaranty, the first part being unlimited, and the second part only limiting it as to amount.<sup>44</sup> A guaranty was as follows: “I agree to be responsible for the price of goods purchased of you, either by note or account, by H, at any time hereafter, to the amount of \$1,000.” Goods were sold on the credit of the guaranty to the amount of more than \$1,000, which were paid for, and more goods were sold, when H became insolvent, owing more than \$1,000 that had been sold on the credit of the guaranty. Held, the guaranty was continuing and not exhausted by the first sales amounting to \$1,000, and that the guarantor was liable for \$1,000. The court said: “When by the terms of the undertaking, by the recitals of the instrument, or by reference to the custom and course of dealing between the parties, it appears that the guaranty looked to a future course of dealing for an indefinite time, or a succession of credits to be given, it is to be deemed a continuing guaranty, and the amount expressed is to limit the amount for which the guarantor is to be responsible, and not the amount to which the dealing or whole credit given is to extend.”<sup>45</sup> The same thing was held when the guaranty was: “I will be and am responsible for any amount for which \* \* \* may draw on you, for any sum not exceeding \$1,500, on condition of your acceptance of the same.”<sup>46</sup> Also, when the material part of a guaranty was: “For any goods he hath or may supply W P with, to the amount of £100.”<sup>47</sup> A guaranty to be “accountable that B will pay you for glass, paints, etc., which he may require in his business, to the extent of \$50,” is a continuing guaranty, and not exhausted by the first \$50 of credit given to B. “Had the guarantor desired or

<sup>44</sup> Whelan v. Keegan, 7 Irish Com. Law 544; Historical Publishing Co. v. La Vaque, 64 Minn. 282, 66 N. W. Rep. 1150, with which compare Standard Oil Co. v. Hoese, 57 Neb. 665, 78 N. W. Rep. 292.

<sup>45</sup> Bent v. Hartshorn, 1 Met. (Mass.) 24, per Shaw, C. J. Cited and followed in Toleston & Stetson Co. v. Barck, 81 Minn. 470, 84 N.

W. Rep. 330; Henry McShane Co. v. Padian, 142 N. Y. 207, 36 N. E. Rep. 880, reversing 20 N. Y. Supp. 679; Standard Oil Co. v. Hoese, 57 Neb. 665, 78 N. W. Rep. 292.

<sup>46</sup> Crist v. Burlingame, 62 Barb. (N. Y.) 351.

<sup>47</sup> Mason v. Pritchard, 12 East 227.

intended to limit his responsibility to a single transaction, or to several transactions not exceeding that sum in all, it was easy to have said it in plain and unmistakable terms; that if he failed to do so, and by equivocal language induced the guaranty to part with the goods, he should be held to abide the consequences."<sup>48</sup> The same thing was held where the guaranty was: "I will be responsible for what stock \* \* (A) has had, or may want hereafter, to the amount of \$500."<sup>49</sup> An obligation was as follows: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole £1,000, we hereby jointly and severally guaranty the payment of any such sum as may be owing to the bank at the expiration of said period of eighteen months." Held, under the circumstances (which should be considered), this was a continuing guaranty. The words, "not exceeding in the whole £1,000, \* \* were intended to express the limit of the defendants' liability, and not to prohibit the bank from making any further advances to R. & Co."<sup>50</sup> A guaranty of goods to be sold "from time to time," to an amount not exceeding a specified sum, is a continuing guaranty until the sums remaining unpaid reach the designated limit, even though the aggregate of the purchases far exceeds it.<sup>51</sup>

**§179. When guaranty exhausted and when not exhausted by the advance of the amount mentioned therein.**—A guaranty, not under seal, of "the sum of \$500, to be drawn out in merchandise by W from time to time as he may want; this guaranty to remain good until further order, or until April 1, 1857," is continuing, and renders the guarantor liable to the

<sup>48</sup> Rindge v. Judson, 24 N. Y. 64, per James, J. See, also, Platter v. Green, 26 Kan. 252. So an undertaking executed to a bank by a firm, viz.: "We hold ourselves responsible for the payment of any sum not to exceed \$5,000, Mr. C. H. W. may require of your bank for legitimate purposes," was held to be a continuing guaranty. City National Bank v. Phelps, 86 N. Y. 484, affirming to this point, 16 Hun 158.

<sup>49</sup> Gates v. McKee, 13 N. Y. 232. A guaranty in the following words: "Please let Mr. Jno. Newman have credit for goods to the amount of one hundred dollars, and for the payment of which I hold myself responsible," was held to be continuing. Tootle v. Elgutter, 14 Neb. 158.

<sup>50</sup> Lawrie v. Scholefield, Law Rep. 4 Com. Pl. 622, per Smith, J.

<sup>51</sup> Crittenden v. Fiske et al., 46 Mich. 70.

extent of \$500 for goods sold within the prescribed period, even though more than that amount of goods have been sold on the credit of the guaranty and paid for by the principal within that time.<sup>52</sup> The same thing was held where the guaranty was as follows: "In consideration of your supplying my nephew, V, with china and earthenware, I guaranty the payment of any bills you may draw on him, on account thereof, to the amount of £200."<sup>53</sup> An obligation was as follows: "Our friend \* \* (A), to assist him in business, may require, your aid from time to time, either by acceptance or indorsement of his paper or advances in cash; in order to save you from harm by so doing, we do hereby bind ourselves, severally and jointly, to be responsible to you at any time for a sum not exceeding \$8,000, should the said \* \* (A) fail to do so." Held, a continuing guaranty and not exhausted by the first sale of eight thousand dollars' worth of goods.<sup>54</sup> The following has been held to be a continuing guaranty, and not exhausted by the first sales under it: "Gentlemen, my brother Roswell is wishing to go into business in New York, by retailing goods in a small way. Should you be disposed to furnish him with such goods as he may call for, from three hundred to five hundred dollars' worth, I will hold myself accountable for the payment, should he not pay, as you and he shall agree."<sup>55</sup> M wrote to L thus: "Mr. B informs me that in conversation with Mr. S, of your firm, he stated to B, 'if he would get me to be responsible for him to you, or, in other words, to give B a letter of credit to you, he would sell him on longer time, say nine months or a year.' This is therefore to inform you that I will be responsible for B to the amount of \$1,000." Held, to be a continuing guaranty until goods to the amount of

<sup>52</sup> Hatch v. Hobbs, 12 Gray 447. See, also, Pratt v. Matthews, 24 Hun (N. Y.) 386, in which case an instrument guarantying payment for coal, provided the amount in default should not at any time exceed the sum of \$1,000, was held a continuing guaranty, held also that the proviso was a limitation upon the guarantor's liability, and not upon the amount of coal to be furnished; and the fact that the indebtedness

at times exceeded that sum did not relieve the guarantors. And see, also, Delaware, Lack. & W. R. R. Co. v. Burkhard, 36 Hun (N. Y.) 57, and Conway v. Cunningham, 6 Rich. (S. C) 351.

<sup>53</sup> Mayer v. Isaac, 6 Mees. & Wels. 605.

<sup>54</sup> Douglass v. Reynolds, 7 Pet. 113.

<sup>55</sup> Rapelye v. Bailey, 5 Conn. 143.

\$1,000 were purchased, but no longer.<sup>56</sup> Where a guaranty was, "Mr. Lyman Wilson wishes to buy stock for his shop and pay in six months or before, we will be surety for him for a sum not to exceed \$100," it was held that the plaintiffs were authorized to deliver stock to Wilson to the amount of \$100 on the credit of the guaranty, and that it need not all be sold at once, but might be sold and delivered from time to time, within a reasonable period.<sup>57</sup>

**§ 180. What not continuing guaranty—Instances.**—Twenty-seven person signed a guaranty, by which they agreed to be each bound for \$100 for the purchasers "for any goods" they might buy of the sellers, the goods to be paid for at such time as might be agreed upon between the purchasers and sellers, "and each of us to be bound for \$100, and no more." Held, this was not a continuing guaranty, and only bound the guarantors for goods sold at any time or times, which in the whole amount to \$2,700.<sup>58</sup> Where a guaranty was: "I, \* \* agree to become surety to \* \* (A) for any bills contracted by \* \* (B) from this date, said bills in the aggregate not to exceed \$300," it was held not to be continuing, and that it was exhausted by the sale of the first \$300 worth of goods.<sup>59</sup> A bond recited that Colburn (principal), having occasion for divers sums of money, not exceeding in the whole the sum of £3,000, had applied to the plaintiffs to advance the same at such times and in such parts and proportions as he might require. Held, this was not a continuing guaranty, but was ex-

<sup>56</sup> *Lawton v. Maner*, 10 Rich. Law (S. C.) 323.

<sup>57</sup> *Keith v. Dwinnell*, 38 Vt. 286. For other examples of continuing guaranties, see *Hitchcock v. Humfrey*, 5 Man. & Gr. 559; *Id.*, 6 Scott (N. R.) 540; *Farmers' & Mechanics' Bank v. Kerchival* 2 Mich. 504; *Heffield v. Meadows*, Law Rep. 4 Com. Pl. 595; *Coles v. Pack*, Law Rep. 5 Com. Pl. 65; *Burgess v. Eve*, Law Rep. 13 Eq. 450; *Simpson v. Mauley*, 2 Cro. & Jer. 12; *Bastow v. Bennett*, 3 Camp. 220; *Merle v. Wells*, 2 Camp. 413; *Tanner v. Moore*, 9 Q. B. 1; *Hoad v. Grace*, 7 Hurl. & Nor. 494; *Woolley v. Jennings*, 5 Barn.

& Cres. 165; *Platter v. Green*, 26 Kan. 252; *Clark v. Hyman*, 55 Iowa 14; *The Cosgrave Brewing & Malt-ing Co. v. Starrs*, 5 Ont. (Can.) 189; *Cochran v. Kennedy*, 10 Daly (N. Y. Com. Pl.) 347; *Dover Stamping Co. v. Noyes*, 151 Mass. 342; *Crathern v. Bell*, 45 Up. Can. (Q. B.) 473; *Grahame v. Grahame*, Law Rep. (Irish), 19 Ch. Div. 249; *Tischler v. Hofheimer*, 83 Va. 35; *Mathews v. Phelps*, 61 Mich. 327.

<sup>58</sup> *Wilde v. Haycraft*, 2 Duvall (Ky.) 309.

<sup>59</sup> *Bussier v. Chew*, 5 Phila. (Pa.) 70.

hausted by the first advances to the extent of £3,000.<sup>60</sup> The following guaranty was held to be not continuing, and to cover only one transaction: "I guaranty the sum of \$500 value in glass shades, purchased by my son A from B. Terms of purchase to be sixty days from date of invoice, and if not paid within ninety days, draft to be drawn on me for the amount."<sup>61</sup> The following obligation was held not to be a continuing guaranty: "I hereby agree to be answerable for the payment of £50 for T. Lerigo, in case T. Lerigo does not pay for the gin, etc., which he receives from you, and I will pay the amount."<sup>62</sup> When a guaranty was: "I hereby agree to guaranty to you the payment of such an amount of goods, at a credit of one year, interest after six months, not exceeding \$500, as you may credit to \* \* (A)," it was held to be not continuing. The court said: "Where by the terms of the guaranty it is evident the object is to give a standing credit to the principal, to be used from time to time, either indefinitely or until a certain period, there the liability is continuing; but where no time is fixed, and nothing in the instrument indicates a continuance of the undertaking, the presumption is in favor of a limited liability as to time, whether the amount is limited or not."<sup>63</sup> A guaranty was as follows: "I hereby agree to be answerable to K for the amount of five sacks of flour, to be delivered to T, payable in one month." Five sacks of flour were delivered to T, and a few days after five more were delivered. Shortly afterwards three and a half of the first five were returned. Held, the guarantor was only liable for one and a half sacks, as the guaranty was exhausted by the delivery of the first five sacks.<sup>64</sup>

<sup>60</sup> Kirby v. The Duke of Marlborough, 2 Maule & Sel. 18.

<sup>61</sup> Boston & Sandwich Glass Co. v. Moore, 119 Mass. 435. The following instrument: "Please deliver to H., goods as he may want from time to time, not exceeding in amount \$300, and if not paid for by him within thirty days, I will be responsible for the same," was held not a continuing guaranty, but was exhausted and satisfied by the first purchase by H. of goods to the

amount of \$300, followed by payment. Cutler v. Ballou, 136 Mass. 337. See, also, Shaw v. Vandusen, 5 U. C. R. (Q. B. Ont.) 353; Sutherland v. Patterson, 4 Ont. Rep. 565; Martin v. McMullen, 18 App. Rep., Ont., 559.

<sup>62</sup> Nicholson v. Paget, 1 Crompt. & Mees. 48; Id., 3 Tyrwh. 164.

<sup>63</sup> Fellows v. Prentiss, 3 Denio, 512, per Hand, Senator.

<sup>64</sup> Kay v. Groves, 6 Bing. 276; Id., 3 Moore & Payne 634.



§ 181. **What not continuing guaranty—Instances.**—A portion of a letter was as follows: “The object of the present letter is to request you, if convenient, to furnish them (principals) with any sum they may want, so far as \$50,000, say \$50,000. They will reimburse you the amount, together with interest, as soon as arrangements can be made to do it, and as our embargo cannot be continued much longer, we apprehend there will be no difficulty in this. We shall hold ourselves answerable to you for the amount.” Held, this was not a continuing guaranty, but was exhausted by the advance of \$50,000.<sup>1</sup> The following was held not to be a continuing guaranty: “Sir, for any sum that my son, George Reed, may become indebted to you, not exceeding \$200, I will hold myself accountable.”<sup>2</sup> A sealed promise to pay “whatever sum may be due for all articles of book account furnished to J at his request and for his use, and for which he is now indebted, and for all other articles of book account furnished on this day or at any future day, provided said articles of book account do not exceed the sum of \$250,” applies only to the existing debt, and articles furnished in addition to make up the sum of \$250, and when these are paid does not continue to secure any future balance of account.”<sup>3</sup> The material portion of a writing was: “We here offer ourselves in security to any gentleman who may feel disposed to give him (purchaser) credit, not exceeding \$700, to be bound and held firmly by this writing to pay the said sum of \$700 or any less sum.” Held, this was not a continuing guaranty, and only authorized the giving of credit one time.<sup>4</sup> R, doing business as a retail dealer in furniture, obtained from C a writing addressed to the plaintiff, who was a wholesale furniture dealer, as follows: “There is a fair prospect that R could sell a few chamber suits if he had them. If you let him have them, we will see that you receive pay for them as sold or soon thereafter.” Held, the guaranty contemplated but a single sale of chamber suits only, accompanied or speedily followed by delivery.<sup>5</sup> A guaranty was in the following words: “Whereas, Joel Hall has agreed to indorse Samuel Cooper’s notes at the Middletown Bank to the amount

<sup>1</sup> *Cremer v. Higginson*, 1 Mason 323.

<sup>2</sup> *White v. Reed*, 15 Conn. 457.

<sup>3</sup> *Congdon v. Read*, 7 B. I. 406.

<sup>4</sup> *Aldricks v. Higgins*, 16 Serg. & Rawle 212.

<sup>5</sup> *Hayden v. Crane*, 1 Lans. (N.

Y.) 181.



of \$4,000, I hereby agree to be responsible to said Hall for one-half the amount of any loss he may sustain by said indorsement; and I agree to pay the one-half of any payments which said Hall may be obliged to pay in the same manner and at the same time, which I should be obliged to pay it, provided I was joint indorser with him on said notes." Held, not a continuing guaranty, and that the party signing it was only liable to contribute as to the first \$4,000 of notes indorsed by Hall.<sup>6</sup> This guaranty was held not continuing: "Sir: \* \* (A) wishing to alter his present mode of doing business and make arrangements in Charleston, has requested me to continue my assistance by lending him my name. I have therefore consented that he shall use it for the amount of from \$1,000 to \$1,500. He will in future carry on business on his own account, and make his own remittances."<sup>7</sup>

§ 182. **What not continuing guaranty—Instances.**—The fact that a guaranty did not limit the amount for which the guarantor might become liable has sometimes had a controlling influence, and induced the court to hold it not to be continuing. Thus, a guaranty was: "If you will let the bearer have what leather he wants, and charge the same to himself, I will see that you have your pay in a reasonable length of time." Held, it was confined to a single transaction. The court said: "We think it is limited to a single purchase or transaction. We must hold this, or that it is unlimited, both as to time and amount. Every person is supposed to have some regard to his own interest, and it is not reasonable to presume any man of ordinary prudence would become surety for another without limitation as to time or amount, unless he has done so in express terms or by clear implication."<sup>8</sup> The same thing was held where the guaranty was as follows: "We consider J V E good for all he may want of you, and will indemnify the same." The court said: "Ordinarily, the instruments that have been held to be continuing guaranties limited the amount of the credit, which greatly diminished the responsibility."<sup>9</sup> "Please let the bearer \* \* (A) buy merchan-

<sup>6</sup> Hall v. Rand, 8 Conn. 560.

followed in Birdsall v. Heacock,

<sup>7</sup> Sollee v. Mengy, 1 Bailey, Law (S. C.) 620.

32 Ohio St. 177 and in Fogel v. Blitz, 28 Mich. 503, 87 N. W. Rep.

<sup>8</sup> Gard v. Stevens, 12 Mich. 292, 640.

per Manning, J., 86 Am. Dec. 52 and note, which case is cited and

<sup>9</sup> Whitney v. Groot, 24 Wend. 82, per Nelson, C. J.

dise to the amount of two or three hundred dollars, on six months, and I will see that you have your pay," is not a continuing guaranty.<sup>10</sup> An instrument was as follows: "P \* \* having informed me that he is making some purchases from you, and not being acquainted with you, that you wish some reference. Though not personally acquainted, yet I would say from my knowledge of P \* \* that you might credit him with perfect safety, and that anything he might purchase from you I would see paid for." Held, not a continuing guaranty, and that it was limited to the purchases then being made.<sup>11</sup> The defendants addressed to the plaintiffs the following letter: "Whatever goods you sell to A B to be sold in our store, we will consent that he may take the money out of our concern to pay for the same, etc. The said A B shall have liberty of taking the pay out of our concern as fast as the goods are sold." Held, if this was a guaranty, it was not a continuing one. The court said: "If the plain terms of the contract may be fulfilled by being confined to one transaction, courts are not anxious to extend it to others."<sup>12</sup> A guaranty was as follows: "I engage to guaranty the payment of Mr. Amos Molden to the extent of £60, at quarterly account bill two months for goods, to be purchased by him of William and David Melville." Held, the guaranty only covered advances made during one quarter."<sup>13</sup>

**§ 183. What not continuing guaranty—Instances.**—A request that plaintiff would send one P "a full line of samples suitable for spring and summer at the lowest figure," adding, "and I will guaranty the payment of any goods you may sell him," was held not a continuing guaranty, but referred to and covered one transaction, and not to a number of transactions that might run through a series of years.<sup>14</sup> One K wrote the following letter to a grocer, viz.: "The bearer, \* \* my son-in-law, wishes to place a stock of groceries in his provision and meat store. \* \* To enable him to do this, I am willing to be responsible to you for the amount of groceries he may order of you." Held, not a continuing guar-

<sup>10</sup> Reed v. Fish, 59 Me. 358.

<sup>13</sup> Melville v. Hayden, 3 Barn. &

<sup>11</sup> Anderson v. Blakely, 2 Watts & Ald. 593.  
Serg. (Pa.) 237.

<sup>14</sup> Schwartz v. Hyman, 107 N. Y.

<sup>12</sup> Baker v. Rand, 13 Barb. (N. Y.) 152, per Hand, J.

anty.<sup>15</sup> A letter addressed to a lumber merchant requesting him to "send my son-in-law the lumber he asks for, and it will be all right," is held not a continuing guaranty.<sup>16</sup> "In consideration of your agreeing to advance to W. & Co. not exceeding the sum of \$7,000 and interest, I hereby guaranty to you the repayment of the sums advanced," was held not a continuing guaranty.<sup>17</sup> And the following guaranty, viz.: "Messrs. \* \* : The bearer, Mr. \* \* , is visiting your city, buying a few goods in your line, and anything you may be able to sell him will be paid promptly as agreed on, which I herewith guaranty," was held not a continuing guaranty.<sup>18</sup> A guaranty executed to wholesale merchants to secure credit for a bill of goods in the following language, viz.: "I hereby guaranty the payment of bills as they mature, purchased by E. S. M. of R. P. S. & Son \* \* to the amount of thirteen hundred dollars," was held not a continuing guaranty.<sup>19</sup>

**§ 184. Duration of continuing guaranty — Revocation.—**

Where no time is specified for which a continuing guaranty is to remain in force, it is held to be limited to a reasonable time, and in determining what is a reasonable time, all the attendant facts and circumstances are taken into consideration.<sup>20</sup> It has already been stated that a continuing guaranty may be re-

<sup>15</sup> Knowlton v. Hersey, 76 Me. 345.

<sup>16</sup> Birdsall v. Heacock, 32 Ohio St. 177.

<sup>17</sup> Frost & Co. v. Weathersbee, 23 S. C. 354.

<sup>18</sup> Morgan v. Boyer, 39 Ohio St. 324.

<sup>19</sup> Smith et al. v. Van Wyck, 40 Mo. App. 522. See, also, Gerson v. Hamilton, 30 La. Ann. 737. For other cases in which the guaranty has been held not to be continuing, see Tayleur v. Wildin, Law Rep. 3 Exch. 303; Allnutt v. Ashenden, 5 Man. & Gr. 392; Bovill v. Turner, 2 Chitty 205; Kirby v. The Duke of Marlborough, 2 Maule & Sel. 18; Sutherland v. Patterson, 4 Ont. (Can.) 565; Sawyer v. Seen, 27 S. C. 251; Perryman v. McCall, 66 Ala. 402; Malone v. Crescent City M. & T. Co., 77 Cal. 38; Bloom & Co. v.

Kern, 30 La. Ann. 1263; Richardson School Fund v. Dean, 130 Mass. 242.

<sup>20</sup> In Rotch v. French, 176 Mass. 1, 56 N. E. Rep. 893, the assignor of plaintiff subscribed to 100 shares of stock in a corporation on the strength of the following guaranty, signed by defendants: "Chicago, Jan. 1, 1886. We hereby guaranty the payment to Mr. William J. Rotch of a dividend of 6 per cent per annum on stock subscribed to this day in the corporation of French Potter & Wilson." Held, that the parties meant to bind themselves only for a reasonable time not extending beyond the lives of the subscribers, and that they were not liable for non-payment of dividends thereafter. See, also, City of Camden v. Greenwald, 65 N. J. Law 458, 47 Atl.

voked at any time by the guarantor. Unless the terms of a continuing guaranty forbid it, the law writes into it a power on the part of each guarantor to revoke it by giving notice as to liability thereafter arising.<sup>21</sup> And the prevailing authority is that death of the guarantor revokes a continuing guaranty at least from the time notice thereof reaches the creditor,<sup>22</sup> unless the guarantor has bound himself expressly or by implication for a definite period as, for instance, an official's term of office.<sup>23</sup>

Rep. 458, cited in note 1, § 191, post. And see, *Dedham Bank v. Chickering*, 3 Pick (Mass.) 335, § 192 post; *Thompson v. Young*, 2 Ohio 335, § 190 post.

<sup>21</sup> *Gay v. Ward*, 67 Conn. 147, 34 Atl. Rep. 1025.

<sup>22</sup> *Valentine v. Donohoe Kelly Banking Co.*, 133 Calif. 191 at 195, 65 Pac. Rep. 381.

<sup>23</sup> Thus, in *Pond v. United States*, 111 Fed. Rep. 989, one of eight sureties on the official bond of a revenue collector died six weeks after the collector entered upon the duties of his office and before any default occurred. The trial court held that upon this showing his executors were released. Held, that "in this ruling the Court erred. The bond," said the Court, "declares in express terms that the principal and sureties 'are held and firmly bound unto the United States of America in the full and just sum of \$100,000 moneys of the United States, to which payment well and truly be made, we bind ourselves, jointly and severally, our joint and several heirs,

executors and administrators.' In *Hecht v. Weaver*, 34 Fed. Rep. 111, 112, Judge Deady said: 'On a careful examination of the authorities, I have concluded that whenever the undertaking of the surety is of a definite period, as for the conduct of an officer during his term of office, or for the repayment of advances made to the principal in the bond until notice is given to the obligee that his liability is terminated, the estate of the surety in the hands of his administrator is answerable for any default of the principal occurring after his death, and this is especially so where, as in this case, the surety bound himself, his 'heirs, executors and administrators' for the performance of his undertaking.'" Citing *Insurance Co. v. Davies*, 40 Iowa 469, 20 Am. Rep. 581; *Green v. Young*, 8 Greenl. 14, 22 Am. Dec. 218; *Knotts v. Butler*, 10 Rich Eq. 143; *Moore v. Wallis*, 18 Ala. 458; *Hightower v. Moore*, 46 Ala. 387; *Mowbray v. State*, 88 Ind. 327. See, also, *U. S. v. Keiver*, 56 Fed. Rep. 422.

## CHAPTER VI.

### OF CASES WHERE THE SURETY ON A GENERAL OBLIGATION IS LIABLE ONLY FOR A LIMITED TIME OR AMOUNT.

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| § 185. When liability of surety on general bond limited by the recitals thereof.  | § 190. When general obligation of surety limited by special circumstances.                    |
| 186. Surety on general bond of annual officer liable for only one year.   | 191. When sureties on bond of annual officer bound for more than a year.                      |
| 187. Surety on general bond of annual officer liable for only a year.   | 192. When general words of obligation not limited by other words or circumstances.            |
| 188. When surety on general bond liable for only one year.  | 193. When general words of obligation not limited by other words or circumstances, continued. |
| 189. When liability of surety on general bond limited by circumstances — Instances — Effect of requirement of special bond. | 194. Liability of sureties who obligate themselves each for a specific sum.                   |

§ 185. When liability of surety on general bond limited by the recitals thereof.—When the words of the condition of a bond are general and indefinite as to the time during which the surety shall remain liable, if there is a recital in the bond, specifying the time during which the prescribed duty is to be performed by the principal, the general words will be limited by the recital, and the surety will only be liable for the time therein specified. The reason is that, taking the whole instrument together, it is but fair to presume that the parties had in contemplation only a liability for the time specified. It is a rule of construction adopted for the purpose of effectuating the intention of the parties. In the leading case on this subject the bond recited that Thomas Jenkins had been appointed deputy postmaster, “to execute the said office from the 24th day of June next coming, for the term of six months,” and was conditioned for his good behavior “during all the time that he, the said Thomas Jenkins, shall continue deputy postmaster.” Jenkins held the office more than two years,

and the surety was sued for a default of his happening two years after his appointment. Held, the surety was not liable for anything happening after the first six months. The general words of the bond were restrained by the special ones. "This time, which is indefinite in itself, ought to be construed only for the said six months for which the condition recites that Jenkins was appointed to be deputy postmaster, and to which the condition relates."<sup>24</sup> The condition of a bond reciting that the defendant had agreed with the plaintiffs to collect their revenues "from time to time for twelve months," and afterwards stipulating that "at all times thereafter, during the continuance of his employment, and for so long as he should continue to be employed," he should justly account and obey orders, etc., confines the obligation to the period of twelve months mentioned in the recital.<sup>25</sup> In construing an agreement in the form of a bond, in which a surety became liable for the due fulfillment of an agent's duties, therein particularly enumerated, a general clause in the obligatory part of the bond must be interpreted strictly, and controlled by reference to the prior clauses specifying the extent of the agency. Held, accordingly, that money received by an agent on account of his employers, during the time of his agency, but not in pursuance of the particular agency, disclosed to the surety by the specified conditions in the bond, were not covered by the surety's obligation, "that during the whole time the said \* \* (agent) shall continue to act as agent as aforesaid, in consequence of the above-recited agreement, he shall well and truly account for and pay to us (the employers) all sums of money received by him on our account."<sup>26</sup>

<sup>24</sup> Lord Arlington v. Merricke, 2 Sound. 403, per Hale, C. J. See, also, Keith v. Fenelon Falls Union School, 3 Ont. (Can.) 194. Sureties for the fidelity of an officer appointed for a limited term are not liable for his defaults beyond the term of the appointment or commission under which the bond was furnished. State v. Powell et al., 40 La. Ann. 241.

<sup>25</sup> Company of Proprietors of the Liverpool Waterworks v. Atkinson, 6 East 507.

<sup>26</sup> Napier v. Bruce, 8 Clark & Fin. 470. In Dunham v. Johnson, 85 Minn. 268, 88 N. W. Rep. 737, the continuing partner gave the retiring partner a bond reciting that the firm in conducting its grocery business had "incurred large debts to various parties in all parts of the country" and that the continuing partner had agreed to assume them and conditioned to "pay all the debts and liabilities of said firm," and save the retiring partner harmless. Held, that the recitals so controlled the

**§ 186. Surety on general bond of annual officer liable for only one year.**—Sureties on the general bond of an annual officer are generally held to be liable only for one year. The sureties are presumed to have contracted with reference to the law, and the general words of the obligation are restrained and limited thereby. Thus, the office of sheriff being annual, and he being appointed and commissioned for one year, gave bond with surety conditioned for his good behavior “during his continuance in office.” He acted a second year without a new nomination or commission, and without having renewed his bond. Held, the sureties were not liable for taxes collected by the sheriff the second year. The court said: “The expression in the bond, ‘during the continuance in office,’ must clearly have reference to the actual duration of the office by virtue of the appointment under which the bond was taken.”<sup>27</sup> A

general words of the condition that the sureties on the bond were not liable for a sum which the retiring partner was afterwards compelled to pay on account of unpaid stock in a corporation which had been owned by the firm.

<sup>27</sup> *Commonwealth v. Fairfax*, 4 Hen. & Munf. (Va.) 208, per Roane, J. To similar effect, see *Railroad v. Murrell*, 11 Heisk. (Tenn.) 715; *Fresno Enterprise Co. v. Allen*, 67 Cal. 505. But see *Sparks et al. v. Farmers' Bank*, 3 Del. Ch. 274. In *Bonney v. Robertson*, 6 Colo. App. 485, 41 Pac. Rep. 842, a county treasurer deposited public funds in defendant's private bank, took from defendant an indemnifying bond reciting that plaintiff “as treasurer” deposits money and that it is desired to secure plaintiff “as treasurer of said county against the loss of any funds which he may have now or at any future time on deposit,” and conditioned that defendant should “pay over when called upon all moneys so deposited.” After the expiration of his term as treasurer, in 1892, the county board, by authority of law, duly

appointed plaintiff to serve until January, 1893, the term having been changed by statute. Defendant's bank having failed, it was held that the sureties were not liable for the loss of funds deposited during the time covered by such appointment, or during the subsequent term to which he was elected in 1893. “All agree if the bond was an official one, it would only be a guaranty against defaults happening during the term for which the bond was given.” Said the Court (p. 489), “The principle would be totally unaffected by the circumstance of a re-election of the same incumbent to the same office for another term. Though the individual might be the same, he would, in law, with reference to his bond and his sureties and his defaults, stand in the same light and occupy the same legal position as though he had been another and elected as a successor to the first \* \*. An intention [on the part of the sureties on the bond in question] to become a guarantor for all time may not be inferred. It is totally contrary to the well known general purpose and intentions of



bond made by the defendant's testator as surety for E recited that E had been and still was collector of the land tax, etc., of a parish, and was conditioned for the due payment by him from time to time, and at all times thereafter, of all money which he should from time to time collect from the inhabitants of the parish on account of any tax then imposed, or which might thereafter be imposed. The office of collector was annual. Held, the surety was only liable for one year. The court said that, in order to make him liable for a longer time, the words of the bond must be clear and unmistakable. If he could be held for more than one year, he could with equal propriety, be held for fifty years, or any length of time in the future.<sup>28</sup> Where, according to the by-laws of an insurance company, the office of secretary was annual, and a secretary was appointed for a year, and gave bond conditioned for his good behavior "during his continuance in office by virtue of his appointment," and at the end of the first year, and for several years thereafter, he was re-elected without any new bond being required or given, it was held the sureties were only liable for the first year. If it were otherwise, there would be no limit to their liability, and no means by which they could terminate it.<sup>29</sup> A constable entered into a general

sureties on this class of obligations and it may not be presumed that a re-election was in contemplation or in the minds of the parties when they signed the bond."

<sup>28</sup> *Hassel v. Long*, 2 Maule & Sel. 363, per Lord Ellenborough, C. J.

<sup>29</sup> *Kingston Mut. Ins. Co. v. Clark*, 33 Barb. (N. Y.) 196. To the same effect, see *Welch v. Seymour*, 28 Conn. 387; *South Carolina Society v. Johnson*, 1 McCord, Law (S. C.) 41. In *Ulster County Savings Institution v. Ostrander*, 164 N. Y. 585, 57 N. E. Rep. 627, affirming 44 N. Y. Supp. 181, Ostrander having been elected treasurer of plaintiff corporation for one year beginning July 16, 1867, gave an official bond with a penalty of \$25,000, conditioned that he "would \* \* well and truly, honestly and faithfully

in all things, serve the said institution in the capacity of treasurer as aforesaid during his continuance in office." He was re-elected each year and filled the office continuously from 1867 to 1891. After his death he was found to have embezzled money at various times from 1871 to 1891. In a suit on the bond it was held by a divided court that the sureties were not liable for any defaults occurring subsequent to his first annual term. In *Westervelt v. Mohrenstecher*, 76 Fed. Rep. 118, 22 C. C. A. 93, 40 U. S. App. 221, an action on the official bond of a national bank cashier, the Court, by Sanborn, J., said that where the term of office to which the principal is elected or appointed is fixed by law, the liability of his bondsmen will be limited to the current term

bond for the performance of his duties as such, "agreeably to his appointment, and in conformity with the existing laws of the state." The office of constable was by law limited to a year, but there was a provision that all officers should hold until their successors were elected. Held, the sureties were not liable for any defalcation of the constable happening more than a year after his appointment, although no successor had been appointed, and he still held the office. The court said: "If a person is surety for the fidelity of another in an office of limited duration, or the appointment to which is only for a limited period, he is not obliged beyond that period. \* \* The condition here is for the faithful performance of the duties

unless they expressly agree to continue liable after its expiration (citing cases). It is equally well settled that where the bond recites the length of the term for which the officer is elected or appointed, the liability of the bondsmen is presumed to be limited to that term, in the absence of an express agreement to be responsible for a longer time (citing cases). But a bond for the fidelity of one who holds his office during the pleasure of the appointing power covers all delinquencies until he resigns or is removed, citing, *Exeter Bank v. Rogers*, 7 N. H. 21, 23. In the *Westervelt* case *supra* the National Bank act provided the cashier should hold office during the pleasure of the directors. The bond, given in 1889, was conditioned for the faithful performance of the cashier's duties "during all the time he shall hold said office of cashier." The by-laws of the bank provided that the cashier should be elected in each January for a term of one year and he was in fact so elected during four succeeding years. It was held that the sureties were liable for defaults occurring at any time until his removal in 1893. In *Soo County Savings Bank v. Seidensticker*, Iowa Dec. 1902, 92 N.

W. Rep. 862, plaintiff bank in 1893 elected a cashier "until the next annual election." The statute provided that the cashier should hold office at the pleasure of the board. The cashier gave an official bond reciting his election, stating nothing as to the term and conditioned for the performance of the duties of his office. He was re-elected cashier each year until 1897, when he was found to be in default about \$10,000, which sum was made up of amounts that had been abstracted from time to time during the entire period he held the office. Held, that the surety on his bond was liable for the entire deficiency. Relying upon *Amherst Bank v. Root*, 2 Metc. (Mass.) 522, and disapproving *First National Bank of Brandon v. Briggs*, 69 Vt. 12, 37 Atl. Rep. 231, 37 L. R. A. 845, 60 Am. St. Rep. 922, in which case it was held under similar facts that the surety was liable for defaults occurring during the first year only. In *Daly v. Mallory*, 123 Ala. 170, it was held that where a new Probate Judge informally continues in office the former Public or General, Administrator, without making any order to that effect, the old sureties on the administrator's bond remain liable.

of high constable, agreeably to his appointment, and in conformity with existing laws. \* \* The commission, and the law under which it was made, necessarily enter into the obligation in construing its extent, and must be considered by the court."<sup>30</sup> The liability of a surety on a bond for a definite term is not affected by his death.<sup>31</sup>

**§ 187. Surety on general bond of annual officer liable for only a year.**—The sureties on the bond of the treasurer of a manufacturing corporation, who by statute is to be chosen annually, "and hold his office until another is chosen and qualified in his stead," where the bond is general for his good behavior and not restricted as to time, are bound only for the year for which he was chosen, and for such further time as is reasonably sufficient for the election and qualification of his successor, although the corporation fail to elect a successor at the next annual meeting. The court said that where the office is annual, the general words of the bond are restrained by that fact. The liability of the sureties is not limited to a year exactly, but may extend a few days longer, till the usual time for holding the meetings of the officers of the corporation. The words, "hold his office till another is chosen," may be applied to this fact, and should not change the general rule.<sup>32</sup> A collector of church and poor rates gave bond with surety, conditioned that he would account to the church wardens "and their successors" for all money received by him. The office of the wardens was annual, and as a consequence that of the collector was annual also. Held, the sureties were liable for the collector's acts during one year only. The court said the

<sup>30</sup> Mayor, etc. of Wilmington v. Horn, 2 Har. (Del.) 190, per Harrington, J.

<sup>31</sup> Pond v. U. S., 111 Fed. Rep. 989, at 997 C. C. A., cited in note 23, § 184 supra.

<sup>32</sup> Chelmsford Co. v. Demarest, 7 Gray 1, per Shaw, C. J. See further, Long v. Seay, 72 Mo. 648; Lionberger v. Krieger, 13 Mo. App. 313; State v. Kurtzeborn, 78 Mo. 98, affirming 9 Mo. App. 245; Union Society v. Mitchell, 26 Mo. App. 206; State v. Powell, 40 La. Ann. 241; Mutual Loan & Building Assn.

v. Price, 16 Fla. 204. But in Inhabitants of Norridgewock v. Hale, 80 Me. 362, it is held that the sureties on the official bond of a town treasurer whose office is an annual one are not liable for a misappropriation of the town moneys after their principal's term expired and before his successor qualified, notwithstanding the bond stipulated that the principal should "well and truly perform his trust as treasurer during the time for which he was chosen, and until another should be chosen in his stead."

words "and their successors" meant that he must account to the successors for acts done by him during the first year, to the successor of one if he died during the year, or to the successors of all at the end of the year.<sup>33</sup> Certain sureties became bound for the acts of a collector of church rates, the office being an annual one. The bond was conditioned for the collector accounting "unto the wardens of the grand account for the time being, or hereafter to be, of all such sum and sums of money so by him collected and received." Held, the sureties were not liable after the first year. The court remarked: "Can we say that they intended to be bound for an indefinite period?"<sup>34</sup> The office of county treasurer being annual, a treasurer was elected in 1790, and gave bond with surety, conditioned that he should "faithfully discharge the duties of the office of treasurer of said county, and account for all sums of money which he \* \* (should) receive for the use of the said county." He was elected annually until 1806, but gave no new bond. Held, no recovery could be had on the bond for anything transpiring after the first year.<sup>35</sup> The office of tax collector being by act of parliament an annual one, a collector gave bond with surety, which recited his appointment under the act, and was conditioned for the due collection by him of the rates and duties at all times thereafter. Held, the due collection of taxes for one year was a compliance with the bond. With reference to the general words of the bond, the court said: "These words must be construed with reference to the recital and to the nature of the appointment there mentioned."<sup>36</sup>

**§ 188. When surety on general bond liable for only one year.**—The condition of a bond was that the principal should "from time to time, and at all times, so long as he \* \* (should) continue to hold said office or employment," faithfully demean himself as clerk. To a suit on this bond against the surety he pleaded that the employment of the clerk was only

<sup>33</sup> Leadley v. Evans, 9 Moore 102, per Best, J.

<sup>34</sup> The Wardens of St. Saviors Southwark v. Bostock, 5 Bos. & Pul. 175, per Mansfield, C. J.

<sup>35</sup> Bigelow v. Bridge, 8 Mass. 275. To same effect, see Riddel v. School

District, 15 Kan. 168. See the same holding on a similar state of facts with reference to sureties' liability on bond of bank cashier. Savings Bank v. Hunt, 72 Mo. 597.

<sup>36</sup> Peppin v. Cooper, 2 Barn. & Ald. 431, per Abbott, C. J.

for one year, and that no default had happened within the year. Replication that by consent of all parties the clerk was retained longer than a year. Held, the replication was bad.<sup>37</sup> A bond from the deputy to the high sheriff, conditioned for the faithful performance of his duty as deputy "during his continuance in office," without specifying the length of time, is binding on him and his sureties for the transactions of one year only, the term of the high sheriff being limited to that time.<sup>38</sup> Debt against a sheriff and his sureties on a bond dated March, 1820, conditioned for the faithful discharge of the sheriff's duties until the next August election and until his successor should be elected and qualified. The breach assigned was that the sheriff had failed to pay over, etc., the revenue of the county for 1822. Held, that although the sheriff may have been elected his own successor and may have neglected to qualify under the new appointment, still the sureties were not liable for his acts after he received his new commission.<sup>39</sup> The condition of a bond recited that S had been appointed (under a statute making the office annual) treasurer of a borough, and it provided that he should duly perform the office according to the provisions of said statutes, and of "such statutes as should be thereafter passed relating to said office." He continued to hold the office for several years under successive appointments, and did not comply with certain statutes passed subsequent to the first year. Held, his sureties were not liable for such default. The words "such statutes as should be thereafter passed" meant such as should be passed during

<sup>37</sup> *Kiton v. Julian*, 4 Ellis & Black. 854, followed in *Wickens v. McMeekin et al.*, 15 Ont. (Can.) 408. In *First Nat'l Bank v. Briggs' Assignees*, 69 Vt. 12, 37 Atl. Rep. 231, the directors of a national bank having power under the national banking act to elect a cashier and dismiss him at pleasure, elected a cashier for one year and successively re-elected him for periods of one year for the ten years next following. During his first year he gave a bond reciting his appointment of one year and conditioned for the faithful discharge of his duties as

cashier forever so long as he should occupy the position. Held, that the sureties were liable for defaults occurring after the first year. Compare *Westervelt v. Mohrenstecher*, 76 Fed. Rep. 118, 22 C. C. A. 93, 40 U. S. App. 221, in note 29 to § 186, *supra*.

<sup>38</sup> *Munford v. Rice*, 6 Munf. (Va.) 81.

<sup>39</sup> *Rany v. The Governor*, 4 Blackf. (Ind.) 2. To similar effect, see *Moss v. The State*, 10 Mo. 338; *Urmston et al. v. The State ex rel.*, 73 Ind. 175.

the first year.<sup>40</sup> Where a statute provided that the period of administration on estates should be one year, but if the estate was not settled at that time the judge might extend it a year, and so on for five years, it was held that the sureties on a general bond of an administrator, given when the administration commenced, were only liable for one year.<sup>41</sup> The office of register in chancery being annual, a party was appointed to it, and gave bond conditioned for his good behavior "whilst he shall continue in the office," and also "during the time he hath officiated in the said register's office." He continued in office four years. Held, the sureties were not liable beyond the first year. The court said: "The provisions of the constitution (making the office annual) form the basis of the contract, and, like the recital in the condition of the bond, restrain the indefinite expressions used in it and adapt them to the intention of the parties."<sup>42</sup> Where no term of office is specified the acceptance by the surety of an annual premium is regarded as an expression of its consent to be bound for at least one year from the date of the bond.<sup>43</sup>

**§ 189. When liability of surety on general bond limited by circumstances—Instances—Effect of requirement of special bond.**—A bond reciting that A had been appointed assistant overseer of a parish was conditioned for the due performance of his duties "thenceforth from time to time, and at all times, so long as he should continue in such office." The office was not annual, but the overseer was appointed annually thereafter for several years, and at an increased salary. Held, the sureties on the bond were not liable for anything happening after his re-appointment at an increased salary. The re-appointment on different terms was a

<sup>40</sup> Mayor of Cambridge v. Dennis, Ell., Black. & Ell. 660.

<sup>41</sup> Flores v. Howth, 5 Tex. 329.

<sup>42</sup> State v. Wayman, 2 Gill & Johns. (Md.) 254.

<sup>43</sup> In North St. Louis Bldg. & Loan Assn. v. Obert, Mo. Sup., Oct., 1902, 69 S. W. Rep. 1044, the term of the secretary of plaintiff corporation was not stated in its by-laws. Obert was made secretary in Jan-

uary, 1891; in October, 1895, he gave a fidelity bond with the Fidelity & Deposit Co. of Md. as surety, mentioning no term and conditioned for the faithful performance of his duty. In March, 1896, he was re-elected secretary. An annual premium was paid to the surety. Held, that the intention of the parties was that the bond should run at least one year from its date.



revocation of the first appointment.<sup>44</sup> A treasurer was appointed by the governor, and gave bond with surety conditioned for his good behavior "as such treasurer," the term of office of a treasurer then being during the pleasure of the governor. Afterwards a statute was passed providing that the treasurer should be elected by the people and hold office for three years. The same party was elected treasurer and gave a new bond. Held, the first set of sureties were not liable for the treasurer's default after his election. They may have been willing to be bound for him if he held office during the pleasure of the governor, but not if the holding was for a fixed term.<sup>45</sup> Subsequent to the passage of the United States internal revenue act of 1864 the assistant treasurer of the United States and treasurer of the branch mint at San Francisco gave a bond conditioned as provided by the act of 1846. The bond provided that he should faithfully discharge the duties of his office and all "other duties as fiscal agents of the government which may be imposed by this or any other act." The act of 1864, which provided that stamps might be furnished to assistant treasurers, also provided that bond for the payment for the same might be required from them. Said assistant treasurer got stamps for which he gave no new bond, and did not pay for them. Held, the sureties on the general bond were not liable for the stamps. If congress had supposed the general bond covered the case, why was a new bond provided for? The general words in the bond should not cover the case. "We think these words only intended to include such duties as naturally and ordinarily belong to the particular officer giving the bond, or have some obvious relation to such duties, and such as the sureties, acquainted with the duties of the various public officers as usually devolved upon them by law, might reasonably be expected to contemplate at the time of executing the bond, as likely to be imposed upon their principal in case the exigencies of government should require it, and not those duties which are more usually imposed upon, and more appropriately belong to, an entirely different class of officers."<sup>46</sup> The sureties in a bond given by the register of

<sup>44</sup> *Bamford v. Hes*, 3 Wels., Hurl. Sawyer 424, per Sawyer, J., Field, & Gor. 380. Compare note 48, § 190. J., concurring. See also on this sub-

<sup>45</sup> *The Queen v. Hall*, 1 Up. Can. subject, to same general effect, *Holt v. (C. P.)* 406. McLean, 75 N. C. 347.

<sup>46</sup> *United States v. Cheeseman*, 3



wills for the performance of his duties generally, and the payment of all money received for the use of the state, are not responsible for collateral inheritance tax collected by him. The terms of his bond were broad enough to cover this tax, but the act establishing the tax provided for the giving of a special bond therefor. The court said: "It seems to us very plain, therefore, that the general bond is not intended to secure either payment of these collections or the giving of the special bond to secure them."<sup>47</sup>

**§ 190. When general obligation of surety limited by special circumstances.**—A bank cashier gave a bond with sureties for his good behavior in office. The charter of the bank would have expired in 1818, but before that time, and after the sureties signed the obligation, the charter was extended by act of the legislature. No new bond was given, but the cashier continued to act during the extended period. Held, the sureties were not liable for any of his defalcations after the time when the original charter expired.<sup>48</sup> M required machinery for a cheese factory, and gave A an order for it, which he refused to fill without security. B thereupon wrote to A as follows: "I recommend M to you, and if he should fail in his promise to you for anything in your way, I consider myself jointly liable for the amount of \$200, payable in six months to your firm." A thereupon filled the order. Held, the meaning of the guaranty, when considered with reference to the surrounding circumstances, was that it applied to the specific order M had given for machinery and to no other.<sup>49</sup> A and B executed a note for \$4,000, payable on demand, the note being joint and several, and both appearing as principals, but B was in fact the surety of A, and that was known by a bank, to the cashier of which the note was payable. The note was made to enable A to raise money at the bank. The

<sup>47</sup> Commonwealth v. Toms, 45 Pa. St. 408. In Hughes v. Goodale, 26 Mont. 93, 66 Pac. Rep. 702, it was held that the general bond of a guardian is liable for misappropriation of the proceeds of the guardian's sale of real estate though the statute required a special bond for that purpose. Citing cases. This was considered to be the necessary

consequence of previous decisions holding the guardian's sale to be valid although he had failed to furnish the special bond required by statute.

<sup>48</sup> Thompson v. Young, 2 Ohio 335. Compare note 44, § 189.

<sup>49</sup> Boyle v. Bradley, 26 Up. Can. (C. P.) 373.

bank advanced A, from time to time, over \$32,000, all of which was paid, and then advanced \$2,000, which was not paid, and the bank thereupon sued A and B on the note. Held, B was not liable. The note was no more than an express guaranty for \$4,000, and was exhausted by the first advance of that amount.<sup>50</sup> The bond of the treasurer of a manufacturing corporation provided for the faithful discharge of his duties "during the time for which he had been elected, and for and during such further time as he \* \* (might) continue therein by any re-election or otherwise." He was re-elected at the next annual election, and served five months of that term, and then resigned, and his successor was appointed and held seven months; at the next annual election the first treasurer was elected again, and served and committed defaults. Held, the sureties were not liable for such defaults. They were liable for more than one year by the express terms of the bond, but were only liable for a continuous holding. The fact that for awhile the principal did not hold the office ended the liability of the sureties. "The word 'continue' excludes all idea of intermission in the office."<sup>51</sup>

**§ 191. When sureties on bond of annual officer bound for more than a year.**—While sureties on the general bond of an annual officer are usually held to be liable only for one year, because such is presumed to have been the intention of the parties, yet there is nothing to prevent such sureties from becoming bound for a longer time, and, if an intention to that effect clearly and unequivocally appears, they will be so held. Thus, the office of treasurer of a borough being annual, A was appointed thereto, and gave bond conditioned for the due accounting for all such moneys as he should or might recover or received "in virtue of \* \* said appointment as treas-

<sup>50</sup> *Agawam Bank v. Strever*, 16 Barb. (N. Y.) 82.

<sup>51</sup> *Middlesex Mfg. Co. v. Lawrence*, 1 Allen 339, per Dewey, J. A bond executed by an official for the faithful performance of his duties during a particular term of office, and for any succeeding terms for which he might afterwards be elected, is presumptive evidence of a consideration for the undertaking of

the sureties to be responsible after the expiration of the first term; and for a defalcation subsequently occurring, an action may be maintained against the sureties on the bond. *Metropolitan Loan Ass'n v. Esche*, 75 Cal. 513. Compare *North St. Louis Bldg. & Loan Assn. v. Obert*, 69 S. W. Rep. 1044, note 43, § 188.

urer, as aforesaid, during the whole time of \* \* continuing in said office, in consequence of the said election, or under any annual or other future election of the said council to said office." Afterwards, and during the year, the term of office was by statute changed to a holding during the pleasure of the council, and at the expiration of the year A was again appointed treasurer, and continued in office a long time. Held, the sureties were liable for defaults of A happening after the first year.<sup>52</sup> By statute, the commission of an auctioneer did not necessarily expire in one year, but might continue for three years without renewal of his bond. M, having applied for appointment as auctioneer, gave bond conditioned that he should perform all the duties of auctioneer, etc., "during the period he \* \* (should) continue to act as auctioneer under the commission that \* \* (might) be granted to him." He was afterwards commissioned for one year. Held, the liability of the sureties did not expire in one year, but continued while M acted as auctioneer.<sup>53</sup> A bond given to secure the faithful performance of his duties by a collector of parochial rates (who was by statute to be appointed by trustees for a

<sup>52</sup> Oswald v. Mayor of Berwick, 5 H. of L. Cas. 856. See also People's Bldg. Ass'n v. Wroth et al., 43 N. J. Law 70. See, on this subject, Hall v. Brackett, 62 N. H. 509. See also note 29, § 186, supra; Town of Scabrook v. Brown, N. H., May, 1901, 51 Atl. Rep. 175. In City of Camden v. Greenwald, 65 N. J. Law 458, 47 Atl. Rep. 458, the Fidelity & Deposit Co., of Md., as surety, on June 1, 1896, executed the official bond of Greenwald, who had just been elected treasurer of the town of Stockton for a term of two years. The bond was conditioned for the performance of the principal's official duties "not only for the term hereinafter specified, but for and during such succeeding terms as said above bounden shall continue to perform the duties of such town treasurer." A breach of the bond occurred ten months after the expiration of the two years' term.

Held, on demurrer, that even if the words extending the bond until a successor should be appointed bound the surety only for a reasonable time after the two years' term (as to which point, see Mayor etc. of Rahway v. Crowell, 40 N. J. Law 207), it was a question of fact for the jury to determine whether or not ten months was such reasonable time. In Barnes v. Cushing, N. Y., 1901, 61 N. E. Rep. 902, reversing 59 N. Y. Supp. 345, a new bond was taken every year from a state depository of canal funds; held, that the several bonds were cumulative and that the sureties on the older ones remained liable.

<sup>53</sup> Daly v. Commonwealth, 75 Pa. St. 33. Holding the sureties on a guardian's second bond, given upon his removal to a new county, liable for a defalcation before committed by him, see State v. Stewart, 36 Miss. 652.

year and then to be capable of re-election) was conditioned that "from time to time, and at all times thereafter, during such time as he should continue in his said office, whether by virtue of his said appointment, or of any re-appointment thereto, or of any such retainer or employment by or under the authority of the said trustees or their successors, to be elected in the manner directed by the said act, he should use his best endeavors to collect the moneys received by means of the rates in the then present or any subsequent year." Held, the obligation of the bond was not confined to the year for which he was originally appointed, but extended also to all subsequent years in which he was continuously re-appointed.<sup>54</sup> A statute provided that the sureties of a clerk should be liable for the whole period he might continue in office, and his bond provided for his good behavior "during the whole period the said \* \* shall or may continue in said office." The clerk was re-elected for a new term, but gave no new bond. Held, the sureties on his original bond were liable for his acts during his second term. The court based its decision upon the express provisions of the statute and the terms of the bond, and held that a recital in the beginning of the bond that the clerk had been elected for four years did not change the result.<sup>55</sup> The commission of a collector of customs appointed him "a collector of her majesty's customs in the province of Canada," and the bond was conditioned for the performance of his duties generally. In a suit on the bond, the surety pleaded that the bond was executed in reference to the office of collector at B, and that he made no default while at B, but was transferred to another place, and there made default. Held, the plea was bad, as the bond was clearly general and could not be narrowed in its application by alleging that something less was meant.<sup>56</sup> In 1831, while a statute was in force which provided that a cashier should hold his office until re-

<sup>54</sup> Augero v. Keen, 1 Mees. & Wels. 390. To similar effect, see People's Building Association v. Wroth et al., 43 N. J. Law 70, where sureties for the treasurer of a corporation, whose office was annual, executed a bond conditioned for his good behavior during his continuance in office, "whether of the

present term for which he has been elected, or of any succeeding terms to or for which he may be elected." Their liability was held to continue.

<sup>55</sup> Treasurers v. Lang, 2 Bailey Law (S. C.) 430.

<sup>56</sup> Regina v. Miller, 20 Up. Can. (Q. B.) 485.

moved therefrom or another was appointed in his stead, a cashier was appointed and gave bond for the faithful discharge of the duties of his office. In 1832 he was re-appointed, but gave no new bond. The record of his appointment both times stated that he was appointed "for the year ensuing." He held the office without any new appointment till 1836, when he committed a default. Held, the sureties on the bond given when he was first appointed were liable therefor. The law made the office a continuing one, and the parties had this fact in contemplation when the bond was made.<sup>57</sup>

**§ 192. When general words of obligation not limited by other words or circumstances.**—The liability of sureties on the general bond of a manufacturer of tobacco, given in pursuance of the United States revenue law, does not cease upon the expiration of his license as such manufacturer. The provision of the law making the neglect of a manufacturer of tobacco to procure a license a punishable offense was not designed for the benefit of sureties, but to protect the government against the frauds of the manufacturer.<sup>58</sup> The office of tax collector continued two years, but the law required the collector to give a bond as to the state taxes every year. The bond given by a collector on going into office recited that he had been elected for two years, and provided that he should "well and truly collect all state taxes which, by law, he ought to collect, and well and truly account for and pay over all taxes by him collected, or which ought to be by him collected, according to law." Held, the sureties were liable for the state taxes received by the collector the second year.<sup>59</sup> A statute provided that a sheriff should hold office for one year, and might, "with his own consent and the approbation of the executive, be continued for two years." The first year a sheriff

<sup>57</sup> *Amherst Bank v. Root*, 2 Met. (Mass.) 522. So where a town treasurer, who held his office until removed therefrom, gave bond with surety conditioned for the faithful performance of his duties "so long as he shall remain in the said office," and he was re-appointed annually for several years, when he defaulted, it was held that the re-appointments were not equivalent to removals and

re-appointments, but were a retention in office of the same treasurer, and that his sureties were not in consequence thereof discharged. *Corporation of Adjala v. McElroy*, 9 Ont. (Can.) 580.

<sup>58</sup> *United States v. Truesdell*, 2 Bond 78.

<sup>59</sup> *Allison v. The State*, 8 Heisk. (Tenn.) 312.

held office, a deputy gave bond conditioned for his good behavior "for and during the time said \* \* (sheriff) may continue in office." The sheriff continued in office two years. Held, the sureties on the bond of the deputy were liable for his acts during the second year.<sup>60</sup> When the bond of an officer is general in its terms, and the office is not annual, the liability of the surety is not, in the absence of special circumstances, limited to a year.<sup>61</sup> A party was elected cashier of a bank in 1814, when it was first organized, and again in 1815 and 1817, by directors chosen annually, and he continued to act as cashier from his first election till 1823, when he committed a breach of duty. Held, a bond given by him with sureties upon his first election, for the faithful performance of his duties "so long as he should continue in said office," covered this breach of duty, it not appearing in the bond, or the charter or regulations of the bank, that the office was annual. "There was nothing to make the sureties suppose it was limited to a year."<sup>62</sup> A deed of guaranty made in Lower Canada by C recited that one M, who had been a member of the firm of C & Sons, required pecuniary assistance to meet the engagements of that firm, which was agreed to be afforded by a bank, and by such guaranty C and others agreed to become sureties for all the then present and future liabilities of M with the bank. M contracted debts with the bank which had no reference to the firm of C & Sons. Held, that although the recital in the instrument was special, yet it did not control the generality of the subsequent operative words, and that the guarantors were liable for such advances.<sup>63</sup>

**§ 193. When general words of obligation not limited by other words or circumstances, continued.**—By statute the term of office of the chairman of the superintendents of schools continued for one year, and until his successor was appointed. Held, the sureties on his bond were liable for money received by him more than a year after he was appointed, he being then in office and no successor having been appointed; the decision being put upon the ground that his term of office continued

<sup>60</sup> Jacob v. Hill, 2 Leigh (Va.) 393.

<sup>62</sup> Dedham Bank v. Chickering, 3 Pick. 335, per Parker, C. J.

<sup>61</sup> Mayor of Birmingham v. Wright, 16 Ad. & Ell. (N. S.) 623.

<sup>63</sup> Bank of British North America v. Cuvillier, 14 Moore's Privy Council Cas. 187.



until a successor was appointed.<sup>64</sup> A bond recited that A had been taken into the service of a bank as a writing clerk, and was conditioned for his due performance of that service "and all and every other service of the \* \* (bank), wherein he he is, or shall, or may be, employed." He was afterwards appointed cashier of a branch bank of the bank to which the bond ran, and afterwards made default. Held, his sureties were liable for such default.<sup>65</sup> A bond recited that the principal had been appointed accountant in a bank, and provided that he should well and faithfully perform all duties in the bank which from time to time might be required of him, and should faithfully account for all moneys which might be intrusted to his care, and should "also continue in said service for the term of two years unless sooner discharged." Held, the bond covered the acts of the accountant as long as he continued in the office, and was not limited to two years.<sup>66</sup> The defendant, as surety, executed a bond, the condition of which recited an agreement between the directors of an East India railway company and P, whereby it was agreed that P should forthwith proceed to such place in the East Indies, at such time and by such conveyance as the company should direct, and should there serve the company at a certain salary per month, to commence on the day of his embarkation at Southampton. The condition was in the terms of the recited agreement, but mentioned no place of embarkation. The company paid P's passage on a vessel about to leave Southampton, but the vessel left before he was ready, and the company directed him to go to Marseilles and meet the vessel. This he failed to do, nor did he go to the East Indies. Held, the surety was liable. The words in the recital, "his embarkation at Southampton," only referred to the time his salary was to commence. The surety agreed that he should go in the manner the company directed, and the general words were not restrained by anything in the recital.<sup>67</sup> The bond of a note clerk

<sup>64</sup> *Chairman of Schools v. Daniel*, 6 Jones' Law (N. C.) 444.

<sup>65</sup> *Thompson v. Roberts*, 17 Irish Com. Law 490, held by a divided court. The fact that the book-keeper of a bank performed the duties of teller was also held not to relieve the sureties on his bond given

for the faithful performance of his duties as book-keeper for defaults committed while acting in the capacity of teller. *Home Savings Bank v. Traube*, 75 Mo. 199.

<sup>66</sup> *Worcester Bank v. Reed*, 9 Mass. 267.

<sup>67</sup> *Evans v. Earle*, 1 Hurl. & Gor. 1.



in a bank provided for the faithful performance of his duties, and recited that he "had been appointed note clerk, to continue in office during the will of the present or any future board of directors of said bank." The directors of the bank were annual officers, but there was no limitation as to the time a note clerk should continue in office. Held, the liability of the sureties on the clerk's bond was not limited to one year. The clerk was not clerk of the directors, but of the bank, and the term of office of the clerk was not limited by the official term of the directors.<sup>68</sup>

**§ 194. Liability of sureties who obligate themselves each for a specific sum.**—It is generally held that a surety to a note or bond may, at the time of his becoming such, fix his liability as between himself and others who sign with him, by limiting his liability to a specific sum, in which case he cannot be held beyond the amount set opposite his name.<sup>1</sup> Thus, the sureties on the official bond of a sheriff,<sup>2</sup> tax collector,<sup>3</sup> city treasurer,<sup>4</sup> and bank clerk,<sup>5</sup> who have limited their liability when signing the bond to certain specified sums, which sums were set opposite their respective signatures, cannot be held chargeable beyond such sums. So sureties to a joint and several recognizance, who have limited their respective liabilities to fractional parts of the penalty, cannot be held individually for the full amount of the bond.<sup>6</sup> When the sureties on a

<sup>68</sup> *Louisiana State Bank v. Ledoux*, 3 La. Ann. 674. Where the bond of an officer of a corporation is conditioned for the faithful performance of his duties so long as he shall continue in office, the fact that he is appointed by a board of directors which is elected for only one year will not limit the liability of the sureties to that year, but it is held to continue throughout the term of his actual holding if his appointment is general and unlimited. *Humboldt Savings & Loan Society v. Wennerhold et al.*, 81 Cal. 528.

<sup>1</sup> *City of New Orleans v. Waggonman*, 31 La. Ann. 299; *Westbrook v. Moore*, 59 Ga. 204; *People v. Slocum*, 1 Idaho 62; *Houck v. Graham*,

123 Ind. 277. But see, contra, *Cor-drain v. State*, 55 Tex. 140.

<sup>2</sup> *Marcy v. Praeger*, 34 La. Ann. 54; *Florant v. Handy*, 35 La. Ann. 816.

<sup>3</sup> *Police Jury of Vermilion Parish v. Brookshier*, 31 La. Ann. 736.

<sup>4</sup> *City of Butte v. Cohen*, 9 Mont. 435.

<sup>5</sup> *Commercial Nat. Bank v. Gorham*, 11 R. I. 162.

<sup>6</sup> *Thomas v. State*, 13 Tex. App. 496. Where the liability of each surety is for the full penalty of the bond, the fact that they are bound "jointly and severally" does not bring it within the ruling of *Thomas v. State*, supra. *Fulton v. State*, 14 Tex. App. 32. Under late Texas

tax collector's bond obligate themselves each for a specific sum, the state is entitled, in case the collector becomes a defaulter, to a judgment against each surety for the whole amount for which he is bound, if the defalcation is for so much, although the judgments against the sureties may amount to much more than the defalcation. If judgment was rendered against the each surety for only his aliquot part of the defalcation, and one or more of the sureties proved insolvent, the state would lose so much. But no matter how much may be the aggregate of the judgments, no more than the amount of the defalcation can be collected from the sureties.<sup>7</sup> Where a statute provides that a surety on a constable's bond may limit the amount of his liability thereon, this does not limit the recovery of costs against the surety, and execution may issue against him although the amount directed to be levied upon exceeds the penalty of the bond.<sup>8</sup> "Such provision has reference only to the amount the sureties are chargeable with on the penalty of the bond. It has no reference to the costs of the action upon the bond."<sup>9</sup>

Criminal Code, held, that surety to a recognizance cannot now limit his liability. *Mathena v. State*, 15 Tex. App. 460.

<sup>7</sup> *State v. Hampton*, 14 La. Ann. 620; *Stetson v. City Bank of N. O.*, 12 Ohio St. 577. Where one became surety for one-third of a debt, and another for two-thirds thereof, a part of which was subsequently discharged by a payment of a portion

of a judgment recovered thereon, held, that neither surety could insist upon an application of the entire amount paid to the release of his liability. *Doud v. Waller*, 48 Iowa 634.

<sup>8</sup> *Mayor etc. of N. Y. v. Ryan*, 9 Daly (N. Y. Com. Pleas) 316. See *Gay v. Hulst et al.*, 56 Mich. 153.

<sup>9</sup> *Daly, J., in Mayor v. Ryan*, 9 Daly (N. Y. Com. Pleas) 316, 320.

## CHAPTER VII.

### OF THE LIABILITY OF ACCOMMODATION PARTIES TO NEGOTIABLE INSTRUMENTS AND OF THE BLANK INDORSER OF ANOTHER'S OBLIGATION.

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| <p>§ 195. When stranger to a note who indorses it in blank is guarantor.</p> <p>196. When stranger to a note who indorses it in blank is guarantor, continued.</p> <p>197. When the blank indorser of a note is not a guarantor.</p> <p>198. Cases holding blank indorser of a note liable as indorser, and express guarantor liable as maker.</p> <p>199. When blank indorser of note is liable as joint maker.</p> <p>200. Liability of blank indorser—General observations.</p> | <p>§ 201. Liability of blank indorser may be shown by parol—Writing unauthorized agreement above blank indorsement does not vitiate actual agreement.</p> <p>202. When indorsement in terms expresses liability of indorser, he is held according to such terms.</p> <p>203. Liability of indorsers under special indorsements and circumstances.</p> <p>204. Liability of accommodation parties to bills of exchange—Special cases.</p> |
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§ 195. When stranger to a note who indorses it in blank is guarantor.—As to what is the precise liability of a stranger to an obligation who indorses it in blank, there is great conflict among the decided cases. The weight of authority is that a stranger to a promissory note, payable to a particular person, who at or before the time of its delivery to the payee indorses it in blank, is, in the absence of evidence as to the liability intended to be assumed, liable as guarantor. The reasoning upon which these decisions are based is that such indorser intended to assume some liability. If he had intended to become a joint maker, he would have signed the note on its face. Not being a party to the note, the title to it does not pass by his indorsement, and he is not liable as indorser. And being neither principal nor indorser, in order to effectuate the presumed intention of the parties, he will be held liable as guarantor.<sup>10</sup> The same thing has been held where a stranger

<sup>10</sup> *Firman v. Blood*, 2 Kan. 496; *v. Berry*, 25 Kan. 373; *Jones v. Fuller v. Scott*, 8 Kan. 25; *Withers Kuhn*, 34 Kan. 414; *Chandler v.*

to a note indorsed it in blank after it was delivered by the payee.<sup>11</sup> In such cases the holder of the note may, at the time of the trial or any time before, write a guaranty over the name of the indorser,<sup>12</sup> and this may be done after the death of the indorser.<sup>13</sup> A party gave a storage receipt for grain, and a stranger to it indorsed it in blank for the purpose of becoming a guarantor. The grain was not delivered, and the

Westfall, 30 Tex. 475; Horton v. Manning, 37 Tex. 23; Van Doren v. Tjader, 1 Nev. 380; Watson v. Hurt, 6 Gratt. (Va.) 633; Clark v. Merriam, 25 Conn. 576; Champion v. Griffith, 13 Ohio 228; Castle v. Rickly, 44 Ohio St. 490; Cushman v. Dement, 3 Scam. (Ill.) 497; Camden v. McKoy, 3 Scam. (Ill.) 437; Klein v. Currier, 14 Ill. 237; Heintz v. Cahn, 29 Ill. 308; Pahlman v. Taylor, 75 Ill. 629; Hamilton v. Johnston, 82 Ill. 39; Stowell v. Raymond, 83 Ill. 120; Eberhart v. Page, 89 Ill. 550; Wallace v. Goold, 91 Ill. 15; Ives v. McHard, 103 Ill. 97, affirming 2 Bradw. (Ill. App.) 176; Brown v. Reasner, 5 Bradw. (Ill. App.) 45; De Witt Co. Nat. Bank v. Nixon, 125 Ill. 615. In Fisk v. Reser, 19 Colo. 88, 34 Pac. Rep. 572, the purchaser of mortgaged land (who had not assumed), after the mortgage became due and when it was in default, wrote his name on the back of the mortgage note in consideration that the mortgagee would not foreclose for the interest then due and would give him a certain credit on the indebtedness. Held, that parol evidence was admissible to show the true character of the transaction and that the contract of such purchaser was that of a guarantor of the note; that his promise was an original promise and need not be in writing, though in form it was a promise to answer for the debt of another. Citing Good v. Martin, 1 Colo. 168, affirmed in

Good v. Martin, 95 U. S. 97, and Thayer v. Rockwell, 4 Colo. 409. A party other than maker or payee, writing his name on the back of a note, "must be regarded either as a guarantor or as an original promisor." Portsmouth Savings Bank v. Wilson, 5 App. Cas. (D. C.) 8. In Donovan v. Griswold, 37 Ill. App. 616, it was held that the burden of proof that the contract of the third party endorsing a note is not a guaranty is upon the guarantor, and whether the guaranty is special or general is a question of fact. This and the other Illinois cases cited hold that a stranger signing under such circumstances is presumed to do so as guarantor, but that this presumption may be rebutted to show what the real intention of the parties was. In California, under the code, a stranger who indorses before delivery is held not as a guarantor but as an indorser. Fessenden v. Summers, 62 Cal. 485. See, contra to doctrine in the text, Levi v. Mendell, 1 Duv. (Ky.) 77.

<sup>11</sup> Thomas v. Jennings, 5 S. & M. (Miss.) 627; Killian v. Ashley, 24 Ark. 511; Stagg v. Linnenfelser, 59 Mo. 336.

<sup>12</sup> Boynton v. Pierce, 79 Ill. 145; Fear v. Dunlap, 1 Greene (Iowa) 331; Chandler v. Westfall, 30 Tex. 475; Gist v. Drakely, 2 Gill (Md.) 330; Leech v. Hill, 4 Watts (Pa.) 448. Contra, Needhams v. Page, 3 B. Mon. (Ky.) 465.

<sup>13</sup> Horton v. Manning, 37 Tex. 23.

holder of the receipt filled the blank above the name of the indorser with a guaranty, and sued on it. Held, the blank might be so filled, and that this took the case out of the Statute of Frauds. The court said: "On such an instrument he [the indorser] cannot become liable as indorser; nor can he become liable as maker unless he places his name on the instrument at the time of its execution, and as in such case he manifestly intends to become liable in some capacity or other to the holder, it can only be as guarantor."<sup>14</sup> In the absence of evidence the presumption is that the blank indorsement of a note by a stranger was made at the time the note was executed.<sup>15</sup> And the same presumption exists where the instrument upon which the indorsement is made is a receipt for the delivery of grain, and not negotiable.<sup>16</sup> It has been held that if the blank indorsement of a note by a stranger to it is made after it has been in circulation, the indorser will not, in the absence of proof, be held as guarantor, but will be held as indorser simply, the presumption being that the note was transferred from holder to holder by blank indorsement.<sup>17</sup> A stranger to a bond, who indorsed it in blank and transferred it to his creditor in payment of a debt, has been held liable as guarantor.<sup>18</sup> Where a promissory note was made by M payable to E or order, and indorsed by C, it was held that while at common law the liability of C was that of second indorser, yet under a statute converting so-called second indorsers into sureties, the liability of C was that of surety for M.<sup>19</sup> An allegation that defendant, by writing his name on the back of the note, guarantied its payment, and that upon the strength of such guaranty the said note was received for value, is a sufficient statement that defendant was a guarantor.<sup>20</sup>

<sup>14</sup> Underwood v. Hossack, 38 Ill. 208, per Walker, J.

<sup>15</sup> Carroll v. Weld, 13 Ill. 682; Webster v. Cobb, 17 Ill. 459; White v. Weaver, 41 Ill. 409; Boynton v. Pierce, 79 Ill. 145; Cook v. Southwick, 9 Tex. 615; Fidelity & Casualty Co. v. Van Dyke, 99 Ga. 542, 27 S. E. Rep. 709.

<sup>16</sup> Underwood v. Hossack, 38 Ill. 208.

<sup>17</sup> Webster v. Cobb, 17 Ill. 459; White v. Weaver, 41 Ill. 409.

<sup>18</sup> Kearnes v. Montgomery, 4 W. Va. 29.

<sup>19</sup> Collins v. Everett, 4 Ga. 266. See also Camp v. Simmons, 62 Ga. 73.

<sup>20</sup> Wallace v. Lark, 12 S. C. 576. Declaration on guaranty, by endorsement, of a note held sufficient: Jenness v. Barron, Me., Nov., 1901, 50 Atl. Rep. 712.

§ 196. **When stranger to a note who indorses it in blank is guarantor, continued.**—By the common law of Connecticut, the blank indorsement of a note (negotiable or not negotiable) by a stranger to it, in the absence of evidence, implies *prima facie* a contract on the part of the indorser that the note is due and payable according to its tenor; that the maker shall be of ability to pay it when it comes to maturity, and that it is collectible by due diligence on the part of the holder.<sup>21</sup> Another court has held that when a person not before a party to a note puts his name on its back, out of the course of regular negotiability, he is not an indorser according to the strict commercial sense of that term. “He is termed a guarantor, and this is so whether his inscription is simply in blank, or preceded by the words ‘I guaranty.’ \* \* A name written on the back of a note gave to the writer his title of indorser, and fixed the character of his liability. If the name was written without regular succession, according to commercial usage, a distinction in the description of the latter was instituted, and he was called ‘guarantor.’ This distinction, however, was only in name; the act performed by each is precisely the same; and it is a well settled and safe rule that the act discloses the intent. \* \* Where one writes his name on the back of a promissory note, either in blank or accompanied by the use of general terms, his undertaking is attended with all the rights and all the liability of an indorser *stricti juris*.”<sup>22</sup> In a later case in the same court, it is held that where a person not before a party to a note indorses it before its delivery, his liability is that of a surety, and demand and notice are necessary in order to fix his liability, and the doctrine of the case last referred to is fully approved. The court said: “In England he is held to be a guarantor, and his contract is that the maker of the note will pay at maturity, or, if he does not, the guarantor will. No demand or notice is considered necessary as a condition precedent to fix the liability of the guarantor.” After saying there was great conflict of authority, the court, speaking of guarantor and indorser, proceeded: “Each undertakes that the maker will pay the note at ma-

<sup>21</sup> *Ranson v. Sherwood*, 26 Conn. 437. For other decisions of the same court on this subject, see *Clark v. Merriam*, 25 Conn. 576; *Candee*, 16 Conn. 223; *Perkins v. Catlin*, 11 Conn. 213. <sup>22</sup> *Riggs v. Waldo*, 2 Cal. 485, per Heydenfeldt, J.

turity, and in case of being compelled to pay it for the principal, each has recourse upon his principal to recover the amount paid.”<sup>23</sup> The law on this subject has been thus stated by another court: “The mere indorsement upon a note, of a stranger’s name in blank, is *prima facie* evidence of guaranty. To charge such person as a maker, there must be proof that his indorsement was made at the time of execution by the other party, or if afterwards, that it was in pursuance of an agreement or intention that he should become responsible from the date of the execution. Such agreement or intention may be proved by parol. The rule is the same whether the instrument is negotiable or not.”<sup>24</sup> A made his note payable to B. It was afterwards transferred to C, who for a valuable consideration transferred it to D, and at the same time wrote his name in blank on its back. There was no other name on the back of the note. Held, C was liable as guarantor. The court said: “The defendant cannot be charged as a surety, for he was no party to the original contract. \* \* Nor can he be charged as indorser, for the note was not indorsed by the payee.”<sup>25</sup> A party made a note payable to himself or order, and two parties, strangers to the note, indorsed it. The blanks above the names of the indorsers were filled with separate guaranties, and then the maker indorsed it and delivered it to the holder. Held, the indorsers were not liable as guarantors but as indorsers. “Where the note creates no valid obligation against the maker, and can create none until it is indorsed and transferred by the payee, the presumption is that the person writing his name in blank upon the back of the note assumes the obligation of an indorser. Inasmuch as the note

<sup>23</sup> Jones v. Goodwin, 39 Cal. 493. In Bryan v. Berry, 6 Cal. 394, the supreme court of California decided that it made no difference on what part of a note the name of a party who was secondarily liable appeared; he was liable as indorser. It did not profess to follow authority, which it said was full of refinements and contradictions, but professed to adopt a safe and certain rule, free from all obscurity. Bryan v. Berry was, however, overruled by Aud v. Magruder, 10 Cal. 282. The

decisions on this subject in California are not harmonious. For other cases, see Pierce v. Kennedy, 5 Cal. 138; Brady v. Reynolds, 13 Cal. 31; and Chafoin v. Rich, 77 Cal. 476.

<sup>24</sup> Champion v. Griffith, 13 Ohio 228. For other decisions of the same court on this subject, see Parker v. Riddle, 11 Ohio 102; Seymour v. Mickey, 15 Ohio St. 515.

<sup>25</sup> Whiton v. Mears, 11 Met. (Mass.) 563.



can never have any validity until the name of the payee appears upon it as an indorser, the person writing his name in blank upon the note understands that, when the note takes effect, his name will appear upon it as a second indorser, and it is reasonable to conclude that such was the position which he intended to occupy." And all persons receiving such note are by its form notified of these facts.<sup>26</sup>

**§ 197. When the blank indorser of a note is not a guarantor.**—After a promissory note became due, the holder agreed to extend the time of payment about ten months, if the maker would get F to indorse the note. Without knowing of this agreement, F indorsed the note in blank, only writing over his signature the date of making it. In a suit against F on the note, it was held he was not a maker nor indorser, and could not be held as guarantor, because a guaranty must be in writing, and if such a guaranty might have been written over the signature, it had not been done.<sup>27</sup> The payee of a note indorsed it in blank. A guaranty was written over his name in a different hand. Held, the presumption was that the indorser was an assignor, and only secondarily liable. The court said: "The fact that a contract of guaranty is found written above the name of the indorser, in a handwriting not his own, would not of itself be sufficient to raise a presumption that it was done by his authority, or that the contract was there when he wrote his name, because the presence of his name is to be accounted for by the fact that as payee of the note, it was necessary for him to indorse it in order to give it negotiability. To hold that any person through whose hands a note may pass can write a guaranty over a blank indorsement, and then require the indorser to disprove it, would be fruitful of fraud, and dangerous to every person who has occasion to receive and indorse a promissory note."<sup>28</sup> It has been held that where the name of a stranger to a note occupies the position of a second indorser, he cannot be held as guarantor, unless it is established by extraneous evidence that he

<sup>26</sup> Blatchford v. Milliken, 35 Ill. 434, per Beckwith, J.

<sup>27</sup> Moore v. Folsom, 14 Minn. 340.

<sup>28</sup> Dietrich v. Mitchell, 43 Ill. 40, per Lawrence, J. See also on similar point, Klein v. Carrier, 14 Ill.

237. When the name of the payee appears in blank on the back of the note, it is presumed that he is indorser only and not a guarantor. Schnell v. North Side Planing Mill Co., 89 Ill. 581.

agreed to become a guarantor.<sup>29</sup> Upon a note in this form: "We, A and B, as principal, and C and D as surety, promise to pay to the order of ourselves," etc., and signed on its face only by A and B, and indorsed successively by A, B, C and D, the liability of D is that of surety or joint promisor in a note payable to the order of the principals and by them indorsed. It was claimed that he was an indorser only as the note was indorsed by the promisee. The court said that would have been so if the note had been in the usual form: "But this note is peculiar, and the application of the rule is controlled by the express declaration in the contract itself of the nature of the liability assumed."<sup>30</sup> With reference to the liability of a stranger to it, who indorses a note in blank, the following has been held: "When a man puts his name on the back of negotiable paper before the payee has indorsed it, he means to pledge in some shape his responsibility for the payment of it. \* \* In the absence of legal evidence of any different contract, he assumes the position of second indorser; and \* \* to render his engagement binding as to any holder of the note, the implied condition that the payee shall indorse before him must be complied with, so as to give him recourse against such payee."<sup>31</sup> On the other hand, it has been held that where a person, not a party to a bill or note, indorses his name on it, he is presumed to have done so as a surety, and not as an indorser; and if such indorser signs his name, thus intending to become indorser and not surety, it will make no difference, as it is an error of law which will not avail him in the absence of fraud by the other party.<sup>32</sup>

**§ 198. Cases holding blank indorser of note liable as indorser, and express guarantor liable as maker.**—A stranger to a note before its delivery wrote upon its back the following: "For value received I guaranty the payment of the within note, and waive notice of non-payment." Held, this constituted him a joint maker of the note, and that he could be sued jointly with the other makers. The court said: "How is this distinguishable from a direct signature as surety? In the latter

<sup>29</sup> *Bogue v. Melick*, 25 Ill. 91. To same effect, see *Kayser v. Hall*, Adm'r, 85 Ill. 511.

<sup>30</sup> *National Pemberton Bank v. Lougee*, 108 Mass. 371, per Colt, J.

<sup>31</sup> *Eilbert v. Finkbeiner*, 68 Pa. St. 243, per Sharswood, J. To same effect, see *Sill v. Leslie*, 16 Ind. 236.

<sup>32</sup> *Smith v. Gorton*, 10 La. (Curry) 374.

case both promise to see the money paid at the day. A man writes thus: 'I promise that \$100 shall be paid to A or bearer;' who would doubt that such a promise would be a good note? The use of the word guaranty, or warrant, or stipulate, or covenant, or other word importing an obligation, does not vary the effect. Read the obligation of a man who signs a note with his principal 'A B, surety;' both and each stipulate in the language of the note I have supposed. Both promise that the payee shall receive."<sup>33</sup> The same court held that a party who in express terms guaranteed the payment of a note was not an indorser, but was a guarantor, and that he did not come under the designation of an indorser, within the terms of a statute providing for the severing of actions in suits against makers and indorsers of notes.<sup>34</sup> A stranger to a negotiable note indorsed it in blank before it was delivered. No demand of payment had been made, nor had notice of dishonor been given the indorser. Held, he was not liable on his indorsement. He was an indorser and could not be held as a guarantor. The court said that an indorser, even though a stranger to a note and signing before its delivery, could not be held as a guarantor unless it was impossible to hold him in any other character. If the note was negotiable, he could not be held as guarantor. But if it was not negotiable, he might be held as guarantor, because in such case, as there is "no possibility of raising the ordinary obligation of indorser, there is then room to infer that a different obligation was intended." The question depends entirely on the fact of negotiability.<sup>35</sup> It was subsequently held by the same court that a stranger to a non-negotiable note, who before its delivery indorsed it in blank, was liable either as maker or guarantor, and not as indorser.<sup>36</sup>

<sup>33</sup> *Luqueer v. Prosser*, 1 Hill (N. Y.) 256, per Cowen, J. See the precisely opposite held in an action on a similar guaranty. *Mowery v. Mast & Co.*, 9 Neb. 445.

<sup>34</sup> *Miller v. Gaston*, 2 Hill (N. Y.) 188. A guaranty of the payment of a note is not an indorsement, although itself indorsed on the note. *Trust Co. v. National Bank*, 101 U. S. 68.

<sup>35</sup> *Hall v. Newcomb*, 3 Hill (N. Y.) 233; affirmed by the court of errors, *Hall v. Newcomb*, 7 Hill 416. To same or similar effect, see *Seabury v. Hungerford*, 2 Hill 80; *Ellis v. Brown*, 6 Barb. (N. Y.) 282; *Tillman v. Wheeler*, 17 Johns. 326; *Spies v. Gilmore*, 1 N. Y. 321.

<sup>36</sup> *Richards v. Warring*, 4 Abbott's Rep. Omitted Cas. 47. In *New Brunswick* it is held that indorse-

**§ 199. When blank indorser of note is liable as joint maker.**  
 —There is a class of cases peculiar to New England which hold that, in the absence of evidence, a stranger to a promissory note, who indorses it in blank before its delivery, is liable as a joint maker. The reasoning upon which these decisions rest is thus stated by the court: "He is not liable as indorser, for the note is not negotiated or title made to it through his indorsement; nor as guarantor, because there is no separate or distinct consideration; but he means to give security and validity to the note by his credit and promise to pay it, if the promisor does not, and that upon the original consideration, and therefore he is a promisor and surety, and it is immaterial to this purpose on what part of the note he places his name."<sup>87</sup> The same court held that strangers to a note, who before its delivery indorsed their names in blank upon it, were not liable as joint makers, if the payee afterwards and before its delivery indorsed his name upon it above theirs. The court said that the rule holding indorsers in any case to be joint makers was anomalous, and peculiar to Massachusetts, and should not be extended beyond what the court was bound to do by previous decisions.<sup>88</sup> Where a stranger to a non-negotiable note, at the time it was made, indorsed it in blank, it was held that in the absence of proof he was liable as an original promisor or surety, and might be sued jointly with the maker.<sup>89</sup> It has also been held that, where it is the intention of the parties that an indorser shall be a joint maker, it makes no difference if his signature appears on the back of the instrument, and he is liable to be sued jointly with the other

ment by a stranger before delivery made the indorser liable as maker. *Bell v. Moffat*, 4 *Pug. & Bur.* (N. B.) 121.

<sup>87</sup> *Per Shaw, C. J., in Chaffee v. Jones*, 19 *Pick.* 260; *Baker v. Briggs*, 8 *Pick.* 122; *Martin v. Boyd*, 11 *N. H.* 385; *Flint v. Day*, 9 *Vt.* 345; *Sanford v. Norton*, 14 *Vt.* 228; *Strong v. Riker*, 16 *Vt.* 554. To same effect, see *Chaffee v. The Memphis, C. & N. W. R. R. Co.*, 64 *Mo.* 193; *Melton v. Brown*, 25 *Fla.* 461. And it is held that, being a joint maker, he is not entitled to notice

of dishonor, nor is he discharged by the payee's delay in making demand on him, though he may, through much delay, have lost all chance of indemnity from the original maker. Neither is this liability modified by the fact that the payee may have known the relation between the maker and indorser to have been one of suretyship. *Carpenter v. McLaughlin*, 12 *R. I.* 270.

<sup>88</sup> *Clapp v. Rice*, 13 *Gray* 403.

<sup>89</sup> *Cook v. Southwick*, 9 *Tex.* 615. See also *Good v. Martin*, 95 *U. S.* 90.

maker.<sup>40</sup> A corporation made a promissory note under seal. A stranger indorsed it and was sued on such indorsement. Held, the right of action was not on the sealed instrument, but on the indorsement, which was a collateral and distinct contract, and the indorser, having become such on a valuable consideration, became absolutely liable to pay the money.<sup>41</sup>

**§ 200. Liability of blank indorser—General observations.—** The law with reference to the liability of the blank indorser of a promissory note has been thus summarized by a court of high authority: "When a promissory note, made payable to a particular person or order, \* \* is first indorsed by a third person, such third person is held to be an original promisor, guarantor or indorser, according to the nature of the transaction and the undertaking of the parties at the time the transaction took place. If he put his name on the back of the note at the time it was made, as surety for the maker, and for his accommodation, to give him credit with the payee, or if he participated in the consideration for which the note was given, he must be considered as a joint maker of the note. On the other hand, if his indorsement was subsequent to the making of the note, and he put his name there at the request of the maker, pursuant to a contract with the payee for further indulgence or forbearance, he can only be held as guarantor. But if the note was intended for discount, and he put his name on the back of it, with the understanding of all the parties that his indorsement would be inoperative until it was indorsed by the payee, he would then be liable only as a second indorser in the commercial sense, and as such would clearly be entitled to the privileges which belong to such indorsers."<sup>42</sup> It is apparent from the cases which have been cited that the question, "What is the liability which, in the absence of explanatory evidence, the law imposes upon the blank indorser of the obligation of another?" is one to which no answer can

<sup>40</sup> Schmidt v. Schmaetter, 45 Mo. 502.

<sup>41</sup> Gist v. Drakely, 2 Gill (Md.) 330.

<sup>42</sup> Rey v. Simpson, 22 How. (U. S.) 341, per Clifford, J. See also Good v. Martin, 95 U. S. 90; Burton v. Hansford, 10 W. Va. 470; Rivers v. Thomas, 1 B. J. Lea (Tenn.) 649; Hoffman v. Moore, 82 N. C. 313;

Heise v. Bumpass, 40 Ark. 545. In Noll v. Oberhellmann, 20 Mo. App. 336, and Patillo v. Mayer, 70 Ga. 715, accommodation indorsers are held as surety for the maker. See Moynahan v. Hanaford, 42 Mich. 329; Varley v. Title Guarantee & Trust Co., 60 Ill. App. 564, note 20, § 3, supra.

be given that will harmonize all the authorities. The decisions have been almost as various as the forms of the obligations indorsed. Some courts have held that the nature of the liability depended entirely on whether or not the indorsed instrument was negotiable, while other courts have held that the nature of the liability was not at all affected by the fact of the negotiability of the indorsed instrument. A controlling influence has in numerous other respects been given to circumstances by some courts which have been wholly ignored by others. Nor is the conflict of authority confined to courts of different states, but there are several instances of the same court holding different views of the subject at different times. Other courts, while following their own former decisions, have admitted they were contrary to the weight of authority. It follows, of course, that no general rules can be laid down.<sup>43</sup>

**§ 201. Liability of blank indorser may be shown by parol—Writing unauthorized agreement above blank indorsement does not vitiate actual agreement.**—It is, however, well settled that the agreement upon which the blank indorser of another's obligation signed, and the liability which he intended to assume, may (at least between the original parties, or those parties and a holder with notice) be shown by parol evidence, and he will be held only according to such agreement and intention.<sup>44</sup> The fact that the indorser's name is on the back of the obligation is itself evidence that he intended to assume

<sup>43</sup> See the perplexities of the law on this subject considered by Hammond, J., in *Miller v. Ridgely* (Cir. Ct. W. D. Tenn.), 22 Fed. Rep. 889.

<sup>44</sup> *Sanford v. Norton*, 14 Vt. 228; *Cook v. Southwick*, 9 Tex. 615; *Burton v. Hansford*, 10 W. Va. 470; *Strong v. Ricker*, 16 Vt. 554; *Baker v. Briggs*, 8 Pick. 122; *Sill v. Leslie*, 16 Ind. 236; *Good v. Martin*, 17 Am. Law Reg. 111; *Rey v. Simpson*, 22 How. (U. S.) 341; *Seymour v. Mickey*, 15 Ohio St. 515; *Perkins v. Catlin*, 11 Ct. 213; *Carroll v. Weld*, 13 Ill. 682; *Clark v. Merriam*, 25 Ct. 576; *Smith v. Finch*, 2 Scam. (Ill.) 321; *Harris v. Pierce*, 6 Ind. 162; *Boynton v. Pierce*, 79 Ill. 145; *Levi v. Mendell*, 1 Duvall (Ky.) 77;

*Leech v. Hill*, 4 Watts (Pa.) 448; *Chandler v. Westfall*, 30 Tex. 475; *Lacy v. Lofton*, 26 Ind. 324; *Pierse v. Irvine*, 1 Minn. 369; *Browning v. Merritt*, 61 Ind. 425; *Thompson v. Taylor*, 12 R. I. 109; *Martin v. Marshall*, 60 Vt. 321; *Harrison v. McKim*, 18 Iowa 485. In *Kellogg v. Dunn*, 2 Met. (Ky.) 215, it was held that a blank indorser could not be shown by parol to be a joint maker, because that would be to contradict the instrument. And in *Hall v. Newcomb*, 7 Hill (N. Y.) 416, it was said, on the same ground, that parol evidence would not be received to show that the blank indorser of a note intended to become a guarantor. For cases at



some liability, but what liability the writing does not in terms show. The parol evidence does not, therefore, contradict the terms of any writing. It merely establishes a contract which is consistent with the writing. It has been said that such instruments are anomalous, and, the law not fixing the relation of the indorser, the intention of the parties controls. Again, it has been held that the introduction of parol evidence in such cases is a well-settled exception to the rule which forbids written instruments to be contradicted or varied by parol, and is a necessity for the convenience of commerce. In a suit against the indorser of a note, he offered to prove by parol that he indorsed it as surety, and that it was understood between him and the creditor, at the time the indorsement was made, that the note was to be paid by him out of money which he might collect from accounts of the principal then in his hands. The code provided that parol evidence should not be received beyond or against a written act. Held, the evidence was admissible. The court said: "The evidence offered was neither to contradict nor explain a written instrument, but to prove a collateral fact or agreement in relation to it."<sup>45</sup> With reference to the reception of parol evidence to explain a blank indorsement, another court has said: "Nor does this position impugn the doctrine that written contracts are not to be varied by parol, for here is no contract in writing. There is evidence of a contract of some kind, but its particular terms are not given on the paper, but are left to be ascertained by parol."<sup>46</sup> Where the payee of a bill of exchange brings suit against the two drawers, one of whom is served with process and the other not, the one who is served may at the trial introduce parol evidence to show that he and the plaintiff, by a prior arrangement between themselves, were, when they severally drew and indorsed the bill, joint sureties for the accommodation of the other drawer, and by such proof defeat the action, if he has paid upon the bill an amount equal to that paid by the plaintiff.<sup>47</sup> Where a note was indorsed in blank by a stranger to it, and the holder wrote over the indorsement a

variance with the text, see *Mason v. Burton*, 54 Ill. 349; *Beattie v. Browne*, 64 Ill. 360. Though see *Jones v. Albee*, 70 Ill. 34.

<sup>45</sup> *Dwight v. Linton*, 3 Rob. (La.) 57, per Murphy, J.

<sup>46</sup> *Barrows v. Lane*, 5 Vt. 161, per Phelps, J.

<sup>47</sup> *Kelly v. Few*, 18 Ohio 441.



guaranty with waiver of notice, when such was not the agreement upon which the indorser signed, it was held that this did not, in the absence of fraud, vitiate the agreement actually made; and that such agreement might be recovered upon, notwithstanding the erroneous indorsement. The court said there was no alteration of a written contract, because there was no written contract to be altered. There was only a blank indorsement, and the liability assumed by the indorser depended upon the agreement of the parties, and this was not affected by the erroneous indorsement.<sup>48</sup>

**§ 202. When indorsement in terms expresses liability of indorser, he is held according to such terms.**—Where the indorsement in terms expresses the liability intended to be assumed by the indorser, there is no room for extraneous evidence or presumptions of law, and he will be held to the expressed liability, and to that only. Thus, where the indorsement by a stranger to a note was, "I guaranty the payment of the within note," it was held he was a guarantor only and not a maker or surety.<sup>1</sup> The payee of a note who signs his name to these words written on the back thereof, "I hereby guaranty the within note," is not liable thereon as indorser, but as guarantor.<sup>2</sup> The legal holder of a note, but not the payee, indorsed upon it, "I warrant this note collectible when due." Held, he was a guarantor and not an indorser.<sup>3</sup> Two parties were bound to another as principal and surety. The note on which they were liable was due, and the creditor, who was pressing for payment, offered to take the notes of a third person, held by the principal, if the principal and surety would indorse such notes. This was done, the principal indorsing in blank, and the surety thus: "Sam'l K. Allen as security."

<sup>48</sup> Seymour v. Mickey, 15 Ohio St. 515. See also Riley v. Gerrish, 9 Cush. 104; Josselyn v. Ames, 3 Mass. 274; Sylvester v. Downer, 20 Vt. 355; Tenney v. Prince, 4 Pick. 385. On the same principle it was held that where a note was indorsed by a stranger after its maturity in consideration of forbearance, such indorsement imported a guaranty of the payment of it. Scott v. Calkin, 139 Mass. 529.

<sup>1</sup> Oxford Bank v. Haynes, 8 Pick. 423. An indorsement upon a certificate of deposit, viz.: "I hereby guaranty the payment of the within certificate," is a contract of guaranty. Nat. Loan & Bldg. Society v. Lichtenwalner, 100 Pa. St. 100.

<sup>2</sup> Belcher v. Smith, 7 Cush. 482.

<sup>3</sup> Benton v. Fletcher, 31 Vt. 418. To a contrary effect when the express guarantor was the payee, see Partridge v. Davis, 20 Vt. 499.

Held, Allen was not liable as guarantor.<sup>4</sup> An engagement indorsed on a bill or promissory note, under seal, for \$500, of the same date with the note, was as follows: "I hereby acknowledge to be security for the within amount of \$500 until satisfactorily paid by" W A. Held, the indorser was liable as surety and not as guarantor. The court said: "The word security has an established and well-known meaning in the minds of most people, and indicates an obligation to stand for the sum absolutely, unless discharged by the supine negligence of the obligor after notice. It is in broad contrast with the word guaranty, which imports a conditional liability if due steps are taken against the principal."<sup>5</sup> Where the indorsement on the back of a note was, "I transfer the within note to \* \* (A) and guaranty the payment of the same," it was held that this, being a guaranty in terms, could not be recovered on as a blank indorsement. "There is no implication of a promise where one is expressed."<sup>6</sup> Where the payee of a note indorsed it as follows, "I assign the within note to \* \* (A) and warrant the solvency of the maker," it was held he was not liable as a general indorser, but that his liability was restricted by the special terms of his indorsement.<sup>7</sup> Where strangers to a note, at the time it was made, indorsed it as follows: "We guaranty payment," it was held they were guarantors and not sureties, and could not require the holder to sue the maker, as provided by statute in the case of sureties.<sup>8</sup> One who places his name on the back of a promissory note, at the time of its execution, designating himself as surety, is held liable as surety, originally and jointly with the maker, and not as an indorser.<sup>9</sup>

**§ 203. Liability of indorsers under special indorsements and circumstances.**—The owner of a negotiable note payable to another party, and not transferred by indorsement, sold and delivered it for value, indorsing upon it his name, and, in addition, the words "Holden thirty days." Held, he was liable to pay the note on condition that payment was demanded of the maker, and he was notified of the maker's default, within

<sup>4</sup> Allen v. Coffil, 42 Ill. 293.

<sup>7</sup> Turley v. Hodge, 3 Humph.

<sup>5</sup> Marberger v. Pott, 16 Pa. St. 9, (Tenn.) 73.  
per Coulter, J.

<sup>8</sup> Sample v. Martin, 46 Ind. 226.

<sup>6</sup> Snevily v. Ekel, 1 Watts & Serg.  
(Pa.) 203.

<sup>9</sup> Phillips v. Cox, 61 Ind. 345.

thirty days, and not otherwise.<sup>10</sup> A, B and C signed a note payable to D, and B and C added to their names the word "surety." E indorsed the note in blank, and it was discounted by D and the money paid to E. In the absence of all evidence on the subject, it was held that E was the surety of the other parties to the note, and that he was discharged by time given them.<sup>11</sup> A stranger to a note indorsed it as follows: "I assign the within note as security to Charles C. Jones." Jones was the payee of the note, and the indorsement was made subsequent to the maker of the note. Held, the indorser was not a joint maker, and could not be sued jointly with the maker.<sup>12</sup> It has been held that one who purchases an undorsed negotiable note, and afterwards writes his name with the word "holden" on its back and sells it for value, is chargeable as guarantor.<sup>13</sup> A wrote on the back of a note, then two years past due, the following: "We waive time, notice and protest, and guaranty the payment of the within." Held, such guarantor did not assume payment of the debt at any particular time, and the circumstances of the guaranty might be alleged and proved to explain when payment was to be made.<sup>14</sup>

**§ 204. Liability of accommodation parties to bills of exchange—Special cases.**—It has been held that the indorsers of an accommodation bill of exchange are not joint sureties, but are liable to each other in the order of their becoming parties.<sup>15</sup> Where there were two drawers of a bill of exchange, and one of them was surety only, and the drawee, having no funds of the principal in his hands, accepted and paid the bill with knowledge of the fact of suretyship, and afterwards sued the drawers to recover the amount paid, it was held the law raised an implied promise to pay on the part of the principal, but there could be no recovery against the surety, even though he had signed as drawer, with the express intention of becoming bound as surety. A bill of exchange never imports an

<sup>10</sup> Knight v. Knight, 16 N. H. 107.

<sup>11</sup> Bank of Orleans v. Barry, 1 Denio 116.

<sup>12</sup> Goode v. Jones, 9 Mo. 866.

<sup>13</sup> Irish v. Cutter, 31 Me. 536. See also to similar effect, Bray v. Marsh 75 Me. 452.

<sup>14</sup> Donley v. Bush, 44 Tex. 1.

<sup>15</sup> Williams v. Bossom, 11 Ohio 62. Holding the accommodation acceptor of a draft to be a principal, see Marsh v. Low, 55 Ind. 271.

obligation on the drawer to pay the amount to the drawee. The contract was not sufficient to effectuate the intention and render the surety liable.<sup>16</sup> A drew a bill of exchange on B, which B refused to accept unless A procured some responsible party to sign the bill with him. A then procured C to sign the bill with him as drawer, C being merely a surety, and B knowing that fact. When the bill became due B paid it out of his own funds and sued A and C for indemnity. C claimed that he was not liable, because the bill, having been paid by the party on whom it was drawn, was dead, and there could be no recovery on it, and there was no implied assumpsit against him. The court held C was liable. "He must be taken to have put his name on the bill in view of the well-established principle of law that if the drawer has no funds in the hands of the drawee to meet the payment of the bill at maturity, in consequence of which the latter has it to pay with his own funds, a right of action instantly arises in his favor, not, indeed, upon the bill, but in assumpsit, to recover the money thus advanced, founded upon an implied promise. This is one of the known fixed legal consequences, resulting from the relation of drawer. \* \* Upon general principles of law, the liability of a surety is co-extensive with that of the principal, and it is wholly unimportant whether the liability arises out of an express or implied understanding on the part of the principal. The surety is as much bound for the implied as for the express promises and undertakings of his principal; in this respect the law knows no distinction."<sup>17</sup> It has been held that the accommodation acceptor of a bill of exchange is not a surety, and is not discharged by time given the drawer. The court said: "He who accepts a bill, whether for value or to serve a friend, makes himself at all events liable as acceptor, and nothing can discharge him but payment or release."<sup>18</sup> A drew a draft at two months, addressed to E, payable to the order of B, and concluding as follows: "Charge the same to the account of your obedient servant." It was signed first by

<sup>16</sup> Wing v. Terry, 5 Hill (N. Y.) Denio 205, reversing Suydam v. Westfall, 4 Hill 211.

<sup>17</sup> Nelson v. Richardson, 4 Sneed 18 Fentum v. Pocock, 5 Taunt. (Tenn.) 307, per McKinney, J. To 192; Id., 1 Marsh. 14, per Mansfield, same effect, see Dickerson v. Turner, C. J.

<sup>18</sup> Ind. 4; Suydam v. Westfall, 2

A, and then by C, the word "surety" being added to C's signature, and then as follows: D, "surety for the above surety." D signed the draft without C's knowledge. B discounted the draft and sent it to E, who paid it without funds, under an agreement to that effect with A; afterwards D paid the draft to E, and sued C for indemnity. Held, he was not entitled to recover. C was not liable by the terms of the draft to the acceptors, and was liable to nobody on the draft unless the acceptors failed to pay, being in effect their sureties. Neither was he liable for money paid to his use, because he never desired the acceptors to advance any money for him.<sup>19</sup>

<sup>19</sup> Wright v. Garlinghouse, 26 N. I. R. A. 247, and note, as to the liability of a surety for a surety. Compare Bulkeley v. House, Y. 539. 62 Conn. 459, 26 Atl. Rep. 352, 21

## CHAPTER VIII.

### OF THE NOTICE AND DEMAND NECESSARY TO CHARGE A GUARANTOR.

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| <p>§ 205. When guarantor must be notified of acceptance of guaranty—Reasons therefor.</p> <p>206. Writer of general letter of credit entitled to notice of its acceptance.</p> <p>207. When writer of guaranty, addressed to a particular person, must be notified of its acceptance.</p> <p>208. When guarantor entitled to notice of acceptance of guaranty—Special cases.</p> <p>209. When guarantor entitled to notice of acceptance of guaranty—Special cases.</p> <p>210. When guarantor entitled to notice of acceptance of guaranty—Special cases.</p> <p>211. When guarantor must be notified of advances made under guaranty.</p> <p>212. When guarantor of definite liability of another not entitled to notice of acceptance of guaranty.</p> <p>213. Notice of acceptance not necessary where the guaranty is fixed and definite—Directors' guaranty of advances to corporation—Guaranty in response to creditor's request—Definite guaranty of future purchases.</p> <p>214. The same continued—Guaranty of corporation debts—Limited guaranties of</p> | <p>future payment—When guarantor not entitled to notice of acceptance of guaranty—Special cases.</p> <p>§ 215. When guarantor not entitled to notice of advances made to principal.</p> <p>216. Cases holding guarantor for indefinite amount on credit to be given, not entitled to notice of acceptance of guaranty.</p> <p>217. When guarantor entitled to notice of default of principal.</p> <p>218. When demand of payment on principal and notice of his default necessary to charge guarantor.</p> <p>219. Where the creditor's want of diligence amounts to a fraud on the guarantor, the guarantor is released pro tanto.</p> <p>220. When demand of payment on principal and notice of his default to guarantor not necessary to charge guarantor—Guaranty of promissory note, etc.</p> <p>221. When guarantor bound without notice of default of principal—Other cases.</p> <p>222. When no notice of default in payment by principal need be given guarantor of overdue debt, of lease, and of negotiable instrument by separate contract.</p> |
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§ 223. If principal be insolvent when debt becomes due, no demand on him, nor notice of his default, necessary to guarantor.

§ 224. What is the reasonable time within which notice must be given—Pleading.

225. How notice may be proved—What amounts to waiver of it.

§ 205. When guarantor must be notified of acceptance of guaranty—Reasons therefor.—A question often arising upon commercial guaranties is whether, in order to charge the guarantor, it is necessary that he be notified of the acceptance of the guaranty by the person acting upon it. When the guaranty is a letter of credit, or is an offer to become responsible for a credit which may or may not be given to another, at the option of the party to whom the application for credit is made, the great weight of authority is that the guarantor must within a reasonable time be notified of the acceptance of the guaranty.<sup>20</sup> The most satisfactory reasons exist for these decisions. It is of the highest importance to the person thus

<sup>20</sup> This is the firmly settled doctrine of the supreme court of the United States. *Edmondston v. Drake*, 5 Pet. 624; *Douglass v. Reynolds*, 7 Pet. 113; *Lee v. Dick*, 10 Pet. 482; *Adams v. Jones*, 12 Pet. 207; *Davis v. Wells*, 104 U. S. 159; *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524. These decisions have been, with few exceptions, followed and approved in the United States. *Lawton v. Maner*, 9 Rich. Law (S. C.) 335; *Sollee v. Mengy*, 1 Bailey Law (S. C.) 620; *Claffin v. Briant*, 58 Ga. 414; *Burns v. Semmes*, 4 Cranch Cir. Ct. 702; *Shewell v. Knox*, 1 Dev. Law (N. C.) 404; *Taylor v. McClung's Ex'rs*, 2 Houston (Del.) 24; *Tuckerman v. French*, 7 Greenl. (Me.) 115; *Kellogg v. Stockton*, 29 Pa. St. 460; *Bank of Illinois v. Sloo*, 16 La. (Curry) 539; *Menard v. Scudder*, 7 La. Ann. 385; *Kinchelse v. Holmes*, 7 B. Mon. (Ky.) 5; *Allen v. Pike*, 3 Cush. 238; *Mussey v. Rayner*, 22 Pick. 223; *Rankin v. Childs*, 9 Mo.

665; *Mayfield v. Wheeler*, 37 Tex. 256; *McCollum v. Cushing*, 22 Ark. 540; *Howe v. Nickels*, 22 Me. 175; *Geiger v. Clark*, 13 Cal. 579; *Cook v. Orne*, 37 Ill. 186; *Milroy v. Quinn*, 69 Ind. 406; *Lowe v. Beckwith*, 53 Ky. (14 B. Monroe) 150, 58 Am. Dec. 659; *Ford Eaton & Co. v. Harris*, 102 Ky. 169, 43 S. W. Rep. 199; *Greer Machine Co. v. Sears*, 23 Ky. Law Rep. 2025, 66 S. W. Rep. 521, cited and approved in *Hughes v. Roberts, Johnson & Rand Shoe Co.*, Ky. App., March, 1903, 72 S. W. Rep. 799, in which case there was an express waiver of notice. *Farmers Bank v. Tatnall*, 7 Houston (Del.) 287, 31 Atl. Rep. 879. In *Schweitzer v. Fishel*, 13 Hawaii 690, defendant at Honolulu wrote to plaintiff in San Francisco, "Let Mrs. Turner select about \$500 to \$700 worth of goods and see to me for payment." Held, that he was a guarantor and not liable without proof of notice to him of the acceptance of his guaranty. See also



offering his credit that he should know he is to be looked to for payment. Knowing that fact he can regulate his dealings with his principal accordingly. He will have an opportunity to secure himself and guard against loss. Concerning this subject it has been said: "It would, indeed, be an extraordinary departure from that exactness and precision which peculiarly distinguish commercial transactions, which is an important principle in the law and usage of merchants, if a merchant should act on a letter of this character and hold the writer responsible without giving notice to him that he had acted on it."<sup>21</sup> Another reason much relied upon by the courts is that the transaction only amounts to an offer to guaranty until the party making the offer is notified of its acceptance, when the minds of the parties meet and the contract is completed. Where the transaction is admitted to amount only to an offer to guaranty, it is universally held that in order to charge the party making the offer he must within a reasonable time be notified that his offer is accepted.<sup>22</sup> The courts, however, differ more or less as to what is a guaranty and what is an offer to guaranty.

*Standard Sewing Machine Co. v. Church*, N. Dak., Dec., 1902, 92 N. W. Rep. 805, holding that a guaranty of payment for goods to be supplied to one who had been appointed plaintiff's sales agent was not binding without notice of acceptance. Following *Davis Sewing Machine Co. v. Richards*, 115 U. S. 524, 6 Sup. Ct. Rep. 173, 29 L. Ed. 480.

<sup>21</sup> *Edmondston v. Drake*, 5 Pet. 624, per Marshall, C. J.

<sup>22</sup> But see *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. Rep. 644, in which case defendant executed a guaranty "to the extent of ten thousand dollars on obligations contracted and to be contracted by Murphy Brothers with P. Lennox & Co. for a period of three years with the understanding that P. Lennox & Co. give Murphy Brothers a permanent credit of at least twenty thousand dollars in leather for the

above period of three years," and thereupon Lennox & Co. delivered their previously executed agreement with Murphy Brothers to give them a permanent credit of \$20,000 for three years, or until Murphy Brothers became insolvent, provided Murphy Brothers buy at least \$25,000 per year. It was held that the guarantor was liable without notice of acceptance. "He already had all the notice he needed," said Holmes, J., "and to send him notice would have been merely a formal act, which is not required, either by custom or by the theory of contract. There is no universal doctrine of the common law, as understood in this commonwealth, that acceptance of an offer must be communicated in order to make a valid simple contract. \* \* \*" Citing *inter alia* *First National Bank v. Watkins*, 154 Mass. 385, 387, 388, 28 N. E. Rep. 275; *Bishop v. Eaton*, 161 Mass. 496, 499,

§ 206. **Writer of general letter of credit entitled to notice of its acceptance.**—The rule that a guarantor of future credits is entitled to notice applies with special force to general letters of credit: “For it might otherwise be impracticable for the guarantor to know to whom and under what circumstances the guaranty attached and to what period it might be protracted.”<sup>23</sup> A party gave a letter of credit to another, agreeing to guaranty payment for purchases made by that other, to a certain amount. The party purchased goods on the strength of the guaranty, but no notice was given the guarantor. Held, he was not liable. The court said: “A party giving a letter of guaranty has a right to know whether it is accepted, and whether the person to whom it is addressed means to give credit on the footing of it or not. It may be most material, not only as to his responsibility, but as to his future rights and proceedings. It may regulate, in a great measure, his course of conduct and his exercise of vigilance in regard to the party in whose favor it is given.”<sup>24</sup> A wrote to B that if he would assume the debt of C and procure the discharge of C’s bail, he, A, would execute his note for £50. B complied with the request, but did not notify A of the fact. Held, A was not liable. The court said: “When a proposition is made by a man for a thing to be done for himself, he must know, when done, that it is done on his proposition. But when he proposes his responsibility for a thing to be done for another, he may not know that it is done, or, even if he does, he will not know whether it was done on his proposition, or on the sole credit of the third person, or on some other security. \* \* If he is to stand as surety, he must have the right to keep watch of his principal and his circumstances.”<sup>25</sup> A gave B a letter of credit addressed to C in a distant city, and agreeing to guaranty any purchases which might be made by B of C, or any person to whom B might be introduced by C. Several parties sold goods on the strength of the guaranty, but no notice was given to A. Held, A was not bound.<sup>26</sup> A writing was as fol-

37 N. E. Rep. 665; Langdell’s Summary of Law of Contract, § 2. Compare Manry v. Waxelbaum Co., 108 Ga. 14, 33 S. E. Rep. 701, note 23 to § 213, §§ 213, 214, post, note 14 to § 221.

<sup>23</sup> Per Story, J., in Adams v. Jones, 12 Pet. 207.

<sup>24</sup> McCollum v. Cushing, 22 Ark. 540, per English, C. J.

<sup>25</sup> Oaks v. Weller, 13 Vt. 106, per Collamer, J. See also Peck v. Barney, 13 Vt. 93.

<sup>26</sup> Kinchelse v. Holmes, 7 B. Mon. (Ky.) 5. To the same effect, when

lows: "The bearer, \* \* wishing to travel with my son, please furnish with a suitable stock, and all will be right." Held, an offer to guaranty, and that the writer was not liable unless the proposition was accepted and he notified of such acceptance. The court said: "A mere offer, not accepted, is not a contract; and a mere mental acceptance of a proposition, not communicated to the party to be charged, is not an acceptance at all in the eye of the law. It is important to the interests of the business community that every one should know the extent of his liabilities, in order that he may take the proper measures to meet them."<sup>27</sup> A banker being in failing circumstances and anticipating a run on his bank, certain persons signed and published an instrument as follows: "We, the undersigned, agree to guaranty the depositors of Wm. E. Culver in the payment in full of their demands against said Culver, on account of money deposited with him. We have entire confidence in his ability to meet all demands on him." A depositor brought suit on this guaranty, alleging that he had a large amount of money in the bank when the guaranty was signed, and was about to withdraw it, but relying on the guaranty he permitted it to remain. Held, that under this state of facts such depositor must aver and prove notice to the guarantors of the acceptance of the guaranty, and a general averment of notice would not be sufficient. The court said: "Where the offer is to guaranty a debt for which another is primarily liable in consideration of some act to be performed by the creditor, mere performance of the act is not sufficient to fix the liability of the guarantor, but the creditor must notify the guarantor of his acceptance of the offer, or of his intention to act upon it. \* \* The rule is that a person thus proposing to become surety for another is not bound to inquire as to the acceptance of his proposal, but the creditor must show reasonable notice."<sup>28</sup>

**§ 207. When writer of guaranty, addressed to a particular person, must be notified of its acceptance.**—The rule is generally held to be the same where the writing is addressed to a particular person and is acted on by him. Thus, where a guar-

the guaranty was a continuing one,      <sup>27</sup> Kellogg v. Stockton, 29 Pa. St. 460, per Lewis, C. J.  
addressed to no one in particular,      <sup>28</sup> Steadman v. Guthrie, 4 Met. 385.  
see Menard v. Scudder, 7 La. Ann.      (Ky.) 147.

anty was as follows: "Gentlemen: \* \* (A and B) wish to draw on you at six and eight months; you will please accept their draft for \$2,000 and I do hereby guaranty the punctual payment of it," it was held the guarantor must be notified within a reasonable time of the acceptance of the draft.<sup>29</sup> A guaranty was as follows: "I would recommend \* \* (A) and go security for him to any reasonable amount, so you can fill his orders and feel yourself secure as when I was doing business with you." Held, the guarantor was not liable unless notified of the acceptance of the guaranty. The court said it made no difference if the guarantor had before verbally requested the creditor to give the credit, and proceeded: "It is difficult to imagine how precedent request alone can supply the place of subsequent notice since after request made and proffer of guaranty, the merchant may refuse the credit or advance craved, and without notice the surety cannot know whether he has or not."<sup>30</sup> A applied to R to purchase lumber to build a ferry-boat, and R refused to credit him without security. A mentioned the name of C as surety, and his name was acceptable. A few days afterwards A presented an order for the lumber in C's handwriting, at the foot of which was written, "Messrs. Rankins (R) will furnish the above bill as soon as possible, and I will order what more I may want for my boat in a short time. James McCurtney (A). I hereby guaranty the payment of the above bill, January 29, 1842. Wm. Childs (C)." The lumber was afterwards sold. Held, C must be notified of the acceptance of the guaranty in order to charge him.<sup>31</sup> The same thing was held where the defendants wrote to the plaintiffs as follows: "We take pleasure in commending Mr. C to you as a gentleman worthy of your confidence, and if he should have any dealing with you we hereby bind ourselves to make good and pay any amount he may be indebted to you on settlement, not exceeding \$1,500. This guaranty to remain in full force until revoked by us."<sup>32</sup> Where the writing was as follows: "For value received, I, Moses Dudley, of Chesterfield, New Hampshire, guaranty to pay

<sup>29</sup> Lee v. Dick, 10 Pet. 482. See Wanamaker v. Benn, Del., May, 1901, 50 Atl. Rep. 512, as to evidence and pleadings in such a case.

<sup>30</sup> Kay v. Allen, 9 Pa. St. 320, per Bell, J.

<sup>31</sup> Rankin v. Childs, 9 Mo. 665.

<sup>32</sup> Wardlaw v. Harrison, 11 Rich. Law (S. C.) 626.

James M. Beebe & Co., of Boston, for two thousand dollars' worth of goods delivered to Charles P. Dudley, of Lowell, when he may call for them," it was held that as the engagement related to goods to be delivered, and no time was fixed within which the delivery was to be made, it was a collateral agreement or guaranty, and not an absolute undertaking, and that the guarantor must, in order to charge him, be notified within a reasonable time of sales made under it.<sup>33</sup> Where the maker of a continuing guaranty had no notice of its acceptance for three years, he was held not liable. In an able opinion the court summarized the law on this subject as follows: "In cases of a written guaranty for a debt yet to be created, and uncertain in its amount, the guarantor should have notice in a reasonable time that the guaranty is accepted, and that credit has been given on the faith of it. \* \* The distinction is between an offer to guaranty a debt about to be created, the amount of which the party making the offer does not know, and it is uncertain whether the offer will be accepted so that he may be ultimately liable, and the case of an absolute guaranty, the terms of which are definite as to its extent and amount. In the latter case no notice is necessary to the guarantor, whereas in the former case the contract is not completed until the offer is accepted."<sup>34</sup> In an action on the following guaranty, viz.: "H. R. Horton, Esq.: If Mr. J. G. Haley contracts with you for lime and plaster, \* \* promising to pay your bills from moneys received by him for work done," \* \* I will guaranty the faithful performance of such contract with you, it was held that the guarantor was entitled to notice of the acceptance of the guaranty, and that without such notice the guaranty did not take effect; and it was also held that the guaranty was not negotiable.<sup>35</sup>

§ 208. When guarantor entitled to notice of acceptance of guaranty—Special cases.—If a promise be made to pay the debt of another, provided the creditor will take the debtor's note, payable at a distant day, the promisor must have notice that the proposition is acceded to and the note accepted, or he will not be liable on his guaranty.<sup>36</sup> The guaranty was as

<sup>33</sup> Beebe v. Dudley, 26 N. H. 249.

<sup>35</sup> King v. Batterson, 13 R. I. 117.

<sup>34</sup> Allen v. Pike, 3 Cush. 238, per Wilde, J.

<sup>36</sup> Patterson v. Reed, 7 Watts & Serg. (Pa.) 144.

follows: "F informs me that you are about publishing an arithmetic for him. I have no objection to be answerable as far as £50; for my reference, apply to B." (Signed) G T. The guaranty was written by B and signed by G T, and then B wrote at the bottom, "Witness to G T——. B." It was forwarded by B to the plaintiffs, who never communicated their acceptance of it to G T. Held, G T was not liable. The court said: "The transaction cannot be tortured into a consummate and perfect contract. The contract was not complete till notice; and with regard to the agency of Brooke (B), there is nothing to show that the plaintiffs might not have been dissatisfied with his opinion of the defendant's solvency. \* \* The subsequent words render the point quite clear that the defendant only intended to be bound by the instrument in case upon inquiry the plaintiffs should be satisfied with regard to his solvency."<sup>87</sup> A wrote to B that C desired the loan of \$15,000, and if B would loan it to C he would be responsible

<sup>87</sup> Per Lord Abinger, C. B., and Parke, B., in *Mozley v. Tinkler*, 1 Crompt., Mees. & Ros. 692; *Id.*, 5 Tyrwh. 416; *Id.*, 1 Gale 11. In *Barnes Cycle Co. v. Schofield*, 111 Ga. 880, 36 S. E. Rep. 965, A made a contract with B stipulating therein that it should not be binding until B approved it in writing, and C for a valuable consideration wrote upon it a guaranty of payment of all sums that might be owing by A under the contract. B's agent signed the contract, but it was never approved in writing by B. Held, that the writing was a mere proposal by A to B, and that the writing by C was a mere offer of guaranty which was not binding without acceptance and notice thereof to the guarantor. *Farmers Bank v. Tatnall*, 7 Houston (Del.) 287, 31 Atl. Rep. 879, was covenant against the maker of the following writing, signed by defendant: "I, Henry L. Tatnall of etc. do hereby request that the Farmers Bank of etc. do from time to time discount to the credit of the firm of

H. L. Tatnall & Co. such negotiable paper as they may offer to said bank, whether as maker or endorser; and in consideration of the discounting by the said bank at any time hereafter of any such negotiable paper, I do hereby, for myself, my executors and administrators, guarantee to the said bank the prompt and full payment at maturity of any and all such paper so to be discounted as aforesaid. Witness my hand and seal this 14th day of February, A. D. 1882." Held, on demurrer, that a declaration that set up defaults of the party guaranteed occurring in October and December, 1882, "of which the defendant on the first day of April, 1883, had notice," and that did not aver any notice of acceptance of the guaranty, was bad. The court said (p. 299) that "the writing is to be treated as an offer to become bound. Until it is accepted it is not binding upon the offerer" and the party receiving it is bound to give notice of acceptance within a reasonable time.



for that amount, and would leave, as collateral for the loan, a mortgage for \$15,000, then in B's hands, and that if B did not feel like loaning the amount he would assist C to get it elsewhere. Held, this was a guaranty, or an offer to guaranty, on the part of A, and, in order to render him liable for any advances made, he must have notice of acceptance within a reasonable time. The court said: "There is a marked difference between an overture or proposition to guaranty, and a simple contract of suretyship. The one is a contingent liability. The other is an actual undertaking."<sup>38</sup> A wrote a letter to the plaintiffs, promising to accept and pay bills to the extent of \$50,000, drawn on them by B, of Illinois, and discounted by the plaintiffs. C, by an indorsement on the letter, guarantied the payment of such bills as might be drawn in pursuance thereof. Bills to the extent of \$37,000 were drawn, not paid, and protested. No notice was given to the guarantor of the acceptance of the guaranty, or the advances made thereon, until after the dishonor of the bills. Held, the guarantor was entitled to notice of the acceptance of the guaranty, and of the advances made under it, and that he was not liable, for want of such notice.<sup>39</sup> A party being about to purchase goods exhibited to the seller a letter from a third party, addressed to the purchaser, containing, among other things, the following: "For the amount of such goods as you wish to purchase on six months' credit, not exceeding one thousand dollars, I will guaranty at two and a half per cent." Upon the faith of this he obtained goods, giving therefor his promissory note, payable in six months, with grace. Held, this was not an authority to the purchaser to bind the writer at all events, nor was the purchaser thereby constituted his agent for the purpose of receiving notice of its acceptance, but that it was a case of collateral guaranty, in which seasonable notice of acceptance was necessary to charge the guarantor.<sup>40</sup> It has been held

<sup>38</sup> Central Savings Bank v. Shine, 48 Mo. 456, per Wagner, J. See also Taylor v. Shouse, 73 Mo. 361.

<sup>39</sup> Bank of Illinois v. Sloo, 16 La. (Curry) 539. In Evans v. McCormick, 167 Pa. St. 247, 31 Atl. Rep. 563, plaintiff telegraphed defendant: "Bierly's purchases amount to about \$700. Will you guaranty pay-

ment?" To which defendant answered: "I will guaranty payment of Bierly bill." Held, that defendant was not liable for the price in the absence of proof of notice to him of acceptance of his guaranty.<sup>40</sup> Bradley v. Cary, 8 Greenl. (Me.) 234.



that in an action for breach of an agreement which is in the nature of a guaranty, if the circumstances alleged as the foundation of the defendant's liability are more properly within the knowledge of the plaintiff than the defendant, notice thereof should be averred in the declaration, and proved on the trial.<sup>41</sup>

§ 209. When guarantor entitled to notice of acceptance of guaranty—Special cases.—Where a party gave a letter of credit to another, addressed to certain merchants, stating: "Should you be disposed to furnish him with such goods as he may call for, from three hundred to five hundred dollars' worth, I will hold myself accountable for the payment, should he not pay as you and he shall agree," it was held to be a collateral undertaking, and that the guarantor was entitled to notice of the acceptance of the guaranty and the amount of credit given.<sup>42</sup> Where an offer of guaranty of rent for a year was made in writing, accompanied by a request in writing for an answer, it was held that the party making the offer must be notified of its acceptance, in order to charge him.<sup>43</sup> Part of a letter written by A to B, concerning a debt already contracted by third parties, was as follows: "I wish you to show him (James Hale) some lenity, as much as you think proper for the collection of it from Mr. Lovejoy, and I will, if you please, stand responsible for the payment of it at the time you and James may agree on." Held, this was an offer to guaranty, and not a completed contract; that the writer of the letter was entitled to notice of the acceptance of his offer within a reasonable time, and not having received any such notice for over two years, he was not bound.<sup>44</sup> A party addressed to certain merchants a note, stating that he would be responsible at the end of three years, for goods sold to F, to the amount of \$1,000. The merchants sold F goods on the strength of the guaranty to the amount of about \$1,000, but did not notify the writer of the note of the acceptance of the guaranty, nor of the amount sold, till two years and eight months after the transaction. Held, the writer of the note was not liable. The

<sup>41</sup> Lewis v. Bradley, 2 Ired. Law (N. C.) 303.

<sup>42</sup> Rapelye v. Bailey, 3 Conn. 438.

<sup>43</sup> Valloton v. Gardner, R. M. Charlt. (Ga.) 86. To similar effect, see Thomas v. Davis, 14 Pick. 353.

<sup>44</sup> Beekman v. Hale, 17 Johns. 134.

To the effect that, when the letter is an offer to guaranty, the writer must be notified of its acceptance, see Fellows v. Prentiss, 3 Denio 512.

court said: "Not only is this notice essential to that exactness and precision, as well as to the good faith and confidence, which should characterize mercantile contracts, but it is equally demanded by a regard to the rights and interests of the defendant; and the most unjust results would follow were a contrary doctrine to prevail. He ought to have the notice to enable him to take such prudential measures as would guard him against eventual loss; to exercise a watchful supervision over the proceedings of him for whom he became responsible; to make payment, if necessary, and to secure himself by suit."<sup>45</sup> A letter, after introducing a party, proceeded as follows: "Any favor you may show in introducing him to the different houses, so that he may be able to fill his orders, will be highly appreciated by him, and will be indorsed by me, if necessary, for the amount of his purchases." Goods were sold on this letter, for which the purchaser gave his individual note, due in six months. No notice was given the writer of the letter till after the note was due. Held, he was not liable, his agreement being to guaranty if necessary; and he should have been promptly notified of the sale, or requested to guaranty the note.<sup>46</sup>

**§ 210. When guarantor entitled to notice of acceptance of guaranty—Special cases.**—Where I gave a writing to P providing that he would indorse any bill or bills which S might give to P in part payment of an order for certain goods then executing for him, I to allow £5 per cent on the amount of the bills for the guaranty; and in part payment for the goods S gave P a bill at eighteen months, which the latter kept for seventeen months and ten days, and then, finding that S was insolvent, applied for the first time to I for his indorsement, tendering the amount of commission, it was held I was not liable. The writing was a simple offer to guaranty upon being paid a consideration. If P intended to accept the offer he should have done so within a reasonable time, and paid the commission.<sup>1</sup> A wrote to B recommending certain parties and giving certain explanations, and added at the end of his letter: "If in addition to the foregoing explanation you shall

<sup>45</sup> *Craft v. Isham*, 13 Conn. 28, per Bissell, J.

<sup>46</sup> *Mayfield v. Wheeler*, 37 Tex. 256.

<sup>1</sup> *Payne v. Ives*, 3 Dow. & Ryl. 664; *Pearsell Mfg. Co. v. Jeffreys*, Mo. App. (Kans. Cy.), Apl., 1902, 67 S. W. Rep. 706.

require any individual guaranty, I shall have no objection to give you that pledge." Held, the letter was not a guaranty, but a statement that if an application was made a guaranty would be given, and no guaranty having been required for more than two years, the inference was that the credit was given solely to the principal, and that the offer to guaranty was not accepted.<sup>2</sup> H, requiring some spirits for the purposes of his trade, received from his friend, the defendant, a letter of introduction to the plaintiff, a distiller, to whom the defendant was well known, but H an entire stranger. There had not been any previous application by H to the plaintiff for credit. The letter was as follows: "The bearer is Mr. Joseph Hugill, a friend of mine, who wishes to purchase some proof spirits, which he hears that you manufacture. If you can arrange matters to your mutual satisfaction I am sure that Mr. Hugill will prove a reliable person to deal with. I will myself, with pleasure, become security for anything he may be disposed to give an order for." Held, this was not a guaranty, but an offer to guaranty, and in order to charge the writer of the letter it was necessary to notify him of the acceptance of the offer.<sup>3</sup> A guaranty was as follows: "Wm. Mitchell, Jr., will probably call on you to purchase your horse, and should you conclude to sell you can do so. Take his note, and I will be responsible for the payment on his return." Held, that in order to hold the guarantor he must be notified of the sale. The court said: "In an action upon a guaranty, unless the instrument given in evidence as such purports to be an absolute and conclusive engagement, the plaintiff must show that he gave notice to the defendant that he accepted it as such."<sup>4</sup> The plaintiff having declined to furnish goods to A's house on his credit alone, a writing was given to A by the defendant to this effect: "I understand A & Co. have given you an order for rigging, etc. I can assure you, from what I know of A's honor and probity, you will be perfectly safe in crediting them to that amount; indeed, I have no objection to guaranty you against any loss from giving them this credit." This writing was handed over by A to the plaintiffs, together with a guaranty from another house, which they re-

<sup>2</sup> *Stafford v. Low*, 16 Johns. 67.

<sup>4</sup> *Smith v. Anthony*, 5 Mo. 504,

<sup>3</sup> *Kastner v. Winstanley*, 20 Up. note 1 to § 210; Cf. *Globe Ptg. Co. v. Bickley*, 73 Mo. App. 499 (St. L.).

quired in addition, and the goods were thereupon furnished, but the defendant was not notified that they were furnished nor that he was relied upon for payment. Held, the defendant was not liable. The writing was not a perfect and conclusive guaranty, but only a proposition tending to a guaranty.<sup>5</sup> A person who promises that, if the creditors of an embarrassed debtor will grant an extension of time he will guaranty the punctual payments of the debts pursuant to the extension, must be given notice by the creditors of their acceptance of the guaranty, otherwise he will not be liable thereon; and the fact that there were over twelve hundred creditors was held not to defeat the rule on the ground of inconvenience in getting notice from all.<sup>6</sup>

**§ 211. When guarantor must be notified of advances made under guaranty.**—When the guaranty relates only to a single transaction, notice of its acceptance usually conveys to the guarantor knowledge of the extent of his liability; and in such case no other notice is necessary. Where, however, the guaranty is a continuing one, notice of its acceptance does not have this effect. In such case the same reasons which require notice of the acceptance of the guaranty also require notice of the advances made under it. It has accordingly been held, and is

<sup>5</sup> *McIver v. Richardson*, 1 Maule & Sel. 557. And to similar effect, see *Sutherland v. Patterson*, 4 Ont. (Can.) 565. For further cases holding a guarantor entitled to notice of the acceptance of the guaranty, see the following: *Wills v. Ross*, 77 Ind. 1; *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308; *Duncan v. Heller*, 13 S. C. 94; *Coe v. Buehler*, 110 Pa. St. 366; *Newman v. Streater Coal Co.*, 19 Brad. (Ill. App.) 594.

<sup>6</sup> *Gardner v. Lloyd*, 110 Pa. St. 278, 2 Atl. Rep. 562, where the cases are reviewed by Green, C. J. This case was cited and followed in *Acme Manufacturing Co. v. Reed*, 197 Pa. St. 359, 47 Atl. Rep. 205, in which case Schlaudecker sent a written order for bicycles to plaintiff, stating therein that he would consider it accepted unless plaintiff notified

him to the contrary within 30 days. Defendant endorsed on the order a guaranty of performance of the "within contract." There was no notice of acceptance to the guarantor. Held, that the guarantor was not liable. The court said that "the guaranty was that, if the appellant would accept Schlaudecker's order, the performance by him of his part of the contract would be guaranteed. \* \* It was clearly the case of a contract to be entered into by the guarantee in the future, depending upon its will. Upon the making of the contract, and notice of the acceptance of the guaranty by the company for the fulfilment by Schlaudecker, and not before, the guarantor would incur liability."

well established, that in the case of a continuing guaranty, not only must notice of acceptance be given, but also, within a reasonable time after all the transactions are closed, the guarantor must be notified of the amount due under the guaranty.<sup>7</sup> As to this matter, the following has been said by an eminent judge: "All such cases must stand upon their own circumstances, and do not seem to furnish just grounds for a general rule."<sup>8</sup> A notice of the amount due after all the transactions are closed is sufficient, and it is not necessary to give notice of each successive sale as it is made.<sup>9</sup> The maker of a continuing guaranty was duly notified of its acceptance. Goods were sold under it, but no notice of the amount so sold nor of default in payment by the principal was given till two years after the close of the transaction, when the principal had become insolvent. Held, the guarantor was not liable. The court said: "Good faith, we think, requires that, when a party gives credit to another on the responsibility or undertaking of a third person, he should give immediate notice to the latter of the extent of the credit, especially when, as in the case under consideration, a continuing guaranty is given without limitation of the time of its continuance, or of the amount of credit for which the guarantor might be held responsible."<sup>10</sup> A, B and C were in partnership. D gave A and B a guaranty to be responsible for one-half of any loss which they might suffer in the business with C. The partnership having been dissolved, it was held that D was not liable on his guaranty, unless he had been notified within a reasonable time after the dissolution of the partnership of any loss within the scope of his undertaking. The guaranty was for an uncertain sum, and its duration was not fixed, and therefore the amount to be paid, and when it was due, could only be ascertained by winding up the concern, which was a matter over which the guarantor had no control, and he was consequently entitled to notice.<sup>11</sup>

<sup>7</sup> Douglass v. Reynolds, 7 Pet. 113; Montgomery v. Kellogg, 43 Miss. 486; Howe v. Nickels, 22 Me. 175; Wildes v. Savage, 1 Story 22; Cremer v. Higginson, 1 Mason 323; Norton v. Eastman, 4 Greenl. (Me.) 521; Killian v. Ashley, 24 Ark. 511; Babcock v. Bryant, 12 Pick. 133; Thomas v. Davis, 14 Pick. 353.

<sup>8</sup> Wildes v. Savage, 1 Story 22, per Story, J.

<sup>9</sup> Lowe v. Beckwith, 14 B. Mon. (Ky.) 150.

<sup>10</sup> Clark v. Remington, 11 Met. (Mass.) 361, per Wilde, J.

<sup>11</sup> Curtis v. Dennis, 7 Met. (Mass.) 510.

§ 212. When guarantor of definite liability of another not entitled to notice of acceptance of guaranty.—When one directly binds himself to be responsible for another's contract already made, and of which he has knowledge when he signs, no notice of the acceptance of the guaranty is necessary.<sup>12</sup> This principle has been applied to a case where a party guaranteed the payment for sewing machines to be furnished another under an existing contract of which he knew, and it was held that no notice of acceptance was necessary to charge the guarantor.<sup>13</sup> The same thing was held where the guaranty of a lease was made at the same time the lease was executed, and was a part of the consideration for the execution of the lease.<sup>14</sup>

<sup>12</sup> *Wills v. Ross*, 77 Ind. 1; *Snyder v. Click*, 112 Ind. 293; *Nading v. McGregor*, 121 Ind. 465; *Furst & Bradley Manuf. Co. v. Black*, 111 Ind. 308; *Wilcox v. Draper*, 12 Neb. 138; *Klosterman v. Olcott*, 25 Neb. 382; *Milroy v. Quinn*, 69 Ind. 406; *Wells, Fargo & Co. v. Davis*, 2 Utah Terr. 411; *Wire v. Miller*, 45 Ohio St. 388; *London Bank v. Parrott*, 125 Calif. 472, 58 Pac. Rep. 164. Neither is notice of acceptance necessary when the guaranty is executed contemporaneously with the contract guaranteed. *Wright v. Griffith*, 121 Ind. 478, where a guaranty of payment was endorsed on the contract of sale of a stock of clothing, held that no notice of acceptance was necessary: *Bechtold v. Lyon*, 130 Ind. 194, 29 N. E. Rep. 912. Citing: *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308, 12 N. E. Rep. 504; *Snyder v. Clark*, 112 Ind. 293, 13 N. E. Rep. 581; *Wills v. Ross*, 77 Ind. 1; *Nading v. McGregor*, 121 Ind. 465, 23 N. E. Rep. 283. An instrument appended to a bill for merchandise in the following language, viz.: "In consideration of seven and one-half per cent I guaranty the above bill to the amount of \$200," is a guaranty and not an offer to guaranty,

which would require acceptance by the beneficiary and notice thereof to the guarantor. *Solary v. Stultz*, 22 Fla. 263. When the guaranty, however, is collateral and the debt guaranteed yet to be created, the amount of which is uncertain, notice of acceptance must be given within a reasonable time to the guarantor. *Milroy v. Quinn*, 69 Ind. 406. But see note 24, § 213, post.

<sup>13</sup> *Davis Sewing Machine Co. v. Jones*, 61 Mo. 409.

<sup>14</sup> *Mitchell v. McCleary*, 42 Md. 374. Where guarantors, who were directors of a brewing, malting and distilling company, guaranteed the payment of malt and hops which their manager should purchase for the use of the brewery, it was held not a mere offer to guaranty but an absolute undertaking to those furnishing malt or hops on the faith of it, and no notice of the extent of the credit given on the faith of the guaranty was necessary. *Boyd v. Snyder*, 49 Md. 325, and *Tapper v. New Home Sewing Machine Co.*, 22 Ind. App. 313, 53 N. E. Rep. 202. A guaranty to pay a note when due does not require notice of acceptance to bind the guarantor. *Stevens v. Gibson*, 69 Vt. 142, 37 Atl. Rep. 244.



Where a party guaranteed the payment of a particular sum at a given time, the court held that no notice to him was necessary, and said: "It is not an indefinite promise either as to amount or time of performance. The party knew what he had contracted to pay, and when it was to be paid, and it was his business to see that the amount was paid."<sup>15</sup> A party executed a guaranty on the back of a note in the following words: "I hereby guaranty the payment of this note within four years from this date." Held, the guaranty was absolute that the note should be paid within four years, "and demand and notice were not necessary in this any more than in all other cases of absolute and unconditional engagements."<sup>16</sup> A having bought a cow at an administrator's sale, and the administrator having refused to deliver her on A's credit alone, A gave his note for the price, and B wrote to the administrator as follows: "I, the undersigned, will sign the note with \* \* (A) for the cow bought of the Wilkerson estate." Held, a completed guaranty, and that no notice of acceptance was necessary to charge B. The court said: "There is a well-recognized distinction between an offer or proposition to guaranty and a direct promise of guaranty. The former requires notice of acceptance and acting upon it, while the latter does not."<sup>17</sup> A, who was digging ore for B under a parol contract to dig it as fast as B wanted it, refused to proceed with the work unless B would give him a guaranty for the fulfillment of the contract on his part. The contract was thereupon reduced to writing and signed by B, who procured C to put on it his guaranty of the same date, as follows: "We agree to warrant the performance of the within and above contract on the part of said B." Held, no notice of the acceptance of this guaranty was necessary in order to charge C. The contract and guaranty, having both been signed at the same time, were part of the same transaction. The delivery of the guaranty was not an incipient step in the making of the contract, but was the completion of the contract, and no notice could make it more

<sup>15</sup> Mathews v. Chrisman, 12 Smedes & Mar. (Miss.) 595, per Sharkey, C. J.      Hopson, 53 Conn. 453; Tyler v. Wad-  
dingham, 58 Conn. 375; Studebaker  
v. Cody, 54 Ind. 586.

<sup>16</sup> Breed v. Hillhouse, 7 Conn. 523,      <sup>17</sup> Carman v. Elledge, 40 Iowa 490,  
per Hosmer, C. J. See also to sim-  
ilar effect, City Savings Bank v.      per Cole, J.



complete.<sup>18</sup> A party desiring to purchase carpets proposed to the seller that he would get a certain person to guaranty notes for the purchase money, which proposition was satisfactory to the seller. The person referred to wrote in a postscript to a letter of the purchaser that he would guaranty the payment of the notes. The seller then shipped the carpets and the purchaser signed the notes, but when they were presented to the party who agreed to guaranty them, he evaded doing so. It was held that, having agreed to guaranty a specific bill, no notice to him of the acceptance of the guaranty was necessary. "The moment he wrote that acceptance of Orne's offer the bargain was complete. He then knew the goods were to be furnished upon his credit. He knew his guaranty was already accepted, and that he would be responsible for the goods if furnished before the guaranty was withdrawn, and within a reasonable time; any further notice of the acceptance of the guaranty would have been superfluous."<sup>19</sup>

§ 213. Notice of acceptance not necessary where the guaranty is fixed and definite—Directors' guaranty of advances to corporation—Guaranty in response to creditor's request—Definite guaranty of future purchases.—It has been held that acceptance of a guaranty is not necessary to charge the guarantors where the guarantors are stockholders and directors in the corporation whose future debts are guarantied and where the guaranty is delivered and credit thereafter extended on the strength of it.<sup>20</sup> Where the guaranty is given in response

<sup>18</sup> Bushnell v. Church, 15 Conn. 406.

<sup>19</sup> Cook v. Orne, 37 Ill. 186, Lawrence, J.

<sup>20</sup> Mamerow v. National Lead Co., 98 Ill. App. 460, at 463. In Doud v. National Park Bank (Ala.), 54 Fed. Rep. 846, 4 C. C. A. 607, 2 U. S. App. 655, five stockholders and directors of the First Nat'l Bank of Sheffield, Ala., reciting that that bank desired to establish a credit with the National Park Bank of New York, in consideration of "said loans discounted or other advances to be made," guaranteed, promised and agreed with the National Park

Bank that the First National Bank of Sheffield would pay on demand any sum for which it might become liable by reason of any or all of said discounts, loans or other advances. Held, that it was not necessary to aver or prove notice of acceptance in order to charge the guarantors. "Concede that the writing is an offer of guaranty," said the court, McCormick, J., "it is given on a consideration moving to the guarantors through their bank, and in such cases the performance of the consideration by the guarantee implies its acceptance, completes the contract, and imposes

to a request for it by the creditor no notice of acceptance is necessary for the answer of the guarantor to the request sufficiently shows that he knew he had assumed responsibility.<sup>21</sup>

An employee's fidelity bond executed at the same time as his contract of employment and as part of the consideration thereof is held binding without notice of acceptance.<sup>22</sup> In the case cited below the Supreme Court of Georgia held that no notice of acceptance is necessary "where the undertaking of the guarantor is positive, and the amount he agrees to guaranty is fixed and the guaranty is to take effect on the doing

the liability. Langdell Cases on Contract, § 987. The precedents on this subject are reviewed, and their doctrine stated, in *Davis v. Wells*, 104 U. S. 159." In *Hull v. Myers*, 90 Ga. 674, 16 S. E. Rep. 653, the five directors of an incorporated club endorsed its notes and thereby procured them to be cashed. It was held that they were liable notwithstanding that no notice of dishonor had been given to them. The court assumed in the absence of the charter in evidence that the affairs of the club were in charge of the directors and that they had control of its assets, and said "a single director, or even a minority of the directors, indorsing a note for the corporation, might be entitled to notice of dishonor; for one only, or a small number, might have a right to suppose that the note would be attended to at maturity; but when the whole board, or a majority of its members, unite in the indorsement, each and all so indorsing should be charged with the duty and responsibility of protecting the paper, since the power to control the conduct of the corporation in respect to paying or not paying would be in their own hands. On the question of notice, the present case is fairly and fully within the principle of *Carney v. Da Costa*, 1 Espinasse 302, in which it was held

that where the indorser of the notes of an insolvent person took effects of the insolvent to the full amount of his indorsement, he could not avail himself of the want of notice of non-payment of the notes at maturity. \* \* He was treated as if he were primarily liable and the debt were his own. Following the reason and spirit of that decision, these directors ought to be treated in the same way."

<sup>21</sup> *N. O. Nelson Mfg. Co. v. Shreve*, 94 Mo. App. 518, 68 S. W. Rep. 376, Goode, J.; *Dover Stamping Co. v. Noyes*, 151 Mass. 342, 24 N. E. Rep. 53; *Cooke v. Orne*, 37 Ill. 186, Lawrence, J.; *Davis v. Wells, Fargo & Co.*, 104 U. S. (14 Otto) 159, 26 L. Ed. 686, Matthews, J.; *Lennox v. Murphy*, 171 Mass. 370, 50 N. E. Rep. 644, Holmes, J., note 3, § 205, supra. In *Lynn Safe Deposit & Trust Co. v. Andrews*, 180 Mass. 527, 62 N. E. Rep. 1061, it was held, on demurrer, that the guarantor of a loan was liable without notice of acceptance when his guaranty was forwarded in accordance with a previous understanding with the lender that the loan would be made upon his guaranty and he had actual notice within 2 or 3 days that the loan had been made upon his guaranty.

<sup>22</sup> *Bryant v. Stout*, 16 Ind. App. 380, 44 N. E. Rep. 68.

§ 214 WHAT NECESSARY TO CHARGE GUARANTOR.

or forbearing some definite thing as its consideration.<sup>23</sup> Under the California code it is held that a guaranty that is limited in its terms and has been acted upon in good faith by the creditor is binding on the guarantor without notice of acceptance.<sup>24</sup>

§ 214. The same continued—Guaranty of corporation debts—

<sup>23</sup> In *Manry v. Waxelbaum Co.*, 108 Ga. 14, 33 S. E. Rep. 710, Grubbs, who had unsuccessfully sought credit from plaintiff, obtained it by delivering to plaintiff in January, 1896, the following signed by defendant: "Georgia, Randolph County. For and in consideration of the sum of one dollar in hand paid, and the receipt of which is hereby acknowledged, I, J. H. Manry, do hereby guarantee the prompt payment of all accounts and notes given in settlement for goods purchased by G. W. Grubbs of Bethel, Georgia, from the Waxelbaum Company of Macon, Georgia, to the extent of four hundred dollars. Be it further understood that I, J. H. Manry, shall be at liberty to withdraw this guarantee at any time, provided that the account of G. W. Grubbs is paid." Grubbs died about two years later indebted to plaintiff over \$477. No notice of acceptance was ever given to Manry. Held, that the writing was a continuing guaranty, that Manry's liability was not limited to the first \$400 of goods purchased by Grubbs, which Grubbs paid for, and that no notice of acceptance was necessary. Citing *Sanders v. Etcherson*, 36 Ga. 404. See next section. See also *Doud v. National Park Bank*, 54 Fed. Rep. 846, 4 C. C. A. 607, 2 U. S. App. 655, cited in note 5, *supra*. See also § 214, *post*. In *Newcomb Bros. Wall Paper Co. v. Emerson*, 17 Ind. App. 482, 46 N. E. Rep. 1018, defendant wrote to plaintiff: R "desires to make pur-

chases from your firm. I will engage to secure sales you make to" him "in the sum of" \$300. Held, that defendant became liable without notice to him of acceptance. In *Lane v. Mayer*, 15 Ind. App. 382, 44 N. E. Rep. 73, defendant wrote to plaintiff: "I hereby agree to hold myself responsible for, and agree to pay for any goods and merchandise which may be purchased of you by A. L. Lane, Lebanon, Indiana, to the amount of \$500." Held, that no notice of acceptance was necessary to charge defendant.

<sup>24</sup> In *Scribner v. Schenkal*, 128 Calif. 250, 60 Pac. Rep. 860, defendant, on October 11, wrote to plaintiff agreeing with plaintiff "to pay for all the hogs which J. R. Crockett should buy." Five days later plaintiff sold Crockett 800 hogs and 800 sheep at \$4.75 per 100 lbs., to be delivered not later than Dec. 10. After part had been delivered and paid for by defendant, defendant refused to pay for more, whereupon plaintiff sold the remainder on the open market at \$1,400 less than the contract price. Held, that "the plaintiff having parted with value, having sold the hogs, and having given credit, \* \* solely upon the security of this promise, it became an original obligation of the promisor—not a mere offer of guaranty, but an absolute guaranty [citing code]—and no notice of acceptance to the guarantor was necessary," and that defendant must pay the \$1,400.

**Limited guaranties of future payment—When guarantor not entitled to notice of acceptance of guaranty—Special cases.**—Certain stockholders of a company, by an instrument under their hands and seals, guarantied the payment of all the debts of the company then outstanding, and bound themselves to pay all of said debts to the “creditors of the company who will not sue, but indulge the company upon their claims for ten months from this time.” Held, that a creditor of the company at that time, who indulged in ten months, was entitled to recover the amount of his debt against the company from said stockholders with having notified them that he would so indulge it. The instrument signed by the stockholders was an absolute present guaranty, and not an offer to guaranty.<sup>25</sup> The following instrument, viz.: “Mr. J C, I will guaranty the payment to you of \$625 in treasury warrants, to be paid on or before the 20th of August, on and for account of Mr. J W, July 13, 1844,” was held not to be a guaranty in the legal sense of the term, but an original undertaking to pay J C the money specified at the appointed time, and no notice of any kind was necessary to charge the maker of the instrument.<sup>26</sup> A guaranty was as follows: “If D. A. Wills purchases a case of tobacco on credit, I agree to see the same paid for in four months.” When Wills returned from market, he showed the guarantor a bill for a case of tobacco, saying he had bought it and paid for it with his note. The court held the guaranty was absolute, and notice of acceptance was not necessary to charge the guarantor. The only condition was that the goods should be furnished, and that was done. When Wills told the guarantor he had bought a case of tobacco, he should have inquired and ascertained the facts.<sup>27</sup> A agreed to furnish B with books for sale, at a certain price, upon condition that B should get a good guarantor to the contract. Upon the back of the contract was written as follows: “We guaranty to \* \* (A) that the above-named \* \* (B) will well and truly perform all his above and foregoing undertakings, pursuant to the tenor and effect of said contract.” C signed this guaranty, and B delivered it to A. Books were delivered according to the contract, but C was not notified of the accept-

<sup>25</sup> Sanders v. Etcherson, 36 Ga. 404. See note 23, § 213, supra.

<sup>26</sup> Mathews v. Chrisman, 12 Smed. & Mar. (Miss.) 595.

<sup>27</sup> Case v. Howard, 41 Iowa 479.

ance of the guaranty. Held, he was liable for the price of the books. The court said: "An absolute present guaranty, complete in its terms and fixing the liability of the guarantor, takes effect as soon as acted upon."<sup>28</sup> A guaranty was as follows: "Mr. A. Ferm tells me that he is about to loan from you \$500, and wishes me to state that I will become his eventual security for the payment; this I am willing to do, as I have found him punctual on similar occasions." Three hundred dollars were loaned on the faith of the guaranty. Held, no notice of the acceptance of the guaranty was necessary to charge the guarantor. "The substance of the letter is this: 'I will become his eventual security for payment.' Here is, then, no conditional agreement, but a conclusive undertaking."<sup>29</sup> A guaranty requested the delivery of goods to a purchaser, and promised to pay for them if the purchaser made default, and concluded as follows: "Of which default you are required to give us reasonable and proper notice." Held, no notice of acceptance of the guaranty need be given the guarantor to charge him. He had stipulated for a certain kind of notice, viz.: notice of the default of his principal, and, therefore, no other notice was required.<sup>30</sup> In the greater portion of the foregoing cases, holding notice of acceptance not necessary to charge the guarantor, as in many of the cases holding such notice necessary, the distinction is drawn between an absolute guaranty and an offer to guaranty. There is no conflict in principle between those cases, but in the application of the principle to special circumstances there is not entire harmony in the decisions.

**§ 215. When guarantor not entitled to notice of advances made to principal.**—Upon the same general principles, where the guaranty is a completed undertaking to be responsible for the existing contract of another, of which the guarantor has knowledge, it has been held that no notice of advances to the principal is necessary to charge the guarantor.<sup>31</sup> A and B agreed to buy of C his crop of strawberries for the year, and to pay therefor on delivery. D added to the agreement this

<sup>28</sup> Bright v. McKnight, 1 Sneed (Tenn.) 158.

<sup>30</sup> Wadsworth v. Allen, 8 Gratt. (Va.) 174.

<sup>29</sup> Caton v. Shaw, 2 Harris & Gill (Md.) 13. See Boyd v. Snyder, 49 Md. 325.

<sup>31</sup> Bushnell v. Church, 15 Conn. 406.

clause: "On the part of the said Dillons (A and B), I hold myself with them responsible for their part of the above contract." C delivered the berries to A and B as they ripened, without being paid for them on delivery or afterwards. D had no notice of the failure of A and B to pay till suit was brought against him three months after the delivery of the berries. It was held that D by signing the contract became directly, and not collaterally, liable, and it was his duty without notice to see that the contract was performed. Delivering the berries without getting pay for them as delivered did not change the contract.<sup>32</sup> A, who was cultivating a large number of trees on his land, agreed in writing with B to cultivate them there till September 13th, and at that time to deliver to B at the place of their growth fifteen thousand trees, to be designated and counted by the parties. It was stipulated that if either party failed to perform his contract he should forfeit \$3,000. Underneath was written as follows: "In case B, one of the parties named in the foregoing instrument, should incur the forfeiture mentioned therein, we hereby guaranty the payment of the same;" which was signed by C as guarantor. A cultivated the trees as agreed, and was always ready to perform, but B failed of performance on his part. Held, that C was liable, and no notice of B's default need be given to fix his liability. The court said: "None is bound to give notice to another of that which that other person may otherwise inform himself of. Nor is notice necessary where the thing lies as much in the cognizance of the one as of the other. \* \* In the present case \* \* (C) was privy to the contract made by \* \* (B); he, as well as \* \* (A), knew its terms and its time of performance, and by an inquiry could have ascertained whether a forfeiture against which he had himself stipulated had occurred."<sup>33</sup> A party gave an agreement to pay his instalments on shares in an insurance company, and another party guarantied the performance of the agreement. Held that, although the amount which was to become due on the agreement was uncertain when it was made, yet notice of that amount was not necessary to be given the guarantor, as he himself should have taken notice of the amount. The court said that, where the unascertained liability existed on the face

<sup>32</sup> Kirby v. Studebaker, 15 Ind. 45.

<sup>33</sup> Hammond v. Gilmore's Adm'r, 14 Conn. 479, per Church, J.



of the original contract, it was the duty of the guarantor to see that the principal performed his contract.<sup>34</sup> A bond signed by a principal and two sureties stated that the principal required money to carry on his business, and required advances from the bank, and "in case of his failure to pay any such loans and advances as aforesaid," the same might be collected from the signers. The bank advanced money to the principal, but did not notify the sureties of the same. Held, no such notice was necessary to charge the sureties. They were joint original promisers who were directly liable, and not guarantors who were collaterally liable.<sup>35</sup> A executed a writing, whereby he agreed with B that he would at all times hold himself responsible to B to the amount of \$20,000, without notice to be given to him by B. This writing was simultaneously delivered by A and accepted by B, and B, on the credit thereof, discounted paper indorsed by C. Held, that no notice of the acceptance of the guaranty or the amount advanced under it was necessary to charge A. The court said this was not such a case as that of a letter of credit. A letter of credit is a mere proposition, and, until it is accepted and notice of that fact given, the minds of the parties have not met, and there is no contract. "Its reception is unavoidable; its acceptance as a promise optional; its delivery is with a view to its acceptance, and must therefore necessarily precede it. Until such acceptance it is not consummated into a contract, but remains a mere proposition, and there has been no meeting of the minds of the parties." But in this case the delivery of the instrument "was not an incipient step in the formation of the contract, but the result of previous negotiation and agreement, and constituted the very consummation of the contract."<sup>36</sup>

**§ 216. Cases holding guarantor for indefinite amount on credit to be given, not entitled to notice of acceptance of guaranty.**—There is a class of cases which hold that where the guaranty relates to advances to be made, and the party to make them, as well as the amount to be advanced, are not ascertained, the guarantor is liable without notice of the accept-

<sup>34</sup> Protection Ins. Co. v. Davis, 5 Allen 54.

<sup>35</sup> McMillan v. Bull's Head Bank, 32 Ind. 11. For a similar conclusion respecting a bond conditioned to answer for the debts and de-

faults of a sewing machine agent, who was the principal obligor therein, see Cox v. Weed Sewing Machine Co., 57 Miss. 350.

<sup>36</sup> New Haven Co. Bank v. Mitchell, 15 Conn. 206, per Storrs, J.



ance of the guaranty, or of the amount advanced. These decisions, while they are the law where they were rendered, are opposed to the great weight of authority, and seem to be founded on much less satisfactory reasons than the cases holding the opposite view. But even here the conflict is more in the application of principles to special facts than in principles themselves. All courts recognize the principle that it is necessary to the completion of a contract that the minds of both contracting parties shall meet; the conflict is as to when they have met. They all hold that a mere offer to guaranty, the same as any other offer, is not binding unless accepted; the conflict is as to whether the guarantor must be notified of the acceptance of the guaranty, and whether the writing amounts to an offer to guaranty or to a completed guaranty. A guaranty addressed to a mercantile firm in these words, "We consider Mr. J good for all he may want of you, and will indemnify the same," was held to be a completed guaranty, of the acceptance of which it was not necessary to notify the guarantor. The court said: "Unless there is something in the nature of the contract or terms of the writing creating or implying the necessity of acceptance or notice as a condition of liability, neither are deemed requisite. \* \* The party entering into an absolute engagement for the responsibility of his friend should see to the performance of it. The relation in which the parties afterwards stand to each other presupposes privity and knowledge of the credit obtained."<sup>87</sup> A letter of guaranty was as follows: "If you will let A have one hundred dollars' worth of goods on a credit of three months, you may regard me as guarantying the same." Held, the guarantor was liable without any notice of the acceptance of the guaranty. "Here the undertaking was absolute. The defendant said to the plaintiff, in substance: 'If you will deliver the goods I will guaranty the payment.' We cannot add a condition that the defendant shall have notice. He should have provided for that himself in the proposal made to the plaintiff. I know there are cases which require notice, but we think they are not based on the common law, and for that reason they have not been followed in this state."<sup>88</sup> Where

<sup>87</sup> Whitney v. Groot, 24 Wend. 82, Bronson, J. To similar effect, see per Nelson, C. J. Wright v. Griffith et al., 121 Ind.

<sup>88</sup> Smith v. Dunn, 6 Hill 543, per 478.

A, by a general letter of credit, undertook to accept and pay drafts to be drawn by B to a given amount, and C, at the foot of the letter, at the same time, wrote and signed these words: "I hereby agree to guaranty the due acceptance and payment of any draft or drafts issued in virtue of the above credit," it was held that C was liable to the party advancing money on the guaranty, without any notice of its acceptance.<sup>39</sup> A guaranty addressed to a merchant, after explaining who the bearer was, went on, "I want you to sell him a bill of goods on the best terms you can afford; I will guaranty the payment of every dollar." Held, no notice of the acceptance of the guaranty or the default of the principal was necessary to charge the guarantor.<sup>40</sup> Where the agreement to accept a letter of credit on the part of the person to whom it is addressed is contemporaneous with the writing of the letter, and is known to the writer, there no other notice of acceptance of guaranty is necessary to charge him.<sup>41</sup>

**§ 217. When guarantor entitled to notice of default of principal.**—Whether demand of payment must be made of the principal, and notice of his default be given, in order to charge the guarantor, is a question depending very much upon the nature of the particular guaranty. Where the liability of the guarantor is not direct, but is collateral and dependent upon the default of another, notice of such default to such guarantor, within a reasonable time, has been held necessary where a guaranty of a note was as follows: "I guaranty the payment of the within note to \* \* (A), for value received;"<sup>42</sup>

<sup>39</sup> *Union Bank v. Coster's Ex'r*, 3 N. Y. 203. Following and approving these cases, see *Lonsdale v. Lafayette Bank*, 18 Ohio 126; *Powers v. Bumcratz*, 12 Ohio St. 273, overruling *Taylor v. Wetmore*, 10 Ohio 491. In *Clark v. Burdett*, 2 Hall (N. Y.) 217, this principle was applied to a continuing guaranty.

<sup>40</sup> *Yancey v. Brown*, 3 Sneed 89.

<sup>41</sup> *Wildes v. Savage*, 1 Story 22. To similar effect, see *Paige v. Parker*, 8 Gray 211.

<sup>42</sup> *Cox v. Brown*, 6 Jones' Law (N. C.) 100. To same effect, see *Grice v. Ricks*, 3 Dev. Law (N. C.)

62; *Ringgold v. Newkirk*, 3 Ark. (Pike) 96; *Foote v. Brown*, 2 McLean 396; *Gamage v. Hutchins*, 23 Me. 565. In *Donnelly v. Newbold*, Md., Dec., 1901, 50 Atl. Rep. 513, it being impossible to tell from the writing whether it was an original or a collateral undertaking the question was held to have been properly submitted to the jury. See also *Heyman v. Dooley*, 77 Md. 169, 26 Atl. Rep. 117, 20 L. R. A. 257, and note. Contra to text, *Iron City National Bank v. Rafferty*, Sup. Ct. Pa., Nov., 1903, 56 Atl. Rep. 445.

where a debtor transferred to his creditor certain notes of third persons in payment of his own debt, and promised, if the creditor could not collect the notes, he would pay them;<sup>43</sup> and where an instrument was as follows: "I have this day sold to Kannon a note on Wortham for \$412, which I guaranty to said Kannon, waiving all exception of my not assigning said claim, and holding myself bound for the same for value."<sup>44</sup> So, where the holder of a promissory note failed to give the guarantor of the same notice of its non-payment for nine months after its dishonor, and the maker was solvent when the note became due, but afterwards became insolvent, it was held the guarantor was discharged. The court said: "It is clearly conformable to the general principles of right and justice that the creditor, who knows of the delinquency of his debtor, and withholds information of it from the guarantee, by reason of which the debt is actually lost when it might have been saved by either, should not throw the loss upon the guarantor."<sup>45</sup> The payee of a note sold it and indorsed a guaranty of its payment upon it. No demand was made on the maker of the note, and he remained solvent for six months after it became due, and afterwards became insolvent. Two years after the note became due, notice of non-payment was given the guarantor, and demand of payment made on him. Held, he was not liable. The court said: "The undertaking of the guarantor of a promissory note is conditional, and he will be discharged by the neglect of the holder to demand payment of the maker, and give the guarantor notice of the non-payment, provided the maker was solvent when the note fell due, and afterwards became insolvent."<sup>46</sup> A party guarantied the punctual payment of two accepted bills. When the bills be-

<sup>43</sup> *Adcock v. Fleming*, 2 Dev. & Bat. Law (N. C.) 225.

<sup>44</sup> *Kannon v. Neely*, 10 Humph. (Tenn.) 288. To similar effect, see *Sage v. Wilcox*, 6 Conn. 81.

<sup>45</sup> *Oxford Bank v. Haynes*, 8 Pick. 423, per Parker, C. J. And if it appear that the principal was solvent at the maturity of the obligation, but became insolvent before demand of payment or notice given, except under special and peculiar circumstances, damages will be presumed.

*Newton Wagon Co. v. Diers*, 10 Neb. 284.

<sup>46</sup> *Talbot v. Gay*, 18 Pick. 534, per Wilde, J. Generally, as to when guarantor is entitled to notice of principal's default, see *Lowe v. Beckwith*, 14 B. Mon. (Ky.) 150; *Ward v. Wilson*, 100 Ind. 52; *Furst & Bradley Mfg. Co. v. Black*, 111 Ind. 308; *Hernandez v. Stilwell*, 7 Daly (N. Y. Com. Pleas) 360. Failure to give such notice is of course a matter of defense, but damages

came due the acceptors were solvent, and so continued for four months, and then became insolvent. No notice was given to the guarantor within the next four years. Held, he was discharged. The court said: "In the case before us, the guaranty was that the acceptances should be promptly met by the acceptors. An agreement in such case to pay at all events, without reference to or reliance upon the acceptors, could not be inferred. His warranty was that the acceptors would pay as they were bound to do, and not that he himself would pay without regard to whether they did so or not."<sup>47</sup> Where certain parties guarantied the performance of a contract for the purchase of a lot of cattle, and the payment therefor, and for eighteen months after the maturity of the contract the principal was solvent, but afterwards became insolvent, and no notice of his default was given the guarantors, it was held they were discharged.<sup>48</sup> A guarantor of a promissory note payable on demand is discharged from his contract of guaranty by the omission of the holder to give him notice within a reasonable time of demand on the maker and non-payment by him, provided the maker was solvent when the guaranty was made, and became insolvent before notice of non-payment was given.<sup>49</sup> In cases where notice of the principal's default is necessary to charge the guarantor, the same strictness is not required as in the case of indorsers. The notice need not be given immediately upon the principal's default. If it is given within a reasonable time, that is sufficient.<sup>50</sup>

**§ 218. When demand of payment on principal and notice of his default necessary to charge guarantor.**—When the advances are made to the principal on a letter of credit signed by the guarantor, the weight of authority is that demand of payment must be made on the principal, and notice of his default be given the guarantor within a reasonable time, in order

must be shown as a result of such failure. *La Rose v. Logansport Nat. Bank*, 102 Ind. 332.

<sup>47</sup> *Globe Bank v. Small*, 25 Me. 366, per Whitman, C. J.

<sup>48</sup> *Gaff v. Sims*, 45 Ind. 262.

<sup>49</sup> *Whiton v. Mears*, 11 Met. (Mass.) 563. To similar effect, see *Nelson v. Bostwick*, 5 Hill, 37; *Douglass v. Rathbone*, 5 Hill, 143.

<sup>50</sup> *Bull v. Bliss*, 30 Vt. 127; *Dunbar v. Brown*, 4 McLean, 166; *Talbot v. Gay*, 18 Pick, 534. In *Tausig v. Reid*, 145 Ill. 253, 34 N. E. Rep. 413, reversing 35 Ill. App. 439, it was held that the guarantor in a collateral continuing guaranty was released for want of reasonable notice of default of the principal. Note 56, § 219.

to charge him, unless the principal be insolvent when the debt becomes due. The law upon this subject and the reasons upon which it is founded have been thus stated: "A demand upon him (the principal), and the failure on his part to perform his engagements, are indispensable to constitute a *casus foederis*. The creditors are not indeed bound to institute any legal proceedings against the debtor, but they are required to use reasonable diligence to make demand, and to give notice of the non-payment. The guarantors are not to be held to any length of indulgence of credit which the creditors may choose, but have a right to insist that the risk of their responsibility shall be fixed and terminated within a reasonable time after the debt has become due."<sup>51</sup> Where O, by an instrument under seal, assigned certain contracts for the payment of money, and covenanted that the sum set opposite each contract, in a schedule annexed to the assignment, was due and would be paid, it was held that O being a guarantor of the amount due on the contracts, in order to maintain a suit against him, it was necessary to aver a previous demand of payment from the persons bound by the contracts. The contracts having been assigned to the plaintiff, they alone could demand and receive payment, and they must make such demand before coming upon the guarantor.<sup>52</sup> Certain parties entered into a guaranty, in part as follows: "We hereby engage to see you paid, in due course, for the bill of goods bought by Mr. Ross from you on the 27th inst." A particular bill of goods which had been previously bargained for were delivered on the strength of the guaranty. Held, that this was not an original undertaking, but an undertaking to pay if Ross did not, and that the guarantors were entitled to prompt notice of his default unless he was insolvent.<sup>53</sup> Where a guaranty provided that when a note became due it should be good and collectible, it was held that it did not bind the guarantor unless diligence was used to collect the note, and the guarantor was notified

<sup>51</sup> Per Story, J., in *Douglass v. Reynolds*, 7 Pet. 113. See, also, *McCollum v. Cushing*, 22 Ark. 540. In *Smith v. Bainbridge*, 6 Blackf. (Ind.) 12, a delay of eighteen months in notifying the guarantor

was held to be unreasonable, and to discharge the guarantor.

<sup>52</sup> *Mechanics' Fire Ins. Co. v. Ogden*, 1 Wend. 137. Contra, *Barker v. Scudder*, 56 Mo. 272.

<sup>53</sup> *Mayberry v. Bainton*, 2 Harr. (Del.) 24.

that it could not be collected. The court said that, if a party stipulates to do a thing himself, or that another shall do it, he must take notice whether or not it is done. But when he stipulates that the party he contracts with can, by his diligence, do a certain thing, the case is different. "He is not then supposed to know, nor does he assume to know, the means taken, or the result. Notice is, therefore, required, for the reason assigned by Judge Swift, that it would be against principle to admit a man to be sued when he has no knowledge of the existence of the demand."<sup>54</sup> A and B each owned an interest in the same land. A transferred his interest to B, and guarantied that if the title proved defective the grantor of the two would recompense B for the loss of the title. Held, that demand on the grantor by B, and notice of his default to A, were necessary before bringing suit against A on the guaranty. Whether A had to pay at all depended upon a contingency and in order to put him in default it was necessary to demand payment from the grantor, and notify A of his default.<sup>55</sup>

**§ 219. Where the creditor's want of diligence amounts to a fraud on the guarantor, the guarantor is released pro tanto.**—In a leading Georgia case the guarantor, after maturity of a note for \$2,500, pleaded that he notified the payee that the money was ready in the maker's hands with which to pay the note and that the payee, without any notice thereof to the guarantor, neglected for three or four years to call for the money because he did not care to accept payment in depreciated confederate currency, and during that time the maker, who was abundantly good before, became insolvent. The trial court struck the plea from the files and judgment was rendered against the guarantor. The supreme court, on the guarantor's appeal, reversed the judgment on the ground that if the payee, at the time of being so notified to call for his money, had promised the guarantor to call for it, or by silence had given the guarantor to understand that he would call for it, his failure to call for the money was a fraud on the guarantor which should release him from liability, and the guarantor was given leave to amend his plea so as to set up such promise if any was

<sup>54</sup> *Sylvester v. Downer*, 18 Vt. 32, per Royce, J. As to the notice necessary to charge a guarantor of col-

lection, see *Brackett v. Rich*. 23 Minn. 485.

<sup>55</sup> *Morris v. Wadsworth*, 17 Wend. 103.



made. The opinion of the court contains an excellent statement as to the measure of diligence due to a guarantor which is given in a note.<sup>56</sup> Negligence on the part of the creditor

<sup>56</sup> Wright v. Shorter, 56 Ga. 72. In this case the court held that so far as the plea rested upon the bare law of guaranty it was not good. "Speaking for myself only," said Bleckley, J., "I will briefly classify guarantors and then point out what I take to be the true position of some of them in regard to diligence on the part of creditors. Guarantors, viewed in reference to the consideration of their contract, are either mere sureties or more than sureties. They are mere sureties when the consideration of the guaranty moves, not to them, but to the person for whose performance they become bound. They are more than sureties when the consideration is a benefit flowing to themselves [citing 2 Parsons Cont. 21, 22 Ga., Code Sec. 2148]. Regarded in reference to the substance of their contract, they undertake, either for the collectibility, or for the payment of the given debt. A guarantor of any class may, by his contract, limit his liability according to his own pleasure, and stipulate for such diligence or preliminary action on the part of the creditor as he may choose to exact. In the absence of any special terms, the most favored guarantors are those who are mere sureties and guarantee collectibility only; and the least favored are those who, for a consideration, moving to themselves, guarantee payment. If the guaranty be of the payment of a pre-existing debt, and expressed in general terms, the guarantor, if a mere surety, cannot insist on a higher degree of diligence in the creditor than could be exacted in the same case and under the same

circumstances, in behalf of the most favored class of sureties, such as accommodation indorsers; nor can he, if more than a surety, require greater diligence than might be demanded in behalf of the most favored class of debtors receiving value, such as indorsers for value. In some respects, the condition of a general guarantor of payment is less advantageous than that of an indorser, but in no respect is it more advantageous. To gain a better status than that of an indorser, the guarantor must vary his general liability by express stipulation. In those states where indorsers are entitled to notice of non-payment, guarantors of similar debts might, upon principle, be entitled to notice also; but not necessarily to equally strict and formal notice, diligence in case of indorsers being more influenced by reasons of commercial policy than diligence for the behoof of guarantors. Less than commercial expedition, or the ordinary transactions by mail, will scarcely suffice in giving notice to indorsers; whereas it is sufficient anywhere that guarantors be notified in time to prevent loss by insolvency, etc., with no restriction to the first appropriate opportunity. In states (as in Georgia) where the general rule is, by statute, that indorsers are not entitled to any notice whatever, a guarantor of payment may consistently be denied notice of non-payment, supposing his guaranty to be concerning a class of paper to which the general rule applies. The change of policy which is involved in doing away with notice to indorsers is so radical that its spirit



§ 220 WHAT NECESSARY TO CHARGE GUARANTOR.

in making demand or giving notice can be availed of by the guarantor only to the extent that he has sustained loss thereby.<sup>57</sup>

**§ 220. When demand of payment on principal and notice of his default to guarantor not necessary to charge guarantor—Guaranty of promissory note, etc.**—Where the contract of guaranty absolutely and unconditionally provides that the debtor shall pay a given sum at a stated time, no demand of payment on the principal or notice of his default is necessary before suing the guarantor.<sup>1</sup> This principle has been very generally

reaches and includes guarantors in like cases. In a system of diligence which expressly dispenses with notice to the former, there would seem to be no place for a rule requiring notice to the latter. The broad reason of notice is repealed by a statutory denial of its application to indorsers, they being the great representative class with reference to which the law of notice has, for the most part, been moulded. It would be a striking anomaly for an absolute guarantor of payment to stand discharged for want of notice under circumstances that would leave an indorser still bound.

\* \* What has been said of notice will apply, in substance, to demand, bringing suit against the principal debtor, and other acts of diligence. No higher standard of general diligence can be insisted upon by guarantors of absolute payment than indorsers, in the like case, would have a right to call for. Either might give the statutory notice to sue, and stand upon the consequent right to special diligence. Were the paper before us 'bank paper,' negotiated before due, the doctrine of demand and notice of non-payment would still, notwithstanding the statute, apply to it in favor of an indorser, and might apply, to a certain extent, in favor of a guar-

antor; but the paper has neither of these characteristics. It was guaranteed after due and was payable generally—not at bank. The authorities touching the measure of diligence to which the creditor is bound in favor of a guarantor are very numerous, and not altogether harmonious. Scores of them have been examined in the course of our investigations in this case. They are largely collected in 2 American Leading Cases, 1 to 141. If, as a whole, they can be squared with any general principle, they seem to me not to run counter to the line of thought which I have pursued above. Wherever indorsers and guarantors of payment of pre-existing debts are compared, the latter, I think, will generally be found to be put on a lower plane than the former, never on a higher.' The statute as to indorsers referred to seems to have been changed since *Wright v. Shorter* was decided. See *Mayer v. Thomas*, Rec'r. 97 Ga. 772, 25 S. E. Rep. 761; *Sibley v. American Exchange Bank*, 97 Ga. 126, 25 S. E. Rep. 470; note 13, § 220, post.

<sup>57</sup> *Hughes v. Heyman*, 4 App. Cas. (D. C.), 444, at 449.

<sup>1</sup> *Mann v. Eckford's Ex'rs*, 15 Wend. 502; *Peck v. Barney*, 13 Vt. 93; *East River Bank v. Rogers*, 7 Bosw. (N. Y.) 493; *March v. Put-*

applied to guaranties of promissory notes.<sup>2</sup> Where a party guarantied the payment of a note if it should not be "duly honored and paid" by the maker, according to its tenor and effect, it was held he was liable on his guaranty if the note was not paid by the maker, even though no demand of payment was made on the maker before suit was brought against him. The court said: "Now it is clear that a request for the payment of a debt is quite immaterial unless the parties to the contract have stipulated that it shall be made; if they have not, the law requires no notice or request, but the debtor is bound to find out the creditor and pay him the debt when due."<sup>3</sup> The payees of a note indorsed it as follows: "For value received we guaranty the payment of the within note at maturity." Held, "as between them (the guarantors) and the maker of the note, the holder was under no obligation to demand payment of the maker, and on his default to notify the guarantors, for they undertook to pay at all hazards at maturity, the one being as much bound as the other. \* \* Their duty was, and of each of them, on its maturity, to go to the holder and take it up. The holder was under no legal or moral obligation to hunt them and make a demand."<sup>4</sup> The same thing was held where the guaranty of a note was as follows: "I guaranty the said note is good, and the payment of the same;"<sup>5</sup> where the payee of a note indorsed it as follows: "I do assign the within note to \* \* (A) for value received, and guaranty the punctual payment of the same at matur-

ney, 56 N. H. 34; Bank v. Hammond, 1 Rich. Law (S. C.), 281; Eneas v. Hoops, 10 Jones & Spen. (N. Y. Superior Ct.) 517; Taylor v. Taylor, 64 Ind. 356; Kline v. Raymond, 70 Ind. 271; Furst & Bradley Manuf. Co. v. Black, 111 Ind. 308; Fitch v. Citizens' Nat. Bank, 97 Ind. 211; Coburn v. Brooks, 78 Cal. 443; Bloom & Co. v. Warder, 13 Neb. 476; Koenig v. Bramlett, 20 Mo. App. 636; Hofheimer v. Losen, 24 Mo. App. 652; Osborn v. Lawson, 26 Mo. App. 549.

<sup>2</sup> Forest v. Stewart, 14 Ohio St. 246; Williams v. Granger, 4 Day (Conn.), 444; Mallory v. Lyman, 3

Pinney (Wis.), 443; Ten Eyck v. Brown, 3 Pinney (Wis.), 452; Clark v. Merriam, 25 Ct. 576; Levi v. Mendell, 1 Duvall (Ky.), 77. See, also, Gammell v. Parramore, 58 Ga. 54; Kenney v. Masemam, 14 Daly (N. Y. Com. Pleas), 379; Bartholomew v. Seaman, 25 Hun (N. Y.), 619.

<sup>3</sup> Walton v. Mascall, 13 Mees. & Wels. 452, per Parke, B.

<sup>4</sup> Gage v. Mechanics' Nat. Bank of Chicago, 79 Ill. 62, per Breese, J. To same effect, see Singer Manuf. Co. v. Hester, 71 Mo. 91.

<sup>5</sup> Woodstock Bank v. Downer, 27 Vt. 539.

ity;"<sup>6</sup> where the payee of a non-negotiable note indorsed it as follows: "I guaranty the within at maturity;"<sup>7</sup> when a guaranty was in these words: "On the 25th December, 1824, we bind ourselves to see the within note paid;"<sup>8</sup> where a party wrote on the back of a note: "I hereby guaranty the payment of balance due on note \* \* within sixty days from the 2d of May, 1843, balance due this day, \$292.22;"<sup>9</sup> and where a guaranty on the back of a note was as follows: "I guaranty the payment of the within note to C. Edgerton or order."<sup>10</sup> In the case last referred to, the court said: "Where the guaranty of payment is absolute and unconditional, we are of opinion that it is not necessary, in order to make out a prima facie case for recovery, to aver or prove either demand or notice." Moss obligated himself to deliver on a given day, and at a specified place, seventy bushels of salt to Hunter. Hunter transferred this obligation by assignment, and guarantied the payment of the salt as follows: "För value received I assign the within note to \* \* (A) and guaranty the payment of the same." Held, this was an absolute engagement to deliver the salt at the time and place specified, if the maker did not, and demand on the maker and notice to the guarantor were not necessary to charge the guarantor.<sup>11</sup> A memorandum at the foot of a promissory note in these words: "I hereby obligate myself that the above note shall be paid in three years from this 4th day of June, 1838," made in consideration that the payee should delay payment until two years after the maturity of the note, was held to be an original undertaking, which did not require that demand of payment should be made of the maker and notice of his default be given in order to charge the guarantor.<sup>12</sup> An accommodation maker or indorser of a note is not an "indorser" within the meaning

<sup>6</sup> Thrasher v. Ely, 2 Smedes & Marsh. (Miss.) 139.

<sup>7</sup> Peck v. Frink, 10 Iowa, 193. To precisely like effect, see Savings Bank v. Strother, 28 S. C. 504. In the latter case the court raised the quære whether the above rule would apply to the guaranty of a negotiable instrument.

<sup>8</sup> Taylor v. Ross, 3 Yerg. (Tenn.) 330.

<sup>9</sup> Cooper v. Page, 24 Me. 73.

<sup>10</sup> Clay v. Edgerton, 19 Ohio St. 549, per Brinkerhoff, C. J. See, also, Neil v. Board of Trustees, 31 Ohio St. 15, 22.

<sup>11</sup> Hunter v. Dickinson, 10 Humph. (Tenn.) 37.

<sup>12</sup> Reed v. Evans, 17 Ohio, 128.

of a statute requiring notice of non-payment to be given to the indorser.<sup>13</sup>

§ 221. **When guarantor bound without notice of default of principal—Other cases.**—The same principle has been applied and notice to the guarantor of the principal's default held not to be necessary in a variety of other cases. Thus where A agreed to account with B and pay over to him such sum as he should be found to be indebted, and C covenanted that A should perform the agreement, it was held that an action lay against C by B, for the default of A, without previously giving C notice of such default.<sup>14</sup> A contract provided for the return of certain shares of railroad stock which were loaned, and for the payment of interest for their use. At the same time the contract was executed certain parties guarantied it as follows: "We, the undersigned, guaranty the fulfillment of the above obligation, and hereby promise said Hiram Simons that said stock shall be returned at the time specified, agreeable to the above contract." Held, no demand on the principal or notice of default on his part was necessary to charge the guarantors.<sup>15</sup> A and B, being partners, dissolved their partnership, and A agreed to pay the partnership debts, and gave B bond, with C as surety, that he would do so. Held, that no notice of A's default in paying the partnership debts was necessary to be given C before B could sue him. The court said: "It is a general rule that where one guaranties the act of another his liability is commensurate with that of his principal, and he is no more entitled to notice of the default than the latter. Both must take notice of the whole at their peril."<sup>16</sup> Where a guaranty stated that if the principal did not pay the creditor a certain sum "in three months from this time," the guarantor agreed "to guaranty to said Dickerson the payment of said sum of money." It was held that no notice of the non-payment by the principal was necessary to charge the guarantor.<sup>17</sup> A guaranty stated that if certain merchants would

<sup>13</sup> Mayer v. Thomas, Rec'r, 97 Ga. 972, 25 S. E. Rep. 761; Sibley v. American Exchange Bank, 97 Ga. 126, 25 S. E. Rep. 470. Note 56, § 219.

<sup>14</sup> Douglas v. Howland, 24 Wend. 35, in which Mr. Justice Cowen delivered an elaborate opinion repudiating the entire doctrine that

notice of acceptance of a guaranty is necessary to charge the guarantor. Compare note 22 to § 205.

<sup>15</sup> Simon v. Steele, 36 N. H. 73.

<sup>16</sup> Gage v. Lewis, 68 Ill. 604, per Sheldon, J.

<sup>17</sup> Dickerson v. Derrickson, 39 Ill. 574.

furnish a purchaser goods, the guarantor would "be accountable to you for all his contracts or engagements, as you and he may agree, and in case he does not fulfill them as agreed, I will guaranty the payment thereof." Goods were sold and the guarantor notified thereof. Held, it was not necessary, in order to charge him, that payment should first be demanded of the principal and notice of his default be given.<sup>18</sup> In April, 1825, the defendant guarantied the payment of money due from his son to the plaintiff upon a sale of timber. The plaintiff received part payment from the son, and made repeated unsuccessful applications to him for the residue till December, 1827, when he became bankrupt. The plaintiff never disclosed to the defendant the result of these applications, but on December 27, 1827, sued him on his guaranty. Held, the guarantor was liable, on the ground that mere passive delay on the part of the creditor will not discharge the surety.<sup>19</sup> A guaranty that the principal will "return" a certain sum of borrowed money by a particular date has been held to render the guarantor liable without any demand on the principal or notice of his default having been given.<sup>20</sup> Where the guaranty is for a certain indebtedness that may be incurred by the principal before a certain day, notice of the acceptance of the guaranty is held to be implied, and notice of the principal's default is unnecessary, therefore, to charge the guarantor.<sup>21</sup>

**§ 222. When no notice of default in payment by principal need be given guarantor of overdue debt, of lease, and of negotiable instrument by separate contract.**—The rule that no notice of the principal's default need be given in order to charge the unconditional guarantor of an existing demand is specially applicable to a guaranty of a debt made after the debt is due. In such case the principal is in default when the guaranty is made, and the reasons requiring notice do not apply. Thus H was indebted to R in a certain sum then due and payable, and C, in consideration of an indemnity given by H, and of R's engagement not to sue H for twelve months, promised to pay R the debt at that time, unless the same should

<sup>18</sup> Noyes v. Nichols, 28 Vt. 159.

<sup>20</sup> Cordier v. Thompson, 8 Daly

<sup>19</sup> Goring v. Edmonds, 6 Bing. 94; (N. Y. Com. Pleas), 172.

Id., 3 Moore & Payne, 259.

<sup>21</sup> Bank of Newbury v. Sinclair, 60 N. H. 100.

have been paid by H. Held, this was an original and absolute undertaking, and no demand on H, or notice of his default, was necessary in order to charge C.<sup>22</sup> The same thing has been held in the case of a guaranty of an overdue promissory note, when the guaranty on the back of the note was: "I assign the within note to \* \* (A), and guaranty the payment thereof, for value received;"<sup>23</sup> when a stranger to a note wrote on it, after it was due, "I hereby guaranty the payment of the within note, ninety days from the date of this guaranty;"<sup>24</sup> and when the payee of an overdue note indorsed it as follows: "I assign the within note to \* \* (A), for value received, and guaranty its prompt and full payment."<sup>25</sup> It is not usually necessary, in order to charge the guarantor of rent to come due under a lease, that demand should be made on the principal, and the guarantor be notified of his default. Thus a party, by a writing on the back of a lease, running five years, bound himself to pay the lessors "all rents, and damages of every kind they may sustain by reason of the non-compliance or fulfillment of the stipulations of the within lease by said" lessee. The lessee occupied the premises about half the term, and then left them. About three years after he left, the lessors demanded the rent of the guarantor, and brought suit on the guaranty, but they had before given the guarantor no notice of the default of the lessee. Held, the guaranty was an absolute undertaking, and the guarantor was liable.<sup>26</sup> In an action

<sup>22</sup> Read v. Cutts, 7 Greenl. (Me.) 186.

<sup>23</sup> Foster v. Tolleson, 13 Rich. Law & Eq. (S. C.) 31. And see a case precisely similar, Munro v. Hill, 25 S. C. 476. See, though, contra, Benton v. Gibson, 1 Hill (S. C.), 56.

<sup>24</sup> Sabin v. Harris. 12 Iowa, 87.

<sup>25</sup> Wright v. Dyer, 48 Mo. 525. To same effect, see Lane v. Levillian 4 Ark. (Pike), 76.

<sup>26</sup> Voltz v. Harris. 40 Ill. 155, explaining and modifying White v. Walker, 31 Ill. 422. To same effect, see Ducker v. Rapp, 9 Jones & Spencer (N. Y.), 235; Turnure v. Hohenthal, 4 Jones & Spencer (N. Y.), 79. Contra, Virden v.

Ellsworth, 15 Ind. 144. In Welch v. Walsh, 177 Mass. 555, 59 N. E. Rep. 440, a landlord allowed twenty-three months to elapse before notifying the guarantor of a lease that the tenant was in default. It was held that where the guaranty was absolute that a stated sum should be paid at a stated time, the creditor owed no duty of notice of default to the guarantor and therefore could not be guilty of negligence in failing to notify him. Following Watertown Fire Insurance Co. v. Simmons, 131 Mass. 85, and disapproving a dictum to the contrary in Vinal v. Richardson, 13 Allen (Mass.) 521, 532.



against the guarantor of rent already due, and to become due for a certain time, from a tenant at will, it has been held that it is not necessary to prove a demand of payment on the tenant, and notice of the non-payment to the guarantor, unless the terms of the guaranty, or the nature and circumstances of the particular case, require it. The court in an able opinion, which presents a clear view of the law on this point, said: "The subject of the guaranty was the payment of certain sums at certain times, both absolute, and fixed by the terms of the guaranty itself. It required no act of the plaintiff to precede the performance by Bailey (principal), except the permission for Bailey to remain, which the defendant knew had been given. If Bailey made a corresponding agreement to do what the defendant agreed he should do, it was broken by the mere fact of non-payment, without demand upon him. The same fact was of itself a breach of the defendant's contract of guaranty. A formal demand upon Bailey is not necessary to make his failure to pay the rent a breach of his obligation, and the defendant's contract is simply that Bailey shall perform his agreement. But whether Bailey made such a corresponding agreement or not, the defendant, by his guaranty, undertook that Bailey should perform certain specific acts, and he is liable on his agreement for Bailey's failure to do those acts. \* \* In a suit against a guarantor it is undoubtedly necessary to allege and prove a breach of the contract of guaranty, but it is only necessary to show such acts as would constitute a breach of the particular contract in suit. If the guaranty be for the performance of a specific act of another, and be absolute in terms, whatever is sufficient to show default in that other person will ordinarily show a breach of the contract of guaranty, and a right of action upon it." <sup>27</sup> One who is not a party to a negotiable instrument, but guarantees its payment by a separate contract, is not discharged by want of demand on the principal and notice of dishonor to the grantor, unless the guarantor is injured thereby.<sup>28</sup>

<sup>27</sup> Vinal v. Richardson, 13 Allen, 21; Hank v. Crittenden, 2 McLean, 521, disapproving Ilsley v. Jones, 557; Holbrow v. Wilkins, 1 Barn. & Gray, 260. See note 26, § 222. Cress. 10; Id., 2 Dow. & Ry. 59;

<sup>28</sup> Hitchcock v. Humfrey, 5 Man. Reynolds v. Douglass, 12 Pet. 497; & Gr. 559; Id., 6 Scott (N. R.), Carter v. White, L. R. 25 Ch. D. 540; Lewis v. Brewster, 2 McLean, 666; Rhett v. Poe, 2 How. (U. S.)



§ 223. If principal be insolvent when debt becomes due, no demand on him, nor notice of his default, necessary to guarantor.—If the principal debtor be insolvent when the debt becomes due, and afterwards so remain, no demand need be made on him, or notice of his default be given the guarantor, in most cases where it would otherwise be necessary, unless some loss or damage can be shown to have occurred to the guarantor in consequence; and he will only be discharged to the extent that he is injured.<sup>29</sup> Delay and damage must both concur to discharge the guarantor.<sup>30</sup> In this respect a guarantor differs from an indorser of a negotiable instrument, for while an indorser must be at once notified, independent of all considerations, it is otherwise with a guarantor.<sup>31</sup> With reference to this subject, it has been said that guarantors “insure, as it were, the solvency of their principals, and therefore, if the latter become bankrupt and notoriously insolvent, it is the

457; *Walton v. Mascall*, 13 Mees & Wels. 72; *Gasquet v. Thorn*, 14 La. (Curry), 506. Contra, *Philips v. Astling*, 2 Taunt. 206.

<sup>29</sup> *Louisville Manuf. Co. v. Welch*, 10 How. (U. S.) 461; *Johnson v. Wilmarth*, 13 Met. (Mass.) 416; *Bank v. Knotts*, 10 Rich. Law (S. C.), 543; *Leech v. Hill*, 4 Watts (Pa.), 448; *Skofield v. Haley*, 22 Me. 164; *Beebe v. Dudley*, 26 N. H. 249; *Farmers' & Mechanics' Bank v. Kercheval*, 2 Mich. 504; *Union Bank v. Coster's Ex'r*, 3 N. Y. 203; *Wolfe v. Browne*, 5 Ohio St. 304; *Reynolds v. Douglass*, 12 Pet. 497; *Gillighan v. Boardman*, 29 Me. 79; *Bashford v. Shaw*, 4 Ohio St. 264; *Voltz v. Harris*, 40 Ill. 155; *Fear v. Dunlap*, 1 Greene (Iowa), 331; *Fuller v. Scott*, 8 Kan. 25; *Withers v. Berry*, 25 Kan. 373; *Wildes v. Savage*, 1 Story, 22. In *Mamerow v. National Lead Co.*, 98 Ill. App. 460, at 466, three stockholders of the Berner-Mayer Co., a corporation, guaranteed “the payment to said National Lead Company, upon demand, of all moneys, debts, obliga-

tions and demands of whatever nature or character, now due or which may hereafter become due, from said The Berner-Mayer Company to the said National Lead Company.” Thereafter the National Lead Company gave the Berner-Mayer Company credit to an amount exceeding \$4,000. The Berner-Mayer Co. failed in December, 1897, and, a year thereafter, without previous demand or notice, the defendant Mamerow was sued on said guaranty. In affirming judgment against him, the court said, even if demand was necessary, it did not appear that defendant was prejudiced by the failure to make demand, and that since he had not specially pleaded any such defense, the trial court had properly excluded evidence tending to show that he was so prejudiced.

<sup>30</sup> *Woodson v. Moody*, 4 Humph. (Tenn.) 303.

<sup>31</sup> *Gibbs v. Cannon*, 9 Serg. & Rawle (Pa.), 198; *Overton v. Tracey*, 14 Serg. & Rawle (Pa.), 311.

same thing as if they were dead, and it is nugatory to go through the ceremony of making a demand upon them.”<sup>32</sup> Another court has clearly and correctly expressed the law on this subject, as follows: “The guarantor is entitled to notice, but cannot defend himself for want of it, unless the notice has been so long delayed as to raise a presumption of payment, or waiver, or, unless he can show that he has lost, by the delay, opportunities for obtaining securities, which a notice, or an earlier notice, would have secured him. \* \* If the notice be delayed for a very short time, but by reason of the delay the guarantor loses the opportunity of obtaining indemnity, and is irreparably damaged, he would be discharged from his obligation. But if the delay were for a long period, and it was nevertheless clear that the guarantor would have derived no benefit from an earlier notice, the delay would not impair his obligation.”<sup>33</sup> When the guaranty is such from its terms, or otherwise, that notice is necessary to put the guarantor in default, such notice may, if the principal be insolvent when the debt becomes due, and so remain, be given at any time before suit brought, and the same diligence is not required as in cases where the principal is solvent when the debt becomes due. The insolvency of the principal has a controlling influence on the question of the reasonable time in which notice should be given.<sup>34</sup> If the guarantor is also an indorser he is liable as guarantor even though statutory requisites for holding him as indorser have not been observed.<sup>35</sup>

**§ 224. What is the reasonable time within which notice must be given—Pleading.**—No general rule can be laid down as to

<sup>32</sup> *March v. Putney*, 56 N. H. 34, per Stanley, J. See, also, *Dearborn v. Sawyer*, 59 N. H. 95.

<sup>33</sup> *Second Nat. Bank v. Gaylord*, 34 Iowa, 246, per Day, J. To same effect, see *Davis Sewing Machine Co. v. Mills*, 55 Iowa, 543; *Singer Manuf. Co. v. Littler*, 56 Iowa, 601.

<sup>34</sup> *Salem Manuf. Co. v. Brower*, 4 Jones' Law (N. C.), 429; *Protection Ins. Co. v. Davis*, 5 Allen, 54; *Paige v. Parker*, 8 Gray, 211; *Salisbury v. Hale*, 12 Pick. 416. See, also, on this subject, *Reynolds v. Edney*, 8 Jones' Law (N. C.), 406.

<sup>35</sup> In *Lowe v. Farnham*, 22 Colo. 307, 44 Pac. Rep. 507, appellant assigned a note to appellee and by the same indorsement guaranteed payment of it. Held, that though the statute of Colorado, adopted from Illinois, makes the assignor liable only on proof that suit had been instituted against the maker of the note, or that the maker was insolvent, yet since appellant had not only assigned, but had also guaranteed the note, he was liable on his guaranty without such proof.

the time within which notice of the acceptance of the guaranty, or of the default of the principal, must be given the guarantor when such notice is necessary. All that can be said is, that the notice must be given within a reasonable time, the circumstances of each particular case being considered.<sup>36</sup> What is such reasonable time has been held to be a question of law,<sup>37</sup> especially where there is no dispute about the facts.<sup>38</sup> This question can very seldom, however, be resolved into a mere question of law, to be decided by the court, but must generally be a mixed question of law and fact, to be determined by the jury under proper instructions by the court.<sup>39</sup> It has been held that in determining whether notice of the acceptance of a continuing guaranty has been given within a reasonable time, reference must be had to the time of the acceptance of the guaranty, and not to the last sale under it.<sup>40</sup> Where a guaranty was a continuing one for certain drafts to be accepted, it was held that if the course of dealing between the parties was sufficient to justify a finding that the guarantor had notice of acceptance, it might be inferred that notice accompanied each transaction. The guaranty being continuous, the notice would be continuous also.<sup>41</sup> When notice of default in payment on the part of the principal is necessary to charge the guarantor, the declaration should aver the notice; but a general statement of notice, as "of which premises the defendant had due notice," is sufficient.<sup>42</sup> If notice is alleged in the declaration when it is not necessary, in order to charge the

<sup>36</sup> *Montgomery v. Kellogg*, 43 Miss. 486; *Howe v. Nickels*, 22 Me. 175. Note 56 to § 219.

<sup>37</sup> *Salem Mfg. Co. v. Brower*, 4 Jones' Law (N. C.), 429; *Craft v. Isham*, 13 Conn. 28. In *Barnes Cycle Co. v. Reed* (Pa.), 91 Fed. Rep. 481, 33 C. C. A. 646, 63 U. S. App. 279, the court said: "What is a reasonable time for notice of the acceptance of a guaranty depends upon the circumstances of each particular case, and generally is a question for the determination of the jury." To the same effect is *Averill Fertilizer Co. v. Byfield*, 9 Ind. App. 180, 34 N. E. Rep. 451.

<sup>38</sup> *Seaver v. Bradley*, 6 Greenl. (Me.) 60.

<sup>39</sup> *Lowry v. Adams*, 22 Vt. 160; *Louisville Manuf. Co. v. Welch*, 10 How. (U. S.) 461; *Wadsworth v. Allen*, 8 Gratt. (Va.) 174; *Seaver v. Bradley*, 6 Greenl. (Me.) 60.

<sup>40</sup> *Mussey v. Rayner*, 22 Pick. 223.

<sup>41</sup> *First Nat. Bank of Dubuque v. Carpenter*, 41 Iowa, 518.

<sup>42</sup> *Lewis v. Brewster*, 2 McLean, 121; *Oaks v. Weller*, 16 Vt. 63. That failure to give notice of the non-performance of a guaranteed contract, where loss results to the guarantor, is matter of defense, see *Furst & Bradley Mfg. Co. v. Black*,

guarantor, the allegation may be treated as surplusage, and need not be proved.<sup>43</sup> An averment that defendant "executed and delivered" per bond has been held a sufficient averment that it was accepted. The court said that "execution implies acceptance."<sup>44</sup>

**§ 225. How notice may be proved—What amounts to waiver of it.**—When notice to the guarantor is necessary in order to charge him, such notice need not be proved by direct evidence, but may be inferred from circumstances.<sup>1</sup> The notice need not be in writing nor in any particular form.<sup>2</sup> It may be given by letter.<sup>3</sup> It need not be given by the creditor. If knowledge is brought to the guarantor in any manner he can protect himself.<sup>4</sup> It may be inferred from what took place at the time of giving the guaranty, subsequent casual conversations of the guarantor with third persons, and his conduct and remarks in reference to the collection of the demand of the person for whose benefit the guaranty was given.<sup>5</sup> It is sufficient

111 Ind. 308; *Stanley v. Stanley*, 112 Ind. 143; *Snyder v. Click*, 112 Ind. 293; *Wells, Fargo & Co. v. Davis*, 2 Utah Terr. 411.

<sup>43</sup> *Gibbs v. Cannon*, 9 Serg. & Rawle (Pa.), 198.

<sup>44</sup> *Tapper v. New Home Sewing Machine Co.*, 22 Ind. App. 313, 53 N. E. Rep. 202.

<sup>1</sup> *Rankin v. Childs*, 9 Mo. 665; *Lawton v. Maner*, 9 Rich. Law (S. C.), 335; *Ruffner v. Love*, 33 Ill. App. 601. Written notice to a guarantor of the default of a lessee, with a certificate of the sheriff that he had served the same upon the guarantor, is competent evidence of service of the notice: *Taylor v. Taylor*, 64 Ind. 356.

<sup>2</sup> *Reynolds v. Douglass*, 12 Pet. 497. It need not be in writing unless so stipulated. *Lee v. Briggs*, 39 Mich. 592. See, also, *Ruffner v. Love*, 33 Ill. App. 601. In *Hart v. Minchen* (C. C., Ia.), 69 Fed. Rep. 520, defendant at Carroll, Ia., on August 14, 1893, wrote plaintiff at

Chicago: "I will guaranty the payment of such purchases as Jonas Nichols may make of you \* \* for this fall and winter trade." Plaintiff on August 24, 1893, replied: "We desire to acknowledge receipt of your favor of the 14th guarantying whatever Jonas Nichols may purchase of us for his fall and winter stock. His purchases up to this time amount to \$3,390.50, which we are getting ready for shipment." Held, in a suit on the guaranty, that this was a sufficient acceptance. Citing *Bell v. Bruen*, 1 How. (U. S.), 169; *Lawrence v. McCalmont*, 2 How. 426; *Mauran v. Bullus*, 16 Pet. (U. S.), 528; *Reynolds v. Douglas*, 12 Pet. (U. S.).

<sup>3</sup> *Dole v. Young*, 24 Pick. 250.

<sup>4</sup> *Griffin v. Rembert*, 2 Rich. Law, N. S. (S. C.) 410; *Oaks v. Weller*, 16 Vt. 63; *Greer Machine Co. v. Sears*, 23 Ky. Law Rep., 2025, 66 S. W. Rep. 521.

<sup>5</sup> *Woodstock Bank v. Downer*, 27 Vt. 539.

if the notice is given by the person for whom the guarantor became holden.<sup>6</sup> Notice of "about the amount" of goods furnished under a guaranty is sufficient.<sup>7</sup> It has been held that notice was sufficiently shown by the fact that the guarantor and the principal were close neighbors and relatives, and that the guarantor took other steps to further the credit of the principal with the creditor, and knew of advances made by the creditor to the principal.<sup>8</sup> Where a father-in-law lived just

<sup>6</sup> *Oaks v. Weller*, 16 Vt. 63; *Noyes v. Nichols*, 28 Vt. 159; *Powell v. Chicago Carpet Co.*, 22 Ill. App. 409.

<sup>7</sup> *Noyes v. Nichols*, 28 Vt. 159. But see *Spencer v. Carter*, 4 Jones' Law (N. C.), 287.

<sup>8</sup> *Menard v. Scudder*, 7 La. Ann. 385. In *Barnes Cycle Co. v. Reed* (C. C. W. D., Pa.), 84 Fed. Rep. 603, *Schlaudecker*, in Nov., 1895, made a written proposition to plaintiff company to act as its agent at Erie, Pa., and providing for the future ordering of bicycles from it. On Feb. 2, 1896, Reed signed a guaranty indorsed on this proposal guaranteeing "the payment when the same becomes due, of all sums owing or which may hereafter be owing for bicycles and bicycle attachments sold and delivered by said Barnes Cycle Co. to said Leo Schlaudecker under this contract," and further guaranteeing "the performance by said Leo Schlaudecker of all the other provisions of said contract on his part to be performed." Five days thereafter the Barnes Cycle Co. formally accepted Schlaudecker's proposal by indorsement of such acceptance thereon, but no notice of such acceptance was given to Reed, and, says the circuit court (p. 604), "there is no evidence that he knew of any goods being furnished to Schlaudecker by the Barnes Co. before August, 1896, at which time all deliveries were

completed." For want of such notice a verdict was directed for defendant. Judgment on such verdict was reversed by the circuit court of appeals, 91 Fed. Rep. 481, 33 C. C. A. 646, 63 U. S. App. 279, which held that there was conduct on the part of the guarantor from which the jury might properly infer that he had knowledge before the expiration of Schlaudecker's contract, that the cycle company was furnishing goods to Schlaudecker on the strength of his guaranty—the taking of indemnity against loss on this and other guaranties, and the receipt from Schlaudecker of a statement of his financial condition showing large indebtedness to the cycle company. Acheson, J., referring to the text, said that notice of acceptance of the guaranty need not be shown by direct proof, but may be inferred from circumstances, from the conduct or remarks of the guarantor, notice need not come from the creditor, it is sufficient if it reaches the guarantor from any source. Citing *Bascom v. Smith*, 164 Mass. 61, 41 N. E. Rep. 130; *Adams v. Jones*, 12 Pet. (U. S.) 207, 313. In *Fisk v. Stone*, 6 Dak. (Terr.) 35, defendant wrote to plaintiffs of a woman who had applied to them for credit: "If you will send her such goods as she may order not exceeding \$300 due you at any one time, I will guarantee that you are paid in full," and entrusted his

across the street from his son-in-law, and frequently passed his store, and dealt with him occasionally, it was held these facts did not constitute notice to the father-in-law of the acceptance of a guaranty for goods to be sold the son-in-law.<sup>9</sup> The fact that the principal and guarantor were relatives and had been partners has been given weight, and, with other circumstances, held to be sufficient evidence of notice to the guarantor.<sup>10</sup> An acknowledgment by the guarantor of his liability and a promise to pay supersedes the necessity of any further evidence of notice of the acceptance of the guaranty,<sup>11</sup> and of default of the principal.<sup>12</sup> Where the guaranty expressly waives demand and notice, the guarantor is liable to an action thereon without previous demand or notice;<sup>13</sup> and in such case the guaranty cannot be contradicted by oral evidence of a contemporaneous agreement to collect the note from the principal and of laches in pursuing him.<sup>14</sup> The guarantor cannot complain of want of notice of acceptance of the guaranty when his acts and declarations amount to a waiver of such notice.<sup>15</sup> Where partners have, before dissolution of the firm, waived demand and notice in an indorsement, it will be binding on them after dissolution.<sup>16</sup> Where there was an acceptance by letter it is sufficient to show the due and proper mailing and it is not

letter to the woman for delivery to plaintiff, and upon receiving it for her plaintiff extended the desired credit. Held, that the guaranty was intended to be absolute. That if it was an offer of guaranty, the defendant by his conduct waived the right to notice of its acceptance.

<sup>9</sup> *Craft v. Isham*, 13 Conn. 28.

<sup>10</sup> *Lowry v. Adams*, 22 Vt. 160.

<sup>11</sup> *Peck v. Barney*, 13 Vt. 93.

<sup>12</sup> *Breed v. Hillhouse*, 7 Conn. 523.

<sup>13</sup> *Bickford v. Gibbs*, 8 Cush. 154.

See, also, *Bray v. Marsh*, 75 Me. 452. So, in a suit on a bond it is not necessary to allege or show any notice to the surety of a default by the principal, where the bond expressly waives "presentment for payment, notice of non-payment, protest or notice of protest, and diligence." *Murphy v. Victor Sew.*

*Mach. Co.*, 112 U. S. 688. And see, to same effect, *Crittenden v. Fiske*, 46 Mich. 70. Where the written guaranty waives notice of acceptance, no notice is necessary. *Hughes v. Roberts, Johnson & Rand Shoe Co.*, Ky. App., Mch., 1903, 72 S. W. Rep. 799. The opinion contains a form of guaranty of credit. See, also, *Swisher v. Deering*, 104 Ill. App. 572.

<sup>14</sup> *Worcester Co. Institution v. Davis*, 13 Gray, 531.

<sup>15</sup> *Trefethen v. Locke*, 16 La. Ann. 19. As where he guaranties a note "unconditionally at all times,"—in such event he thereby waives demand and notice of acceptance. *Davis v. Wells*, 104 U. S. 159.

<sup>16</sup> *Star Wagon Co. v. Swezy*, 59 Iowa, 609, 13 N. E. Rep. 749.

necessary to show that the letter reached the guarantor.<sup>17</sup> Where the guarantor stipulated that the written acknowledgment of his principal should in every respect bind him and be conclusive against him he was not allowed to dispute the correctness of a written statement by his principal.<sup>18</sup>

<sup>17</sup> Bishop v. Eaton, 161 Mass. 496,  
37 N. E. Rep. 665.

<sup>18</sup> Swisher v. Deering, 104 Ill.  
App. 572.



## CHAPTER IX.

### OF THE RIGHTS OF THE SURETY OR GUARANTOR AGAINST THE PRINCIPAL.

- § 226. Promise by principal to indemnify surety implied—When cause of action accrues to surety.
227. General principles respecting surety's right to indemnity.
228. Surety may pay by instalments, and sue principal for every instalment—Implied contract of indemnity arises when surety becomes bound.
229. Surety who pays the debt may sue principal in assumpsit, and is entitled to full indemnity from all or any one of the principals.
230. When joint sureties can, and when they cannot, maintain joint suit for indemnity.
231. Surety who has not been requested to become such cannot recover indemnity—Surety who pays may immediately sue principal without demand or notice.
232. Surety who pays the debt with his own note or property may at once sue the principal for indemnity.
233. Surety who extinguishes the debt for less than the full amount can only recover from the principal the value of what he paid.
234. Surety can only recover from principal the amount paid, and not consequential or indirect damages.
- § 235. Effect of judgment against surety on liability of principal for indemnity—Notice—Statute of limitations, etc.
236. How claim of surety against principal affected by usury—Wager.
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239. Mortgage for indemnity of surety valid—What it covers.
240. Rights of surety who has been indemnified.
241. Effect of the bankruptcy of the principal on the surety's claim for indemnity.
242. When surety may by express contract recover indemnity from principal before paying the debt—Mortgage of indemnity, etc.
243. The same continued—Various forms of indemnity contracts.
244. When special contract of indemnity will not authorize surety to recover before paying the debt, etc.
245. When surety, apprehending loss, may, before paying the debt, bring suit in chancery to compel principal to pay it.

- § 246. Cases in which a surety may have relief in equity before paying the debt.
247. Cases in which a surety cannot recover indemnity from the principal.
248. Set-off—Surety may bid at execution sale of principal's property—Surety may assign his claim against the principal, etc.
249. When insolvent principal cannot collect debt due him by surety—Verbal guarantor who pays debt may recover indemnity—Other cases.
250. Surety on note who pays without notice of failure of consideration may recover indemnity—When surety, who has joined in fraudulent scheme with principal, may recover indemnity—Other cases.
- § 251. Other cases as to rights of surety against principal—Agreement not to sue as a defense.
252. Statute of limitations as between surety and principal.
253. When surety may replevy property of principal.
254. When surety has lien on property of principal.

**§ 226. Promise by principal to indemnify surety implied—When cause of action accrues to surety.**—Upon payment by the surety or guarantor of the debt for which he is bound, the same being then due, a right of action for reimbursement immediately arises in his favor and against the principal.<sup>19</sup> In the absence of an express agreement the law implies a prom-

<sup>19</sup> And it is no objection to a recovery in such action that such payment was made upon a judgment recovered by the creditor against them both. The surety by reason of such payment is entitled to the benefit of the judgment against the principal and may enforce it against him by execution. *Kimmel v. Lowe*, 28 Minn. 265. And see, also, *Wilson v. Crawford*, 47 Iowa, 469. *Campbell v. Rotering*, 42 Minn. 115, 43 N. W. Rep. 795, 6 L. R. A. 278, and note. But not before payment: In *Resseter v. Waterman*, 151 Ill. 169, the creditor was sued in assumpsit on his verbal promise to get the principal to execute a chattel mortgage securing his note in consideration of the surety's signing the note as surety. He defended on the ground that his promise was a promise to answer for the debt default or miscarriage of another, and

therefore must be in writing. That cannot be, said the court, for the debtor is under no obligation to save his surety harmless. The surety has no right of action against the principal until after he has paid the debt or given his own notes or made other like arrangements equivalent to payment, and then he can recover only the amount paid and interest. The principal being under no obligation to give his surety such chattel mortgage, a promise that he would give one is an original promise and need not be in writing. The claim of a creditor against the estate of his deceased surety for a possible breach that has not been discovered or has not occurred is not provable in the probate court: *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. Rep. 641; note 21, § 226 at end.

ise of indemnity on the part of the principal.<sup>20</sup> If the debt is due, the right of action on this implied promise accrues to the surety or guarantor at the time he pays the debt or a part of it, and not before.<sup>21</sup> Consequently a surety cannot commence an attachment suit against his principal before the note he has signed is due, and before he has paid it, under the provision of a statute allowing an attachment to be brought in certain cases where "nothing but time is wanting to fix an absolute indebtedness." Here something besides time is wanting, for the principal may pay the debt when due and the surety never be damnified.<sup>22</sup> Judgment was obtained against a surety on a note which he paid. The amount of the note was within the jurisdiction of a justice of the peace, but the amount of the judgment, and which was paid, was not. Held, the surety could not sue for indemnity before a justice, as his cause of action arose upon payment of the judgment and was for the amount paid.<sup>23</sup> A surety who had not paid the debt for which he had become bound had effects of the principal in his hands which had not been left with him for his indemnity. He was summoned as garnishee of the principal, and it was held that he was liable even though he was afterwards sued for, and obliged to pay, the debt of the principal. He had no right of action against the principal when summoned as garnishee.<sup>24</sup> If the surety takes a bond of indemnity from the principal, it has been held that he cannot upon paying the debt sue the principal upon an implied promise, but is confined to his remedy on the bond upon the ground that "Promises in law only exist where there is no express stipulation."<sup>25</sup> But it has been held that where a surety takes security for his indemnity from a stranger, the presumption is that it is cumulative, and the

<sup>20</sup> *Martin v. Ellerbee's Adm'r*, 70 Ala. 326.

<sup>21</sup> *Pigon v. French*, 1 Wash. (U. S.) 278; *Ford v. Stobridge*, Nels. 24; *Forest v. Shores*, 11 La. (Curry), 416; *Cotton v. Alexander*, 32 Kan. 339; *Harper v. McVeigh*, 82 Va. 751; *Lee v. Wisner*, 38 Mich. 82; *Lane v. Westmoreland*, 79 Ala. 372; *Stearns v. Irwin*, 62 Ind. 558; *Covey v. Neff*, 63 Ind. 391. And this is true with respect to the estate of the principal. Surety cannot

seek to charge his principal's estate until he has first paid the debt. In *re Estate of Hill*, 67 Calif. 238. *Bullard v. Brown*, Vt., Mch., 1902, 52 Atl. Rep. 422; *Forbes v. Harrington*, 171 Mass. 386, 50 N. E. Rep. 641; note 19, § 226, *supra*.

<sup>22</sup> *Dennison v. Soper*, 33 Iowa, 183.

<sup>23</sup> *Blake v. Downey*, 51 Mo. 437.

<sup>24</sup> *Ingalls v. Dennett*, 6 Greenl. (Me.) 79.

<sup>25</sup> *Toussaint v. Martinnant*, 2 Durn. & East, 100, per Buller, J.

implied obligation of the principal to indemnify the surety is not waived or merged.<sup>26</sup> The implied promise of indemnity arises in favor of the surety who pays the debt without suit against him.<sup>27</sup> The surety may, without the request of the principal, pay the debt before it is due, and after it is due sue the principal for indemnity. In such case the cause of action accrues to the surety at the time the debt becomes due.<sup>28</sup> With reference to this matter an eminent judge has said: "Why may not a surety take measures of precaution against loss from a change in the circumstances of his principal and accept terms of compromise before the day which may not be attainable after it? He may ultimately have to bear the burden of the debt, and may therefore provide for the contingency by reducing the weight of it. Nor is he bound to subject himself to the risk of an action by waiting till the creditor has a cause of action. He may, in short, consult his own safety, and resort to any measure calculated to assure him of it which does not involve a wanton sacrifice of the interests of his principal."<sup>29</sup>

**§ 227. General principles respecting surety's right to indemnity.**—A surety seeking indemnity from his principal must sue in his own name; he cannot sue in the name of his obligee.<sup>30</sup> A surety's right to indemnity cannot be defeated because the principal's name did not appear in the body of the obligation,<sup>31</sup> nor because he did not execute it.<sup>32</sup> To deprive a surety, who

<sup>26</sup> *Wesley Church v. Moore*, 10 Pa. St. 273. See, to this point, *Water Power Co. v. Brown*, 23 Kan. 676.

<sup>27</sup> *Mauri v. Heffernan*, 13 Johns. 58.

<sup>28</sup> *White v. Miller*, 47 Ind. 385; *Tillotson v. Rose*, 11 Met. (Mass.) 299. But he cannot sue for indemnity before the debt is due. *Ross v. Menefee*, 125 Ind. 432.

<sup>29</sup> *Gibson, C. J.*, in *Craig v. Craig*, 5 Rawle (Pa.), 91.

<sup>30</sup> *Hardware Co. v. Deere, Mansur & Co.*, 53 Ark. 140. In *Moulton v. McLean*, 5 Colo. App. 454, 39 Pac. Rep. 78, a county treasurer, upon depositing public money in defendants' bank, took from defendants an indemnity bond in which it was recited that "said G. H. Moulton,

treasurer of the county of Garfield," had deposited such money, and conditioned to safely keep said money "or such other sums as may be hereafter deposited in said bank by said county treasurer," and pay the same to his order as required. Held, that an action on this bond was properly brought in the name of the treasurer as an individual, and, following *Comstock v. Gage*, 91 Ill. 328, such deposit was not a loaning of public money such as is forbidden by statute in Illinois and Colorado.

<sup>31</sup> *Harnsberger v. Yancey*, 33 Gratt. (Va.) 527.

<sup>32</sup> *Trustees of Schools v. Sheik et al.*, 119 Ill. 579.

has been damnified, of recourse upon his principal for indemnity, it must appear in the obligation in distinct terms, and is then strictly construed.<sup>33</sup> Where a stranger pays the principal's debt and the surety reimburses him, the surety is entitled to be indemnified by the principal.<sup>34</sup> The fact that a surety suffered judgment to go against him by default, contrary to a statute prohibiting sureties from permitting judgments against them by default, has been held not to defeat his right of indemnity from the principal for money paid on such judgment.<sup>35</sup> The surety may, before he pays the indebtedness upon which his principal has defaulted, bring suit upon a note that he holds as collateral.<sup>36</sup> But, it has been held, a surety cannot maintain a bill for indemnity on the mere apprehension that the principal may default and that he may thereby suffer loss.<sup>37</sup>

**§ 228. Surety may pay by instalments, and sue principal for every instalment—Implied contract of indemnity arises when surety becomes bound.**—When the debt becomes due the surety may pay a part of it and immediately sue the principal for the amount so paid. If he pays different parts at different times he may sue the principal for each part when he pays it. This is not making several claims of one, because the debt due the creditor is not the surety's cause of action. His cause of action is the payment which he has made for the principal, and it is complete the instant he makes the payment.<sup>38</sup> "However convenient it might be to limit the number of actions in respect of one suretyship, there is no rule of law which requires the surety to pay the whole debt before he can call for reimbursement."<sup>39</sup> A surety paid the creditor part of the amount due on a note with a view of reducing it within the jurisdiction of a justice of the peace, and sued the principal for the sum so paid. Held, that as he was bound for the debt he had a right to make a partial payment and recover the amount paid without

<sup>33</sup> Thomas v. Leibke, 81 Mo. 675, (C. C. Ind.), 95 Fed. Rep. 49; note affirming 9 Mo. App. 424. 12, § 1.

<sup>34</sup> Harper's Adm'r v. McVeigh's Adm'r, 82 Va. 751. <sup>38</sup> Bullock v. Campbell, 9 Gill (Md.) 182; Williams' Adm'r v.

<sup>35</sup> Riley v. Stallworth, 56 Ala. 481. Williams' Adm'r, 5 Ohio 444;

<sup>36</sup> Klein v. Funk, 82 Minn. 3, 84 Pickett v. Bates, 3 La. Ann. 627. N. W. Rep. 460.

<sup>39</sup> Davies v. Humphreys, 6 Mees.

<sup>37</sup> American Bonding & Trust Co. v. Logansport & W. Va. Gas Co. & Wels. 153, per Parke, B.

regard to the intent with which the payment was made.<sup>40</sup> Although the surety cannot, in the absence of express contract, sue the principal for indemnity before he actually pays the debt, yet the implied contract for indemnity arises immediately upon the surety becoming bound. The law upon this point has been thus stated: "It is clear that the contract of a principal with his surety to indemnify him for any payment which the latter may make to the creditor, in consequence of the liability assumed, takes effect from the time when the surety becomes responsible for the debt of the principal. It is then that the law raises the implied contract or promise of indemnity. No new contract is made when the money is paid by the surety, but the payment relates back to the time when the contract was entered into by which the liability to pay was incurred. The payment only fixes the amount of damages for which the principal is liable under his original agreement to indemnify the surety."<sup>41</sup> This was held in a case where the question was whether the principal was entitled to a homestead. The same principle was held where a voluntary conveyance was made by the principal after the surety became bound, but before he paid the debt, and the conveyance was set aside at the suit of the surety.<sup>42</sup> A was indebted to B in \$100, but he was surety for B for \$500. B conveyed all his accounts to an assignee before A paid anything on account of his suretyship; afterwards A paid the amount for which he was liable as surety. Held, the assignee could recover nothing from A. The court said: "We think there exists in a surety an equity from the time of his assuming the relation, by virtue of the implied undertaking on the part of the principal to see him indemnified, and that although no perfect right of action accrues until actual payment, still such payment has such reference to the original undertaking of suretyship, that it overrides any equities of a subsequent date."<sup>43</sup> "When the principal and

<sup>40</sup> Hall v. Hall, 10 Humph. (Tenn.) 352.

<sup>41</sup> Per Bigelow, J., in Rice v. Southgate, 16 Gray, 142. See, further, as to when the implied contract for indemnity arises, Miller v. Stout, 5 Del. Ch. 259; Zollickoffer v. Feth, 44 Md. 359; Martin v. Ellerbee's Adm'r, 70 Ala. 326.

<sup>42</sup> Choteau v. Jones, 11 Ill. 300. To similar effect, see Hatfield v. Merod, 82 Ill. 113.

<sup>43</sup> Barney v. Grover, 28 Vt. 391, per Redfield, C. J. See, also, Morrow v. Morrow, 2 Tenn. Ch. (Cooper), 549; Loughridge v. Bowland, 52 Miss. 546.

surety each mortgages his own property to secure the debt of the principal, the surety is entitled to have the property of the principal sold first, and the proceeds of the sale applied in satisfaction of the debt."<sup>44</sup>

**§ 229. Surety who pays the debt may sue principal in assumpsit, and is entitled to full indemnity from all or any one of the principals.**—The surety or guarantor who has paid the debt of the principal may maintain an action of assumpsit against the principal for money paid at his request.<sup>1</sup> It has been held that if the surety in any way (as by his land being sold on execution) extinguishes or pays the debt of the principal, it is, so far as the principal is concerned, equivalent to paying money for his benefit and at his request, and the surety may maintain general assumpsit against the principal for money paid.<sup>2</sup> The surety cannot recover indemnity from the

<sup>44</sup> So held in suit to foreclose both mortgages: *Kempner v. Dooley*, 60 Ark. 526; *Pacific Guano Co. v. Anglin*, 82 Ala. 292, 1 So. Rep. 852.

<sup>1</sup> *Morrice v. Redwyn*, 2 Barnardiston, 26; *Davies v. Humphreys*, 6 Mees. & Wels. 153; *Ford v. Keith*, 1 Mass. 139; *Exall v. Partridge*, 8 Durn. & East. 308; *Warrington v. Furber*, 8 East, 242. See, also, *Crisfield v. State*, 55 Md. 192; *Kaiser v. Johnson*, 107 Ga. 659, 34 S. E. Rep. 285. In *McKelvey v. Tucker* (C. C., N. D., N. Y.), 55 Fed. Rep. 719, defendant at Utica, N. Y., telegraphed the First National Bank at Grand Forks, Dak., of which plaintiff was president: "Please provide bondsmen, *Tucker v. Johnson*. See *Noyes* [defendant's attorney in a proposed attachment suit] \* \* We guarantee you against loss on bond of \$2,000, *Tucker v. Johnson*. \* \* We guarantee \$1,300 additional." Thereupon plaintiff became surety on an attachment bond and a bond indemnifying the sheriff for seizing goods of defendant in the case of *Tucker v. Johnson*, and afterwards was sued and compelled

to pay a judgment recovered on the latter bond. Held, that defendants must make good his loss. But in equity the surety is subrogated to all the securities held by the creditor (*Ferguson's Adm'r v. Carson's Adm'r*, 86 Mo. 673; *Crisfield v. State*, 55 Md. 192), and the rule at common law does not apply. Where a surety pays the note of his principal and then has the note assigned to him, it is held he cannot sue his principal on the note, but may maintain an action of implied assumpsit against him for the sum paid. *Frevort v. Henry*, 14 Nev. 191. A statutory remedy given a surety against his principal for money paid is held to be cumulative merely, and does not preclude a common-law action. *Riley v. Stallworth*, 56 Ala. 481.

<sup>2</sup> *Hulett v. Soullard*, 26 Vt. 295. The payment of a note by a surety is not, as between himself and the principal, an extinguishment of the same, and his right of action against the principal is held to be upon the note, and not on an implied assumpsit. *Tutt v. Thornton*, 57 Tex. 35, overruling *Holliman v. Rogers*, 6



principal by an action in tort.<sup>3</sup> If one of several joint guarantors pays the debt for which all are bound, he has thereby a separate right of action against the principal.<sup>4</sup> The law implies a several assumpsit by the principal to reimburse the surety who pays the debt; and, therefore, if the surety who pays the debt releases his co-surety from all claim for contribution, such release does not affect his claim for indemnity against the principal.<sup>5</sup> Unless there is an express agreement to the contrary, the surety is entitled to claim indemnity from all his principals. Thus certain parties, being appointed executors of a will, part of them made a joint bond as such, and a surety also signed the bond. Afterwards A, another of the executors, signed the bond. There was but the one surety, and, when he signed the bond, he stated that he signed it as surety for B, one of the executors, and wished the other executors to get different bondsmen. B was guilty of a default and died, and afterwards judgment was recovered on the bond against the surviving executors, including A, and also against the surety. The surety paid the judgment, and sued all the surviving executors for indemnity. Held, that A, by signing the bond subsequent to the time the surety signed, recognized the surety as his surety, and this was equivalent to a previous request, and that A and all the surviving executors were liable for the indemnity of the surety.<sup>6</sup> If the surety is bound for several principals, he is entitled to recover from any one of them the whole of what he has paid. Each of the principals is debtor for the whole of the debt to the creditor, and the surety, being liable for each of them, has, by paying the debt, freed each of them from the creditors' claim for the whole, and consequently has a right to recover the whole amount from any one of them.<sup>7</sup> He

Tex. 1. But see directly the contrary, *Frevert v. Henry*, 14 Nev. 191.

<sup>3</sup> *Ledbetter v. Torney*, 11 Ired. Law (N. C.), 294.

<sup>4</sup> *Lowry v. Lumbermen's Bank*, 2 Watts & Serg. (Pa.) 210.

<sup>5</sup> *Crowdus v. Shelby*, 6 J. J. Marsh. (Ky.) 61. Surety on indemnity bond held liable for counsel fees in defending suit on former bond. *McKenzie v. Underwood*, 21 Dist. Columbia Rep. 126.

<sup>6</sup> *Babcock v. Hubbard*, 2 Conn. 536. Where H made a note indorsed by W and R and sent to T, who was obliged to indorse it in order that it might be discounted, and he was subsequently compelled to pay it, held, that he was in equity entitled to full indemnity from H, W and R. *Thompson v. Taylor*, 12 R. I. 109.

<sup>7</sup> *Apgar's Adm'rs v. Hiler*, 4 Zab. (N. J.) 812; *Dickey v. Rogers*, 19 Martin (La.), 7 N. S. 588;

may recover the whole amount from the surviving one of two principals,<sup>8</sup> or from the estate of a deceased principal where there are several surviving principals.<sup>9</sup>

**§ 230. When joint sureties can, and when they cannot, maintain joint suit for indemnity.**—If there are several sureties for the same debt, and each pays a portion of it from his individual money, they cannot join in a suit against the principal for the money so paid.<sup>10</sup> Where, however, the payment is made by several sureties from a joint fund, they may join in an action against the principal. Thus, two sureties who were jointly liable as such for a debt, borrowed money to pay a portion of it, for which they gave their joint note, and to pay the balance they gave their joint note to the creditor, who accepted it as payment. Held, they might properly bring a joint suit for indemnity against the principal.<sup>11</sup> Three parties having jointly guarantied a debt and received a mortgage of indemnity, two of them paid the debt, and they all joined in a bill to foreclose the mortgage. Held, they might properly do so.<sup>12</sup> A judgment was rendered against several persons as heirs of a surety, and they gave a surety for a stay of execution, but afterwards paid the judgment. Held, they might jointly sue the principal for indemnity. “Their liability arose upon the fact that we must presume that his (the ancestor’s) estate came into their hands; otherwise they would not have been responsible. It was their joint debt, then, as heirs,” and having made payment jointly they were entitled to join in a suit for indemnity.<sup>13</sup> Where several individuals, acting as partners, and in their partnership name, became sureties for

Bunce v. Bunce, Kirby (Conn.) 137; Clay v. Severance, 55 Vt. 300.

<sup>8</sup> Riddle v. Bowman, 27 N. H. 236.

<sup>9</sup> West v. Bank of Rutland, 19 Vt. 403.

<sup>10</sup> Sevier v. Roddie, 51 Mo. 580; Parker v. Leek, 1 Stew. (Ala.) 523; Appleton v. Bascom, 3 Met. (Mass.) 169; Peabody v. Chapman, 20 N. H. 418; Bunker v. Tufts, 55 Me. 180.

<sup>11</sup> Pearson v. Parker, 3 N. H. 366. To same effect, see Whipple v. Briggs, 28 Vt. 65, and Enos v. Leach, 18 Hun (N. Y.), 139. As to the

weight and sufficiency of evidence in such a case, see Romero v. Desmarais, 4 N. M. 367.

<sup>12</sup> Dye v. Mann, 10 Mich. 291. Holding that sureties who have paid for the default of a tax collector, and been authorized by statute to bring suits for their indemnity against persons owing taxes, may join in such suits, see Prather v. Johnson, 3 Harr. & Johns. (Md.) 487.

<sup>13</sup> Snider v. Greathouse, 16 Ark. 72.

another partnership, and after the dissolution of both partnerships were called upon to pay, and jointly paid, the amount for which they were so liable, it was held that they might maintain a joint action for indemnity.<sup>14</sup> B and G were joint sureties, and B died. His executor was a partner in business with G, and the two partners paid the debt out of their joint funds as partners. Held, they could not join in a suit for indemnity. They were not joint sureties, nor was the money paid for a partnership debt. Having made the payment on a matter foreign to their partnership concerns, it operated as a severance of their joint interest in the money paid.<sup>15</sup> Where the joint agent of 10 sureties paid the principal's debt in their behalf it has been held that they may jointly file a claim against the estate of their deceased principal.<sup>16</sup>

**§ 231. Surety who has not been requested to become such cannot recover indemnity—Surety who pays may immediately sue principal without demand or notice.**—A surety cannot ordinarily recover indemnity from the principal, unless he became surety at the request of the principal, either express or implied.<sup>17</sup> After a bond had been executed by principal and

<sup>14</sup> Day v. Swann, 13 Me. 165.

<sup>15</sup> Gould v. Gould, 8 Cowen (N. Y.), 168.

<sup>16</sup> Whitbeck v. Ramsay, 74 Ill. App. 524, reversed on other grounds in 183 Ill. 550.

<sup>17</sup> Ex'rs of White v. White, 30 Vt. 338; McPherson v. Meek, 30 Mo. 345; King v. Hannah, 6 Brad. (Ill. App.) 495. When request to guaranty will be implied, see Ricketson v. Giles, 91 Ill. 154. In seeking indemnity from the principal, the surety, it is held, need not allege in his complaint a request from the principal to pay for him. Clanton v. Coward, 67 Cal. 373. McKelvey v. Tucker (C. C., N. D., N. Y.), 55 Fed. Rep. 719; note 1, § 229, supra. In Roe v. Kiser, 62 Ark. 92, 34 S. W. Rep. 534, a surety who had paid the principal's note on which he was surety filed his bill to foreclose a mortgage given him by way of

indemnity by the principal. The principal resisted foreclosure on the ground that the note which on its face bore the legal rate of interest at 10 per cent, was in fact usurious and void (under statute) and that the surety had paid the note without the knowledge or consent of the principal and with full knowledge that it was so usurious and void. The court held that evidence was admissible to show the contemporaneous parol agreement, because it tended to show that the written contract was in fact void, and that the surety could not maintain his bill to foreclose. "The note given by Kiser [the principal] and Roe [the surety] to Felker, and the mortgage by Kiser to Roe were usurious and void," said the court. "There was no legal obligation upon either Kiser or Roe to pay the note they had given Felker, and the evidence does

surety, another person, at the instance of the holder, but without the knowledge or consent of the maker, guarantied the bond by indorsing on it as follows: "This is a good bond." He was compelled to pay the bond, and sued the original surety for indemnity. Held, he was not entitled to recover, because he was not an indorser in the usual sense of that term, and he had not been requested to become surety by the party he sought to charge.<sup>18</sup> A and B were principals and C and D sureties in a bond. Before signing, it was agreed that C should be the surety of A, and D the surety of B, but this did not appear from the instrument. C and D each paid one-half of the debt, and A indemnified C. Afterwards D sued A and B for indemnity. Held, he could not recover anything from A. The court said: "The obligation of principals to reimburse to securities the money paid by them is not founded on the bonds which securities give for their principals, but on the express contracts of indemnity which the parties make, or upon the implied promise raised by the law upon the payment of money for another at his request."<sup>19</sup> Where the surety of a surety pays the debt of the principal under a legal obligation from which the principal was bound to relieve him, such payment is a sufficient consideration to raise an implied assumpsit on the part of

not show that Kiser requested Roe to pay the same, but tends to show that he did it voluntarily, knowing that it was usurious and void. \* \* As Roe's right to relief against Kiser depended upon the unlawful transaction in making the usurious agreement by himself, Kiser and Felker, he is not entitled to any relief." Citing *Trible v. Nichols*, 53 Ark. 273, 13 S. W. Rep. 796, where the court held that "when the claim to subrogation grows out of an agreement which is void by reason of usury," it furnishes no basis for relief.

<sup>18</sup> *Carter v. Black*, 4 Dev. & Bat. Law (N. C.), 425. But where the principal maker in a promissory note, after others, who, in fact, are sureties for him, had signed the same, procured another person, in

their absence and without their knowledge, to indorse the same as guarantor, who was afterwards compelled to pay the same, the fact that the guarantor became liable without the request of the sureties was held no defense in an action against them by the guarantor. They all being liable primarily, a request of any one of them to guaranty payment was the act of all. *Hamilton v. Johnson*, 82 Ill. 39. Where the guarantor pays his principal's obligation because he is legally bound to do so, he is held entitled to indemnity, notwithstanding the guaranty was given and debt paid without request of the principal. *Teberg v. Swenson*, 32 Kan. 224.

<sup>19</sup> *Hill v. Wright*, 23 Ark. 530, per Fairchild, J.

the principal to repay the amount, although the payment was made without a request from the principal.<sup>20</sup> A request may be inferred from circumstances. Thus, a party signed an appeal bond from a judgment by a justice of the peace, as surety for appellants, who appeared in the appellate court and defended the suit, and were beaten, and the surety had to pay a portion of the judgment. Held that, from the fact that the principal appeared and defended in the appellate court, a request to the surety to become such would be inferred.<sup>21</sup> A surety who has paid the debt of the principal may at once, without notice to him or making any demand of indemnity, sue him for reimbursement. The contract of indemnity "is supposed to arise at the moment when the surety contracts his obligation, and it is broken the moment when the surety is damnified." It is the duty of the principal to take notice of the fact that the surety has been damnified.<sup>22</sup>

**§ 232. Surety who pays the debt with his own note or property may at once sue the principal for indemnity.**—The surety who, in satisfaction of the debt of the principal, gives his own note, which the creditor receives as payment of the debt, may immediately, and before paying the note given by him, sue the principal for indemnity.<sup>23</sup> A surety gave his note for the

<sup>20</sup> Hall v. Smith, 5 How. (U. S.) 96.

<sup>21</sup> Snell v. Warner, 63 Ill. 176.

<sup>22</sup> Ward v. Henry, 5 Conn. 595, per Bristol, J.; Thompson v. Wilson's Ex'r, 13 La. (Curry), 138; Collins v. Boyd, 14 Ala. 505; Sikes v. Quick, 7 Jones, Law (N. C.), 19. On same subject, see Warrington v. Furber, 8 East, 242.

<sup>23</sup> The cases cited to this proposition have been re-examined by Mr. L. M. Ackley, editor of this edition, and may be stated in greater detail as follows: Doolittle v. Dwight, 2 Metc. (Mass.), 561, assumpsit by two sureties who had paid the principal's debt with their notes. Held, Shaw, C. J., that they could recover though their note was not paid. Bone v. Torrey, 16 Ark. 83, at 87. Claim against the estate

of a deceased principal by his surety who had paid the principal's debt with \$1,000 cash and his note, with security for the balance. The note had not been paid at the trial. The court said the note must be "held prima facie equivalent to a payment in cash." Citing Cornwall v. Gould, 4 Pick (Mass.), 444, and Pearson v. Parker, 3 N. H. 366, holding that a surety who had paid with his note might maintain assumpsit against the principal. In Mims v. McDowell, 4 Ga. 182, a surety who had paid with his note, brought suit, under statute, to foreclose a chattel mortgage of slaves by which the principal's note was secured. The surety's note had not been paid. Held, that that circumstance "did not in the least impair his right to collect from the de-

debt of the principal, which was accepted by the creditor as payment. The surety never paid the note, became insolvent, and afterwards sued the principal for money paid. Held, he

fendant [principal] all that was legally due on the note in the hands of Williams [payee].'' In *Elwood v. Deifendorf*, 5 Barb. (N. Y.), 398, at 408, three sureties gave their own note for \$515 balance due upon the principal's debt, and the court found it was accepted as payment. Held, that after the principal's discharge in bankruptcy, his death and the settlement of his estate, they could, without paying their note, maintain their bill in equity against the principal's heirs and devisees to enforce payment out of his homestead of the amount of the note with interest from its date. Followed in *Auerbach v. Rogin* (1903), 83 N. Y. Supp. 154, 40 Misc. Rep. 695, *Gildersleeve, J.* In which case, there was an express agreement to hold the surety "harmless" and pay whatever "loss" he might suffer. Held that the principal was liable thereunder for the amount of the surety's note, which had been accepted in payment though it was not yet due. *Witherby v. Mann*, 11 Johns. Rep. (N. Y.), 518, held, that a surety who had paid with his note might, without paying the note, maintain assumpsit against the principal. In *Rizer v. Callen*, 27 Kans. 339, seven sureties on the official bond of a county treasurer jointly paid cash, or gave notes, \$500 each, in settlement of his shortage of \$11,000. Held, that they might maintain their joint action against their principal for money paid. There was "no intimation that the makers" of the notes were "not fully solvent" (p. 344). In *Sapp v. Aiken*, 68 Iowa, 699, the surety gave his draft upon the prin-

cipal for the amount of the debt, payable to the creditor. The principal refused to pay the draft. Held, that this was in effect a payment of the principal's debt and that the surety could maintain his action at law for the amount of the debt. In *Flannagan v. Forrest*, 94 Ga. 685, the surety paid the principal's debt to the creditor, a bank, with his own note, and deposited as collateral to his own note a mortgage that the principal had given him to indemnify him against loss on account of his suretyship. He never paid any part of his note, sustained no loss and never was sued. It was held that plaintiff to whom the bank had transferred the mortgage might maintain a suit to foreclose it and that the lien of the mortgage was not affected by the surety's non-payment and insolvency. No citations. In *Hommell v. Gamewell*, 5 Blackf. (Ind.), 5, the surety paid the principal's debt with the note of a third party and brought an action at law against the principal. There was judgment for the defendant. The supreme court set it aside because there was evidence that the surety's note was paid at the time of the trial, which the jury had disregarded. *White v. Miller*, 47 Ind. 385, holds flatly that the surety who pays with his note cannot recover from the principal without showing that he has paid his own note. In *Romine v. Romine*, 59 Ind. 347, the surety paid a judgment that the creditor had obtained against him and the principal by giving his own note for the amount, the judgment was satisfied of record, and



was entitled to recover. The court clearly stated the law on this subject, and the reasons for it, thus: "Anything which the party paying and the party receiving think proper to re-

the principal conveyed to his wife real estate that had been subject to the lien of the judgment. No money was paid on the note. Held, that the surety could not maintain an action against the principal for reimbursement and to set aside the conveyance as fraudulent, because the giving of a note is not such payment as will enable the surety to maintain a suit against the principal for "money which he has not paid, and perhaps may never pay." In *Bausman v. Credit Guaranty Co.*, 47 Minn. 377, 50 N. W. Rep. 496, defendant in consideration of plaintiff's executing two notes "guaranteed him against being called upon to pay them." When they became due plaintiff took them up and gave his two other notes in their place. In an action on the contract of guaranty, held that the transaction amounted *prima facie* to payment and defendant become immediately liable. In *Stanley v. McElrath* (1890), 86 Calif. 449, 25 Pac. Rep. 16, the payee in a \$4,500 note endorsed it and paid a balance due upon it to a bank holding it by executing his own note for \$6,132.50, which the bank accepted in payment. Held that without paying the latter note he might maintain his suit at law against the maker of the \$4,500 note and recover the \$6,132.50 with interest. Citing *Weston v. Wiley*, 78 Ind. 54, 2 Daniel Neg. Inst., p. 232. See also note 12 to § 143 *supra*. Some other courts have been unable to appreciate the beauties of a rule that permits the surety to compel the principal to make good to him a loss he has never sustained. In

*Stone v. Hammell*, 83 Calif. 547, the court, McFarland, J., said: "The rule [stated in the text] is founded on the reason that if the surety, by giving his own obligation, discharges the original debt of the principal, the latter is as much benefited as if he had discharged it by actually paying the money; its weakness lies in the possibility of the surety recovering the whole amount from the principal, and never paying his own note, and thus violating the cardinal rule that the surety shall not speculate out of the principal. But, if we assume the rule to be as first above stated, it is not so clearly commendable as to deserve pushing further than adjudicated cases have already carried it \* \* ." It was accordingly held that a surety was not released from contribution to his co-surety by showing that the co-surety had accepted his note (not yet due) "in full satisfaction of the amount of money which he should contribute" without showing also that the note had been paid. In *Lynch v. Hancock*, 14 So. Car. 66, at 92, it was held that while the rule stated may be binding in a court of law, yet in a court of equity the surety can recover from the principal only what he has actually paid. This case was foreclosure and the court said that the inquiry "should be what is the amount which Hancock [the surety] has actually, not nominally, paid. \* \* For such amount he is entitled to have credit. The mere fact of giving a note or due bill for the whole amount of the bond is not sufficient without proof that he has paid or has the



gard as money must generally be so regarded in a court of justice. Property delivered and accepted as money may be so considered. \* \* Bank bills, which are nothing but the promissory notes of a corporation, are in all the affairs of life, and

means to pay it. The case of *Peters v. Barnhill*, 1 Hill, 237 [next note], which has been relied upon to support a contrary view," said the court, "was an action at law \* \*." In *Brisendine v. Martin*, 1 Ired. Law (N. C.), 286, assumpsit for contribution, it was held the surety, who had paid the principal's debt with his own note, could not recover from his co-surety without showing that his note had been paid. The court declined to follow *Witherby v. Mann*, 11 Johns. Rep. (N. Y.), 518, supra, and said that *Barclay v. Gooch*, 2 Esp. N. P. Rep., 571, holding that a party's own promissory note, if taken in payment, might be considered as money, was disregarded in *Taylor v. Higgins*, 3 East, 169, and in *Maxwell v. Jameson*, 2 Barn & Ald, 51, and added: "The plaintiff is, as yet, none the poorer by the defendant, and until he shall be, we think the action for money paid cannot lie. It is against elementary principles that it should." In *Barclay v. Gooch*, 2 Esp. N. P. 571 (1796), sureties for rent gave their note for the rent (£50) to the landlord, who accepted it in payment. Lord Kenyon charged the jury that without paying their note they might recover the amount from the defaulting tenant and there was a verdict accordingly; motion for new trial overruled; no appeal. In *Taylor v. Higgins*, 3 East 169 (1802), principal and surety being both imprisoned for debt at the suit of the creditor, the surety gave his bond with warrant of attorney to the creditor in payment of the balance due upon prin-

cipal's debt, and then had the principal arrested and held to bail upon an affidavit which stated the cause of action to be for so much money paid, laid out and expended by the plaintiff, surety, for the defendant, principal's, use. Lord Ellenborough said, alluding to *Barclay v. Gooch*: "There is no pretence for considering the giving this new security as so much money paid for the defendant's use. Supposing even the case of the note of hand or bill of exchange, as the current representative of money, to have been rightly decided, still this security, consisting of a bond and warrant of attorney, is not the same as that, and is nothing like money." Lawrence, J., intimated that *Barclay v. Gooch* had not been approved. In *Maxwell v. Jameson*, 2 B. & A. 51 (1818), one of the makers of a note took it up and gave his bond for the amount to the payees; held, he could not maintain assumpsit against his co-maker for contribution before paying the bond. Alluding to *Barclay v. Gooch* and *Taylor v. Higgins*, supra, Bayley, J., said (p. 55) that "as the authorities differ, it becomes necessary to look at the reason of the thing. No money has yet come out of the plaintiff's pocket, and non constat that any ever will." In this country *Barclay v. Gooch* was followed in *Witherby v. Mann*, 11 Johns. Rep. 518 (1814), on the ground that the principal "has received the full benefit; the debt has been satisfied; and as to him it is the same as if so much money has been paid for

in all the courts, regarded as money. A payment of the debt of a third person, at his request, in bank bills, would sustain an action for money paid, laid out and expended. \* \* If a surety discharges the debt of his principal by his own note, which is accepted as payment, is it not as much money paid, laid out and expended, as if he had paid it in the notes of a bank?"<sup>24</sup> Where the land of the surety has been levied on

him" (p. 521); and by *Cornwall v. Gould*, 4 Pick (21 Mass.) 444 (1827), *assumpsit*, where Wilde, J., said that though the case had been doubted it had never been overruled. All subsequent American decisions to the same effect appear to be based on those two. The issue in all of them boils down to this: Whether the principal's implied promise to indemnify the surety (§ 228 *supra*), is a promise to indemnify him against loss or against liability to loss as well. All the analogies seem to indicate that the principal's implied promise is to indemnify the surety against actual loss only. *Reynolds v. Magness*, 2 Ired. Law (24 N. C.) 26 at 31. And courts of equity so regard it. In *Morrison v. Cassell*, 25 Ill. 368, the surety borrowed the money from Smith to pay the debt of his principal, a partnership. One of the partners afterwards paid the surety's debt to Smith. Held that the surety could not maintain his bill thereafter to share in the partnership assets; he was nothing out. In *Burdsall v. Chrisfield*, 2 Disney (Cin. Sup. Ct.) 51, two bankrupts exchanged checks for mutual accommodation. Held, each became guarantor of the other against ultimate loss and that neither could recover from the other without first discharging the debt. In *Jordan v. Adams*, 2 English (7 Ark.) 348, a surety paid upon his principal's debt \$70 in bank notes that

were at 50 per cent discount and by giving his own note for \$500, payable apparently in the same currency, which was accepted in satisfaction; held, that he could recover from the principal only 50 per cent of \$570. The court said: "Adams, by discharging the debt, only entitled himself to indemnity out of the decedent's estate. He could not make it a matter of speculation. He sued in an equitable action, and should recover only what justice would give him." In view of the cases, Mr. Ackley believes that the statement in the text—though backed with scores of cases—is correct, at farthest, only as to actions at law and not that far in all jurisdictions. It may not always be even as correct as it is now, for it was born of a slavish adherence to things English that has been outgrown in business and is slowly passing away in the courts. In this connection, an interesting query is suggested: If an insolvent surety pays his solvent principal's debt of say \$10,000 with his own absolutely worthless note,—has the note accepted in payment by the creditor, without actual fraud, and then brings *assumpsit* against the principal for \$10,000, would a court of equity, upon the principal's application, shield the principal from payment?

<sup>24</sup> *Peters v. Barnhill*, 1 Hill, Law (S. C.), 237; qualified by same court, note 23, § 232. And under the same

to satisfy the debt of the principal, and has been applied to that purpose, the surety may recover indemnity in an action for money paid.<sup>25</sup> A judgment was rendered against principal and surety which was replevied (stayed) by the surety alone. The legal effect of the replevin was to extinguish the judgment. Held, the surety might at once sue the principal for indemnity without paying the amount due on the replevin bond.<sup>26</sup> A principal being indebted for rent, he and the creditor and a surety met, and the surety gave the creditor a mortgage on his property for an extended time to secure the debt, and the creditor released the principal and received the mortgage in full payment of the debt. Held, the surety might sue the principal for money paid before paying the mortgage.<sup>27</sup> It has been held that the possession of a note by the surety, which was signed by him and the principal, was prima facie evidence that he had paid it.<sup>28</sup> But it seems that in order to have this effect it must also be shown that the note had been delivered to the payees and was at one time their property.<sup>29</sup> Where the principal by way of indemnity, deposits stock of which he is the apparent but not the real owner and the surety becomes surety upon the faith that the principal is the real owner and without notice to the contrary, he is entitled to be indemnified out of such stock regardless of the rights of the actual owner thereof.<sup>30</sup> The same thing is of course true of other species of property as well.

state of facts it has been held that he was entitled to contribution. *McGhee v. Owen*, 61 Ala. 440.

<sup>25</sup> *Lord v. Staples*, 23 N. H. 448; *Bonney v. Seely*, 2 Wend. 481.

<sup>26</sup> *Burns v. Parish*, 3 B. Mon. (Ky.) 8.

<sup>27</sup> *McVicar v. Royce*, 17 Up. Can. (Q. B.) 529. To the effect that the surety cannot sue the principal for money paid when he has made payment by his bond, see *Boulware v. Robinson*, 8 Tex. 327; *Morrison v. Berkey*, 7 Serg. & Rawle (Pa.) 238.

<sup>28</sup> *Reynolds v. Skelton*, 2 Tex. 516.

<sup>29</sup> *Landrum v. Brookshire*, 1 Stew. (Ala.), 252.

<sup>30</sup> In *Dueber Watch Case Mfg. Co. v. Daugherty*, 62 Ohio St. 589,

57 N. E. Rep. 455, plaintiff became surety on the note of Coburn upon Coburn's agreeing to turn over to him four shares of stock that he held in the Dueber company. Thereafter and before the stock was transferred, plaintiff found out that the stock really belonged to the company and had been put in Coburn's name only for the purpose of qualifying him to be a director and upon his agreement to reassign it. Plaintiff was compelled to pay the note. Held, that as against the company, he was entitled to have the stock applied to indemnifying him. In *Westinghouse v. German Nat'l Bank*, 196 Pa. St. 249, 46 Atl. Rep. 382, Craig, as guarantor of a note,

§ 233. Surety who extinguishes the debt for less than the full amount can only recover from the principal the value of what he paid.—If the surety extinguishes the debt of the principal for any sum less than the full amount thereof, he can, in the absence of express contract, only recover from the principal the amount paid by him,<sup>1</sup> and interest thereon,<sup>2</sup> and costs.<sup>3</sup> The implied contract is that the surety shall be indemnified only, and he will not be allowed to speculate out of his principal. If he pays in depreciated bank notes, or other money which is below par, but is taken by the creditor at par, he can only recover from the principal the par value of such money.<sup>4</sup> If he pays in land he can only recover the value of the land. “He is entitled to recover the amount paid, not the amount ex-

was compelled to pay it, whereupon the defendant bank, holder of the note, delivered to him certain stock which Lawrence, the maker of the note, had deposited as collateral, at the time the note was made and guaranteed by Craig. The stock, in fact, belonged to Westinghouse, who had placed it in the hands of Sproul & Laurence, his brokers, as collateral, with a power of attorney endorsed authorizing them to have it transferred on the company's books, and Lawrence had in fact no authority to hypothecate it. Neither Craig nor the bank had any notice of Westinghouse's interest in the stock until after Craig's guaranty had been made. Held, that Craig's right to the stock was superior to that of Westinghouse. Distinguishing *Westinghouse v. German National Bank*, 188 Pa. St. 630, 41 Atl. Rep. 734, and *Ryman v. Gerlach*, 153 Pa. St. 197, 25 Atl. Rep. 1031, 26 Atl. Rep. 302, in which cases the parties dealing with the stock had notice, actual or constructive, of the real owner's rights.

<sup>1</sup> *Eaton v. Lambert*, 1 Neb. 339; *Pickett v. Bates*, 3 La. Ann. 627; *Coggeshall v. Ruggles*, 62 Ill. 401; *Crozier v. Grayson*, 4 J. J. Marsh.

(Ky.) 514; *Blow v. Maynard*, 2 Leigh (Va.), 29; *Mathews v. Hall's Adm'r*, 21 W. Va. 510; *Succession of Dinkgrave*, 31 La. Ann. 703; *Delaware, Lackawanna & Western R. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151.

<sup>2</sup> *Hicks v. Bailey*, 16 Tex. 229; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Bushong v. Taylor*, 82 Mo. 660; *Waldrup v. Black*, 74 Calif. 409.

<sup>3</sup> *Feamster v. Withrow*, 12 W. Va. 611. A surety cannot recover attorney's fees from his principal, for which the note provides, when he paid the note at maturity and was not required to incur such expenses. *Gieseke, Adm'r, v. Johnson*, 115 Ind. 308; *Carpenter v. Minter*, 72 Tex. 370.

<sup>4</sup> *Kendrick v. Forney*, 22 Gratt. (Va.) 748; *Miles v. Bacon*, 4 J. J. Marsh. (Ky.) 457; *Hall's Adm'r v. Creswell*, 12 Gill & Johns. (Md.) 36; *Crozier v. Grayson*, 4 J. J. Marsh. (Ky.) 514; *Butler v. Butler's Adm'r*, 8 W. Va. 674; *Feamster v. Withrow*, 9 W. Va. 296, 12 W. Va. 611; *Mathews v. Hall's Adm'r*, 21 W. Va. 510. See, also, on this subject, *Edmonds v. Sheahan*, 47 Tex. 443.

tinguished by that payment.”<sup>5</sup> A surety paid the debt of his principal to a bank, a small portion in bills of the bank, and the balance by his note to the bank. During all that time the notes of the bank were worth only fifty cents on the dollar, but the bank received them at par for debts due it. Held, that as the bank had received the note of the surety as payment of the debt, he might, before paying the note, sue the principal for indemnity, but could only recover fifty per cent of the amount of the note and the actual value of the money he had paid, that being the extent of his damage.<sup>6</sup> If the surety, who compounds a debt for which his principal and himself have become jointly liable, takes an assignment of the debt to a trustee for himself, he can only claim against his principal the amount which he has paid. He occupies in that regard the same position as an agent, and cannot speculate out of his principal. “It is on a contract for indemnity that the surety becomes liable for the debt. It is by virtue of that situation, and because he is under an obligation as between himself and the creditor of his principal, that he is enabled to make the arrangement with that creditor. It is his duty to make the best terms he can for the person in whose behalf he is acting.”<sup>7</sup>

**§ 234. Surety can only recover from principal the amount paid, and not consequential or indirect damages.**—In the absence of an express agreement to the contrary, a surety who has paid the debt of his principal can only recover from the principal the amount paid by him. He cannot recover anything for what he has been obliged to sacrifice, by selling his property for less than its value, nor for any incidental loss. “To these disadvantages he voluntarily exposes himself when he becomes surety, and the law affords him no relief against his principal for these consequential damages. \* \* To establish a different rule would create endless confusion, collusion, combination and fraud.”<sup>8</sup> He cannot, when he has not

<sup>5</sup> Bonney v. Seely, 2 Wend. 481, per Savage, C. J.

<sup>6</sup> Jordan, Adm’r, v. Adams, 7 Ark. (2 Eng.) 348.

<sup>7</sup> Reed v. Norris, 2 Mylne & Craig, 361, per Lord Cottenham, C. Contra, Blow v. Maynard, 2 Leigh (Va.), 29, where it is said that there is nothing in the relation of princi-

pal and surety which will prevent the surety from buying the claim against the principal, and taking an assignment of it and holding it for the full amount, the same as a stranger might.

<sup>8</sup> Vance v. Lancaster, 3 Haywood (Tenn.), 130, per Roane, J. See, also, to effect that surety can only

paid the debt, but has been discharged under an insolvent act, recover from the principal damages which he has suffered by being imprisoned on account of the debt.<sup>9</sup> He may agree with his principal upon a certain price for the use of his credit, but unless there is a special agreement he can recover nothing for it. It has been held that where there is an express agreement that something shall be paid, nothing can be recovered unless the sum to be paid is fixed by the agreement.<sup>10</sup> A party became surety in a duty bond to the United States, which was captured in time of war by the English, and by them a *capias* was issued against the obligors in the bond. The surety fled, to avoid being arrested, and thereby his business was broken up and he was put to great expense, and not having paid the bond, he sued certain parties for indemnity who had agreed to save him harmless. Held, he was not entitled to recover. The court said that if a surety is broken up by paying the debt of his principal, he cannot recover for such consequential damages. "Flight to avoid payment of the debt is an accident wholly unforeseen, and its consequences cannot be considered as provided for. The principal had a right to calculate upon his surety's ability to pay, and did not stipulate to save him harmless from anything but the payment of money."<sup>11</sup>

**§ 235. Effect of judgment against surety on liability of principal for indemnity—Notice—Statute of limitations, etc.**—The surety on a note, who, without knowing of a defense, has let judgment go against him by default, and has paid the judgment, may recover indemnity from the principal, notwithstanding the fact that the principal, who was sued at the same court in another suit, by defending the same obtained a judgment in his favor. "To the suggestion that the surety might have resisted and defeated the recovery, he may reply that he was a stranger to the consideration of the note, and was privy to nothing more than the terms of an absolute obligation, which he bound himself to make good, if not punctually fulfilled. But if he had been made privy to the principal's defense, then he might have lost his right to redress."<sup>12</sup> So, where principal

recover from the principal or his estate the amount actually expended, In re Estate of Hill, 67 Calif. 238.

<sup>9</sup> Powell v. Smith, 8 Johns. 249.

<sup>10</sup> Perrine v. Hotchkiss, 58 Barb. (N. Y.) 77. Cf. note 10, § 324.

<sup>11</sup> Hayden v. Cabot, 17 Mass. 169, per Parker, C. J.

<sup>12</sup> Stinson v. Brennan, Cheves' Law (S. C.), 15, per Butler, J. The fact, also, that he suffered judgment against him by default, contrary to



and surety were sued on a note, and the signature of the principal not being proved on the trial, judgment was had against the surety alone, which he paid, it was held that he might recover indemnity from the principal.<sup>12</sup> If the principal has notice of the suit against his surety, he is bound by the result of the litigation, and a foreign judgment has the same effect in this regard as one of the courts in which the suit for indemnity is brought.<sup>14</sup> In such case, the principal cannot complain that the suit was unskillfully defended by the surety.<sup>15</sup> The fact that when a surety is sued he fails to notify his principal of such suit will not preclude him from recovering indemnity.<sup>16</sup> If the surety on a bond which ought probably to have been avoided on the ground of illegality in the consideration has made a reasonable defense in a suit brought on the bond, and has been defeated and paid the judgment, he may recover indemnity from the principal.<sup>17</sup> A surety sued in one state on a warranty of a slave there made may in another state recover against his principal, who had notice of the pendency of such suit, whatever is legally adjudged against the surety by the laws of the state in which the suit against him was brought.<sup>18</sup> The administratrix of a surety was sued for the debt of the principal after it was barred by the statute of limitations as to the estate of the surety, but before it was barred by the statute as against the principal. Instead of pleading the statute, she submitted the matter to referees, who awarded that she should pay the debt, which she did. Held, the principal was liable to reimburse the money so paid. The principal was liable to pay the debt, and it made no difference to him that the surety had done so, without insisting on the bar of the statute.<sup>19</sup> But where a party was surety for another in a bond replevying an execution, and by statute in such case, if an execution was not issued by the creditor within one year

a statute prohibiting sureties from allowing judgments to go against them by confession on default, was held to make no difference in his right to indemnity for money paid on such judgment. *Riley v. Stallworth*, 56 Ala. 481.

<sup>12</sup> *Peters v. Barnhill*, 1 Hill's Law (S. C.), 234.

<sup>14</sup> *Konitzky v. Meyer*, 49 N. Y.

571. See, also, on this subject, *Hare v. Grant*, 77 N. C. 203.

<sup>15</sup> *Rice v. Rice*, 14 B. Mon. (Ky.) 335.

<sup>16</sup> *Williams v. Greer*, 4 Haywood (Tenn.), 235.

<sup>17</sup> *Montgomery v. Russell*, 10 La. (Curry), 330.

<sup>18</sup> *Thomas v. Beckman*, 1 B. Mon. (Ky.) 29.

<sup>19</sup> *Shaw v. Loud*, 12 Mass. 447.



after he had a right to issue it, the surety was discharged, and execution was not so issued, and the surety, after he was discharged by the terms of the law, paid the debt, without having it assigned to him, it was held he could not recover indemnity from the principal. As he was under no obligation to pay the debt, the law would not imply a contract of indemnity.<sup>20</sup>

§ 236. **How claim of surety against principal affected by usury—Wager.**—If the surety to a contract tainted with usury of which he has knowledge pays the usury, it has been held that he cannot recover such usury from the principal, but can only recover what the creditor could have recovered.<sup>21</sup> But where the surety on a usurious note, who did not know of the usury when he signed it, but had knowledge of the fact when he paid it, sued the principal for indemnity, it was held he was entitled to recover unless he had been notified by the principal not to pay the note before he paid it. The principal might avail himself of the statute against usury, but was not obliged to do so, and the surety could not know his intention in that regard, unless notified thereof.<sup>22</sup> So, where the creditor had recovered a judgment against principal and surety, and the surety had paid the judgment, it was held that the principal could not set up against the claim of the surety for indemnity the fact that part of the judgment was for usury.<sup>23</sup> A surety having become liable on a note, the principal executed to him a bill of sale of chattels for his indemnity. Held, the bill of sale was executed upon sufficient consideration, even though the original note was usurious, unless the

<sup>20</sup> *Kimble v. Cummins*, 3 Met. (Ky.) 327. Neither does he occupy any better attitude than a mere stranger or volunteer, and he cannot therefore be substituted to the creditor's rights against the principal or the principal's vendee. *Dawson v. Lee*, 83 Ky. 49; *Lee v. Hill*, 83 Ky. 49.

<sup>21</sup> *Jones v. Joyner*, 8 Ga. 562; *Mims v. McDowell*, 4 Ga. 182; *Whitehead v. Peck*, 1 Kelly (Ga.), 140. But see, however, *Jackson v. Jackson*, 51 Vt. 253.

<sup>22</sup> *Ford v. Keith*, 1 Mass. 139;

*Polhill v. Brown*, 84 Ga. 339, 10 S. E. Rep. 921. For a case holding (under peculiar circumstances) that a surety can recover indemnity from the principal for usury which he has been compelled to pay, see *Kock v. Block*, 29 Ohio St. 565.

<sup>23</sup> *Wade v. Green*, 3 Humph. (Tenn.) 547. Or that the original contract between himself and the creditors was tainted with usury. *Maples v. Cox*, 74 Ga. 701; *Turman v. Looper*, 42 Ark. 500. But see *Lucking's Adm'r v. Gegg*, 12 Bush (Ky.), 298.

and surety were sued on a note, and the signature of the principal not being proved on the trial, judgment was had against the surety alone, which he paid, it was held that he might recover indemnity from the principal.<sup>13</sup> If the principal has notice of the suit against his surety, he is bound by the result of the litigation, and a foreign judgment has the same effect in this regard as one of the courts in which the suit for indemnity is brought.<sup>14</sup> In such case, the principal cannot complain that the suit was unskillfully defended by the surety.<sup>15</sup> The fact that when a surety is sued he fails to notify his principal of such suit will not preclude him from recovering indemnity.<sup>16</sup> If the surety on a bond which ought probably to have been avoided on the ground of illegality in the consideration has made a reasonable defense in a suit brought on the bond, and has been defeated and paid the judgment, he may recover indemnity from the principal.<sup>17</sup> A surety sued in one state on a warranty of a slave there made may in another state recover against his principal, who had notice of the pendency of such suit, whatever is legally adjudged against the surety by the laws of the state in which the suit against him was brought.<sup>18</sup> The administratrix of a surety was sued for the debt of the principal after it was barred by the statute of limitations as to the estate of the surety, but before it was barred by the statute as against the principal. Instead of pleading the statute, she submitted the matter to referees, who awarded that she should pay the debt, which she did. Held, the principal was liable to reimburse the money so paid. The principal was liable to pay the debt, and it made no difference to him that the surety had done so, without insisting on the bar of the statute.<sup>19</sup> But where a party was surety for another in a bond replevying an execution, and by statute in such case, if an execution was not issued by the creditor within one year

a statute prohibiting sureties from allowing judgments to go against them by confession on default, was held to make no difference in his right to indemnity for money paid on such judgment. *Riley v. Stallworth*, 56 Ala. 481.

<sup>13</sup> *Peters v. Barnhill*, 1 Hill's Law (S. C.), 234.

<sup>14</sup> *Konitzky v. Meyer*, 49 N. Y.

571. See, also, on this subject, *Hare v. Grant*, 77 N. C. 203.

<sup>15</sup> *Rice v. Rice*, 14 B. Mon. (Ky.) 335.

<sup>16</sup> *Williams v. Greer*, 4 Haywood (Tenn.), 235.

<sup>17</sup> *Montgomery v. Russell*, 10 La. (Curry) 330.

*Beckman*, 1 B. Mon.

*jud*, 12 Mass. 447.

after he had paid to settle it, the surety was discharged, and execution was not issued against the surety, after he was discharged by the terms of the act, paid the debt, without having it assigned to him, it was held he could not recover indemnity from the principal, as it was his duty to pay the debt, the law would not give him a contract of indemnity.<sup>20</sup>

§ 236. How claim of surety against principal affected by usury—*Wager*.—It is stated in a case reported with usury of which he has recovered from the usury, it has been held that he cannot recover from the principal, but can only recover what the principal has paid to the creditor. But where the surety on a debt is a creditor, and does not know of the usury when he signs the instrument, it was held that when he paid it, he was entitled to recover from the principal not to pay the debt, but to recover the amount he was entitled to recover from the principal, and the principal might avail himself of the usury, and the surety was not obliged to do so, and the surety was not bound to pay the debt in that regard, unless he had recovered a judgment against the principal, and the surety had paid the judgment, and the principal could not set up usury as a defense to the surety's indemnity the fact that part of the judgment was for usury. A surety having issued a bill of sale to the creditor, and executed to him a bill of sale of the property of the principal. Held, the bill of sale was valid, and the surety was not bound to pay the debt, even though the original debt was for usury.

<sup>20</sup> *Kimble v. Cunningham*, 3 Met. 327. Neither does the surety any better attitude than a stranger or volunteer, and he cannot therefore be substituted to the creditor's rights against the principal or the principal's vendee. *Lee v. Hill*, 83 Ky. 49.

<sup>21</sup> *Jones v. Joyner*, 8 Ga. 585; *Mims v. McDowell*, 4 Ga. 245; *Whitehead v. Peck*, 1 Kelly Ga. 140. But see, however, *Jackson v. Jackson*, 51 Vt. 253.

<sup>22</sup> *Ford v. Keith*, 1 Mass. 129.

*Wager v. Wager*, 1 Met. 327. It was held that a surety who has paid the debt, and has recovered from the usury, cannot recover from the principal, but can only recover what the principal has paid to the creditor.

*Wager v. Wager*, 1 Met. 327. It was held that a surety who has paid the debt, and has recovered from the usury, cannot recover from the principal, but can only recover what the principal has paid to the creditor.

surety was privy to the usury.<sup>24</sup> Where a note was given to secure money bet in the state of Missouri, on the election of a president of the United States (such bet being prohibited by law), and a surety on the note, who knew when he signed it the consideration for which it was given, was compelled by legal process in a foreign jurisdiction to pay the same, it was held he could not recover indemnity from the principal. He was privy to an illegal transaction, and could ground no claim to relief upon it. If the principal could be in this manner compelled to pay, the policy of the law in making the note void would be defeated.<sup>25</sup>

§ 237. **When surety of one partner entitled to recover indemnity from the firm.**—When a partner gives his individual note, with surety, for a debt of the firm, and the surety pays it, he may recover indemnity at law from all the members of the firm.<sup>26</sup> The same thing was held where the note was under seal.<sup>27</sup> A and B were partners, and A hired help for which the firm would on general principles of law have been liable, but gave his individual bond with C as his surety for the hire. C had the debt to pay, and brought a suit in equity to recover indemnity from A and B. Held, he was entitled to recover from both.<sup>28</sup> One of several partners executed a bond in his individual name to the United States, for duties on goods imported on account of the partnership, and the plaintiffs executed the bond as sureties. The plaintiffs paid the debt and brought an action for money paid against all the partners. Held, they were not entitled to recover, as there was no privity between them and the partners, who did not sign the bond. The bond being under seal discharged the claim of the United States for the duties, and its remedy was thereafter on the bond, and against the parties alone who signed it. The remedy of the sureties was against the partner who signed the bond, although the court in one case said it might be, if such partner was insolvent and the firm owed him, the sureties could have relief in equity.<sup>29</sup>

<sup>24</sup> Spaulding v. Austin, 2 Vt. 555.

<sup>27</sup> Purviance v. Sutherland, 2 Ohio

<sup>25</sup> Hurley v. Stapleton's Adm'r, St. 478.

24 Mo. 248.

<sup>28</sup> Weaver v. Tapscott, 9 Leigh

<sup>26</sup> Burns v. Parish, 3 B. Mon. (Va.) 424.

(Ky.) 8; Hikes v. Crawford, 4 Bush  
(Ky.), 19; McKee v. Hamilton, 33  
Ohio St. 7.

<sup>29</sup> Embree v. Ellis, 2 Johns. 119;  
Krafts v. Creighton, 3 Rich. Law  
(S. C.), 273.

§ 238. When principal liable to surety for costs paid by surety.—Whether the surety, who had paid costs on account of the debt of the principal, can recover such costs from the principal, depends upon the circumstances of each case. It has been held that he may recover from the principal costs which he has in good faith incurred and paid, litigating the claim upon which he is surety.<sup>30</sup> An eminent judge, in discussing this subject, said: “If, when a surety was sued upon the debt of his principal, and was unable to pay it, and the same went into judgment and was levied upon his land, he must lose all costs recovered, and the expenses of the levy, because he did not pay the principal’s debt more promptly than the debtor himself, whose duty it was to do it, and save the surety all trouble, it would certainly afford a remarkable instance of absurd refinement, not to say refined absurdity; and if the debt may be recovered [by the surety from the principal] as money paid, so equally may the costs.”<sup>31</sup> Where a joint judgment is recovered against principal and surety, and the surety pays the judgment and costs, he may recover such costs from the principal. The principal has a right to defend the suit, and the surety is justified in letting the claim proceed to judgment, in the hope that the money may be made from the principal.<sup>32</sup> If the principal has agreed, in writing, to save the surety harmless, the surety may, on such agreement, recover costs which he has paid on account of the principal’s debt.<sup>33</sup> If the surety on a note, who is indemnified from loss on account of his

<sup>30</sup> Downer v. Baxter, 30 Vt. 467; Bennett v. Dowling, 22 Tex. 660; Borland v. Curry, Irish Law Rep. (4 Q. B., C. P. & Ex.) 273; Feamster v. Withrow, 12 W. Va. 611. See, also, on this subject, Whitworth v. Tilman, 40 Miss. 76; Thompson v. Taylor, 11 Hun (N. Y.) 274; affirmed in 72 N. Y. 32.

<sup>31</sup> Per Redfield, C. J., in Hulett v. Soullard, 26 Vt. 295. To same effect, see Wynn v. Brooke, 5 Rawle (Pa.), 106; McKee v. Campbell, 27 Mich. 497. In Cranmer v. McSwords, 26 W. Va. 412, the court said that “the principal is not liable for costs and expenses unnecessarily

incurred by the surety in litigation carried on by him in order to get rid of his liability or defeat the efforts of a party seeking to enforce it. \*

\* It is incumbent on the surety, seeking to recover from his principal costs and expenses incurred in litigation, to show that the litigation was entered into in good faith and upon reasonable grounds, and was a measure of defense, necessary to the interest of both parties, and was calculated so to result.”

<sup>32</sup> Apgar’s Adm’r v. Hiler, 4 Zab. (N. J.) 812.

<sup>33</sup> Bonney v. Seeley, 2 Wend. 481.

suretyship, incurs expenses in defending a suit on the note, contrary to the expressed wishes of the principal, and after he is notified by the principal that there is no defense, he cannot hold the principal liable for such expenses.<sup>34</sup> It has been held that where a surety knows there is no defense to the suit against him, he can recover no costs except those of a judgment by default.<sup>35</sup> A undertook to pay certain debts of B, and C guaranteed A's undertaking. A failed to pay one of the debts, and B was sued for it, and a judgment was had against him for the amount due and costs of suit. Held, B could not recover such costs from C. He should have paid the debt without suit, and prevented the making of costs.<sup>36</sup>

**§ 239. Mortgage for indemnity of surety valid—What it covers.**—The liability of a surety or guarantor for the debt of his principal before he has made any payment on account thereof is a sufficient consideration for the execution of a mortgage or trust deed for his indemnity, and such mortgage or trust deed will take precedence of any subsequent lien on the property incumbered thereby.<sup>37</sup> A promissory note for the payment of a certain sum of money executed for the purpose of indemnifying the payee against his liability as a surety for the maker of an administration bond, and to enable him to secure himself by an attachment of the property of the maker, is valid, notwithstanding the payee at the time of its execution has not been damnified. The existing liability with an implied promise to pay that amount upon the principal indebtedness, forming a sufficient consideration for the note, the note will be enforced against the objections of other creditors.<sup>38</sup> Where principal and surety have signed notes, and before the

<sup>34</sup> Beckley v. Munson, 22 Conn. 299.

<sup>35</sup> Holmes v. Weed, 24 Barb. (N. Y.) 546. On this subject, see Whitworth v. Tilman, 40 Miss. 76. And in May v. May, 19 Fla. 373, it was held that under such circumstances the sureties should bear the costs themselves when interposing improper defenses.

<sup>36</sup> Redfield v. Haight, 27 Conn. 31. And see to similar effect, Cranmer v. McSworbs, 26 W. Va. 412.

<sup>37</sup> Kramer v. Farmers' & Me-

chanics' Bank, 15 Ohio, 253; Uhler v. Semple, 5 C. E. Green (N. J.), 288; Perkins v. Mayfield, 5 Port. (Ala.) 182; Hawkins v. May, 12 Ala. 673; Lane v. Sleeper, 18 N. H. 209; Bank of Alabama v. M'Dade, 4 Port. (Ala.) 252; Pennington v. Woodall, 17 Ala. 685.

<sup>38</sup> Haseltine v. Guild, 11 N. H. 390. To the same effect, where the surety expressly promised the principal to pay the debt, see Gladwin v. Garrison, 13 Cal. 330.

maturity thereof the principal deposits money with the surety upon the agreement that the surety shall apply the money so received to the payment of the notes, the principal cannot afterwards repudiate the agreement, the suretyship being a sufficient consideration to support it.<sup>39</sup> Where a mortgage is given for the indemnity of a surety, it remains valid for that purpose, notwithstanding the evidences of the debt or the instruments by which the surety is bound may be changed. This was held where a mortgage was given conditioned to save the mortgagee harmless from his indorsement of certain specified notes, and such notes, as they became due, were renewed by the substitution of other notes or drafts having different names upon them, but the obligation of the mortgagee was preserved through the whole series of renewals.<sup>40</sup> So a mortgage to secure accommodation indorsers on a note payable to a particular bank, and so described in the mortgage, is valid to secure the same indorsers, though that bank did not discount the note, and another bank discounted a similar note for the same purpose and with the same indorsers.<sup>41</sup>

**§ 240. Rights of surety who has been indemnified.**—That a principal may lawfully indemnify his surety against loss in consequence of his suretyship is settled.<sup>42</sup> A chattel mortgage given to secure a surety is good, therefore, as against creditors of the mortgagor (the principal).<sup>43</sup> Where a county officer, having the legal title to land, conveys the same to the sureties on his bond for indemnity, equity will not interfere at the instance of a holder of a secret equity.<sup>44</sup> Where a person executes a mortgage to indemnify a surety on an appeal bond, the surety, although he suffers no loss, is entitled to enforce the lien of the mortgage to the extent of the taxes paid by him on the real estate pending the appeal.<sup>45</sup> Where a mortgage is given to indemnify the mortgagees against loss as sureties of the mortgagor, the sureties, in the absence of a provision in the mortgage authorizing it, are not entitled to possession of the mortgaged property until they have paid the

<sup>39</sup> *Mandigo v. Mandigo*, 26 Mich. 349.

<sup>40</sup> *Pond v. Clarke*, 14 Conn. 334; *Smith v. Prince*, 14 Conn. 472. To same effect, see *Markell v. Eichelberger*, 12 Md. 78; *Chouteau v. Thompson*, 3 Ohio St. 424.

<sup>41</sup> *Patterson v. Martin*, 7 Ohio 225.

<sup>42</sup> *Essex Freeholders v. Lindsley*,

41 N. J. Eq. 189, 3 Atl. Rep. 391.

<sup>43</sup> *Grimes v. Sherman*, 25 Neb. 843.

<sup>44</sup> *Phipps v. Mansfield*, 62 Ga. 209.

<sup>45</sup> *West v. Hayes*, 117 Ind. 290, 20 N. E. Rep. 155.



mortgage debt or some part of it.<sup>46</sup> To procure his signature, the principal in a peace bond deposited £49 with his bail to hold for two years as indemnity against possible loss. Held, that having been paid upon an illegal contract the money could not be recovered back at any time.<sup>47</sup>

§ 241. **Effect of the bankruptcy of the principal on the surety's claim for indemnity.**—A surety who, after the bankruptcy of the principal, pays the debt, may generally recover indemnity from the principal for the money so paid. The reason is that until he has paid the debt he usually has no cause of action against the principal and no claim which he can prove against the principal's estate.<sup>1</sup> Upon this principle it has been held that a person discharged under an insolvent act is liable to his surety for the arrears of an annuity due since his discharge, which the surety has been obliged to pay.<sup>2</sup> If, however, the bankrupt or insolvent act expressly provides for the adjustment of the claim for indemnity which a surety, who is liable at the time of the bankruptcy, may have, by reason of afterwards paying the debt, the terms of the statute will of course prevail. It has been held that such claim may be proved under the United States bankrupt law of 1867, and it will be barred unless it is proved.<sup>3</sup> A guardian made default and was afterwards discharged in bankruptcy. His surety was afterwards compelled to pay the defalcation and sued him for indemnity. Held, the surety was entitled to recover, as debts created by embezzlement were expressly excepted from

<sup>46</sup> *Stonebraker v. Ford*, 81 Mo. 532. But where a chattel mortgage given to indemnify a surety is conditioned that the surety shall be entitled to the possession of the property if the debt be not paid at maturity, payment by the surety is held not necessary to give him the right to possession. *Mattingly v. Paul*, 88 Ind. 95; *Kassing v. Bank*, 74 Ill. 16.

<sup>47</sup> *Herman v. Jeuchner*, Law Rep. (15 Q. B. Div.) 561, overruling *Wilson v. Strugnell*, L. R. 7, Q. B. Div. 548. But see *Jones v. Orchard*, 16 Com. B. (81 E. C. L. R.) 614 at 624.

<sup>1</sup> *Paul v. Jones*, 1 Durn. & East,

599; *McMullin v. Bank of Penn Township*, 2 Pa. St. 343; *Taylor v. Mills*, Cowper, 525; *Cake v. Lewis*, 8 Pa. St. 493; *Buel v. Gordon*, 6 Johns. 126; *Emery v. Clarke*, 2 J. Scott (N. S.), 582; *Comfort v. Eisenbeis*, 11 Pa. St. 13; *Haddens v. Chambers*, 2 Dall. (Pa.), 236. But see *Mace v. Wells*, 7 How. (U. S.) 272, reversing *Wells v. Mace*, 17 Vt. 503.

<sup>2</sup> *Page v. Bussell*, 2 Maule & Sel. 551; *Welsh v. Welsh*, 4 Maule & Sel. 333.

<sup>3</sup> *Lipscomb v. Grace*, 26 Ark. 231, disapproving *Poyne v. Joyner*, 6 Ark. (1 Eng.) 241. See notes 7 and 8 below.

the operations of the bankrupt act, and this debt was so created.<sup>4</sup> If, after the surety has paid the debt, the principal becomes a bankrupt and is discharged as such, the discharge will bar the claim of the surety against the principal.<sup>5</sup> Thus, where the surety on a guardian's bond paid the ward an indebtedness due him by the guardian, and the surety subsequently died and his administrators sued the guardian in assumpsit for the amount so paid, it was held that the guardian's discharge in bankruptcy was a good defense and barred the surety's right to recover.<sup>6</sup> The discharge of the principal in bankruptcy under the act of 1898 does not release the surety from his liability to the creditor. But it does bar the surety from all right of enforcing payment of indemnity from the principal if the principal has scheduled the debt among his liabilities and the surety has had notice of the proceeding in bankruptcy.<sup>7</sup> If a bankrupt's paper comes into his hands subsequent to his discharge he cannot maintain an action against the sureties thereon.<sup>8</sup>

**§ 242. When surety may by express contract recover indemnity from principal before paying the debt—Mortgage of indemnity, etc.**—While the surety or guarantor has usually, in the absence of express contract, no right of action against the principal for indemnity until he has actually paid the debt, yet he may by express contract be given such right of action before payment of the debt. Thus, where a bond of indemnity given to a surety on a lease was conditioned for the payment of the rent, and to save him harmless from liability, it was held the surety could recover from the obligor the amount

<sup>4</sup> Halliburton v. Carter, 55 Mo. 435.

<sup>5</sup> Smith v. Kinney, 6 Neb. 447.

<sup>6</sup> Cromer v. Cromer's Adm'r, 29 Gratt. (Va.) 280.

<sup>7</sup> In 1893 A became surety on the note of B. In 1898 B was discharged in bankruptcy in a U. S. district court. In 1899 A was compelled to pay the note. The note was duly scheduled in B's petition in bankruptcy and A had knowledge thereof. Held, that B's discharge in bankruptcy barred A's right to recover indemnity from B, because, under paragraph "i," sec. 57, the

surety might have paid the note and filed his claim to be subrogated to the rights of the holder thereof: Hayer v. Comstock, 115 Iowa 187, 88 N. W. Rep. 351, citing In re Dillon (D. C., Mass.), 100 Fed. Rep. 627. See note 3, supra.

<sup>8</sup> The experiment was tried in Indiana. In Mattix v. Leach, 16 Ind. App. 112, 43 N. E. Rep. 969, a bankrupt, after his discharge bought the note of a firm of which he was a member prior to his discharge in bankruptcy. Held, that he could not enforce payment of it by the sureties thereon. Compare § 251, note 31.

of the rent in arrear, even though he had not himself paid it. The court said: "When a bond is, as in this case, conditioned as well to pay the debt or sum specified as to indemnify and save harmless the obligee against his liability to pay the same, the obligee may recover the entire debt or demand upon default in the payment without having paid anything."<sup>9</sup> The same thing was held where a bond to a sheriff was conditioned to save him harmless from all "loss and liabilities" which he might sustain by selling certain property levied on by him, and a judgment was recovered against him for selling the property, which judgment he had not paid.<sup>10</sup> So, where a mortgage was given to indemnify a surety, it was held he might foreclose the mortgage as soon as he was sued for the debt, and before he had paid it.<sup>11</sup> Where A, being the principal in bond, gave a deed of trust, one of the provisions of which was that the trustee should "save harmless" B, who was his surety in the bond, and another provision was that the trustee, "whenever required by the creditors of A, or by any surety who may be threatened with loss by reason of his suretyship, shall proceed to sell sufficient property to answer the ends of" the deed of trust, it was held that the trustee was not bound to wait till the surety was actually damnified by having been compelled to pay the money, but that it was the duty of the trustee to relieve him, whenever he had funds for the purpose. The court said that, in equity, the money might be applied directly to the relief of the surety without passing into his hands and thus endangering the creditor.<sup>12</sup> Where the principal placed in the hands of his surety a horse for his indemnity, "upon condition if (he) had the money to pay," etc., it was held that, upon the debt becoming due and remaining unpaid, the surety might sell the horse and pay the debt with the proceeds.<sup>13</sup> Principal and surety being joint

<sup>9</sup> Belloni v. Freeborn, 63 N. Y. 383, per Allen, J.

<sup>10</sup> Jones v. Childs, 8 Nev. 121. To similar effect, see Carman v. Noble, 9 Pa. St. 366.

<sup>11</sup> Tankersley v. Anderson, 4 Des. Eq. (S. C.) 44. To similar effect, see Thurston v. Prentiss, 1 Manning (Mich.), 193. See, also, on this point, Darst v. Bates, 51 Ill. 439.

So, also, the surety may, before paying the debt, file his bill in equity against the creditors and his principal, to be substituted to a mortgage security given by the principal to the creditors. Moore v. Topliff, 107 Ill. 241.

<sup>12</sup> Daniel v. Joyner, 3 Ired. Eq. (N. C.) 513.

<sup>13</sup> Bird v. Benton, 2 Dev. Law

makers of a promissory note, the principal covenanted with the surety to pay the amount specified in the note to the payees thereof on a given day, but made default. In an action on this covenant it was held that the surety was entitled to recover the full amount of the note, although he had not paid any of it.<sup>14</sup>

**§ 243. The same continued—Various forms of indemnity contracts.**—A surety being liable upon two promissory notes due at different times, took from the principal a bond and warrant of attorney, the penalty being in double the amount of the two notes, and the condition being for the payment of a sum equal to the amount of the two notes, at a time previous to the maturity of either. The first note became due and the surety was obliged to pay it, and before the last note was due, and while it was unpaid, he entered up judgment on the bond for the amount of both notes. Held, the judgment was properly entered and might be enforced even though the principal offered to pay the surety the amount he had paid on the first note.<sup>15</sup> Where a party, in contemplation of suicide, tied up a bundle and left cash and notes indorsed to a surety, and addressed the bundle to the surety with directions that as soon as his death should be known the surety should, from the proceeds, indemnify himself, and if anything remained give it to the principal's children, and the surety received and claimed the property, it was held he might retain so much thereof as was necessary for his indemnity, and this upon the ground that, where a trust is created for a person without his knowledge, he may afterwards affirm it.<sup>16</sup> If the principal expressly agree to save the surety harmless from all loss and damage on account of the suretyship, the surety may, without paying the debt, recover damages for imprisonment which he

(N. C.), 179; *Goff v. Hedgecock*, 144 Ind. 415, 43 N. E. Rep. 644, in which case the sureties foreclosed a trust deed given them as security before paying the debt. A surety who has been compelled to pay the debt within the period of the statute of limitations may enforce a mortgage of indemnity against the principal after the remedy of the cred-

itor against the principal has been barred by that statute. *Rucks v. Taylor*, 49 Miss. 552.

<sup>14</sup> *Loosemore v. Radford*, 9 Mees. & Wels. 657. To similar effect, see *Dorrington v. Minnick*, 15 Neb. 397.

<sup>15</sup> *Smith v. James*, 1 Miles (Pa.), 162.

<sup>16</sup> *Woodbury v. Bowman*, 14 Me. 154.

has suffered on account of the debt.<sup>17</sup> The allowance by commissioners of a debt of the principal against the estate of a surety, when duly reported to the probate court and registered among the claims against the estate, is a damnification, and will entitle the administrator to sue the principal upon his special promise to "indemnify and save harmless" the surety.<sup>18</sup> A promise by a principal to pay into the hands of a surety for his indemnity the amount for which he is bound, "whenever the surety shall be called upon by the creditor for payment, or shall have reason to doubt the ultimate ability of the principal to save him harmless," is a valid promise as against the creditors of the principal, and an action may be sustained on it by the surety against the principal, without paying any of the debt.<sup>19</sup>

**§ 244. When special contract of indemnity will not authorize surety to recover before paying the debt, etc.**—The right of the surety or guarantor to recover indemnity from the principal before himself paying the debt manifestly depends upon the terms or legal effect of the express contract for indemnity. The liability of the surety for the debt of the principal is a sufficient consideration to support such a contract as against the principal or any of his creditors, and the terms or legal effect of the contract for indemnity will prevail, each particular case being governed by its own circumstances. After a note signed by principal and surety was due, the principal gave the surety a contract of indemnity, engaging to pay the note to the creditor "so as wholly to indemnify and save harmless the \* \* (surety) from his liability on said note by reason of signing the same as surety." Held, this was but a common contract of indemnity, and the surety must have sustained actual damage to entitle him to sue on it, as it could not be presumed that the contract was made to entitle the surety to sue on it at once. If the note had not been due when the contract of indemnity was made, its construction would have been different.<sup>20</sup> Where a surety receives from the principal, as indemnity, the principal's note payable at a particular time, it has been held that he might sue upon it, al-

<sup>17</sup> Powell v. Smith, 8 Johns. 249.

<sup>20</sup> Adm'rs of Pond v. Warner, 2

<sup>18</sup> Adm'rs of Pond v. Warner, 2 Vt. 532. See, also, Jeffers v. Johnson, 1 Zab. (N. J.) 73.

<sup>19</sup> Fletcher v. Edson, 8 Vt. 294.

though he had not been compelled to pay the debt, the fair presumption being that, by making the note payable at a day certain, the parties intended to provide an indemnity against suit rather than against ultimate loss.<sup>21</sup> Where the note given by the principal to the surety for his indemnity is in the nature of a collateral security only, it has been held that the surety may, on such note, recover whatever sum he has actually paid out, up to the time of trial, and no more.<sup>22</sup> If an indemnified surety, by his own act, causes property of the principal levied on for the payment of the debt to be released, the indemnitor is thereby discharged. Thus, C as principal, and A as surety, executed a note, and B at the same time gave A an agreement to save him harmless from all loss on account of such suretyship. The creditor obtained a judgment against A and C, and levied on property of C sufficient to satisfy the debt. A then replevied (stayed) the judgment for two years, the effect of which was to release the property of C from the levy. Before the two years expired, C became insolvent, and A had the debt to pay. Held, he could recover nothing from B, as he had by his own act prevented the payment of the debt by C's property.<sup>23</sup> A mortgage given by a principal to a surety for his indemnity can only be held by him for the very purpose for which it was given, and where it is given to indemnify him against payment of half a debt it will not cover a payment of the other half.<sup>24</sup> Nor will such a mortgage cover a loan made by the surety to the principal.<sup>25</sup>

**§ 245. When surety, apprehending loss, may, before paying the debt, bring suit in chancery to compel principal to pay it.—** After the debt for which a surety or guarantor is liable has become due, he may, without paying the debt and without being called upon by the creditor, file a bill in equity to compel the principal to pay the debt, it being unreasonable that a surety or guarantor should always have a cloud hanging over

<sup>21</sup> Russell v. La Roque, 11 Ala. 352.

<sup>22</sup> Little v. Little, 13 Pick. 426; Osgood v. Osgood, 39 N. H. 209; Child v. Powder Works, 44 N. H. 354. Contra, Woodbridge v. Scott, 3 Brevard (S. C.), 193. See on this

subject, Williams v. Cheney, 3 Gray, 215.

<sup>23</sup> Pope v. Davidson, 5 J. J. Marsh. (Ky.) 400.

<sup>24</sup> Newell v. Hurlburt, 2 Vt. 351.

On same point, see McDowell v. Crook, 10 La. Ann. 31.

<sup>25</sup> Clark v. Oman, 15 Gray, 521.



him, even though not molested for the debt.<sup>26</sup> This principle is universally recognized, and has been applied to a great variety of circumstances. Thus, a surety on a bond to secure a money debt was secured by another bond of indemnity, entered into by the principal debtor's father, who had died, having by will devised certain property specifically upon trust to pay the debt. The creditor having applied to the surety, the surety had recourse to the executors, who said they had no funds in hand, and that they were unable under the will to raise the money by sale of any portion of the testator's estate, except under a decree of the court. Held, that the surety, although he had not paid anything, was entitled to maintain a bill

<sup>26</sup> § 497 post. *West v. Chasten*, 12 Fla. 315; *Antrobus v. Davidson*, 3 Merivale, 569; *Irick v. Black*, 2 C. E. Green (N. J.), 189; *Bishop v. Day*, 13 Vt. 81; *Thigpen v. Price*, Phillips' Eq. (N. C.) 146; *Taylor v. Miller*, Phillips' Eq. (N. C.) 365; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525; *Greene v. Starnes*, 1 Heisk. (Tenn.) 582; *Howell v. Cobb*, 2 Cold. (Tenn.) 104; *Philadelphia & Reading R. R. Co. v. Little*, 41 N. J. Eq. 519; *Delaware, Lackawanna & Western R. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151; *Miller v. Stout*, 5 Del. Ch. 259; *Moore v. Topliff*, 107 Ill. 241. In *Macfie v. Kilauea Sugar Co.*, 6 Hawaii 440, the manager of a sugar company mortgaged his stock in it to secure his personal debt and also to secure one-half of the moneys that might be advanced by the mortgagee to the company for operating expenses. The manager was discharged. The company defaulted in payment of such advances. Held (Judd, C. J.), that plaintiff was entitled to have the creditor enjoined from suing plaintiff as surety until he had exhausted all remedies against the sugar company, and to have the company enjoined from applying its property, other than its product,

otherwise than in payment of the debt for which plaintiff had become surety, but that plaintiff's bill must aver that he apprehends loss or injury from the delay of the creditor in proceeding against the company and must offer to indemnify the creditor for the expense, risk and delay he may suffer by the proceeding to collect the debt from the sugar company instead of from plaintiff. In Arkansas, by statute, "a surety may maintain an action against his principal to obtain indemnity against the debt or liability for which he is bound, before it is due, whenever any of the grounds exist upon which \* \* \* an order may be made for arrest and bail or for attachment." In *Uptmoor v. Young*, 57 Ark. 528, 22 S. W. Rep. 169, a surety by prompt action under this statute obtained precedence over an attaching creditor and had the proceeds of a sheriff's sale applied on the debt for which he was surety and which became due after the institution of the suit. In *Rice v. Dorrian*, 57 Ark. 541, 22 S. W. Rep. 213, it was held that an indorser could not act under this statute before the note was due. In *Roberts v. American Bonding & Trust Co.*, 83 Ill. App. 463, it was held that



against the executors for administration, payment of the debt and indemnity, and that it was not necessary that the bill should be filed on behalf of all the creditors. The court said the following was the rule: "A court of equity will also prevent injury in some cases by interposing before any actual injury has been suffered by a bill which has been sometimes called a bill quia timet, in analogy to proceedings at the common law, where in some cases a writ may be maintained before any molestation, distress or impleading. Thus a surety may file a bill to compel the debtor on a bond in which he has joined to pay the debt when due, whether the surety has been actually sued for it or not; and upon a covenant to save harmless, a bill may be filed to relieve the covenantee under similar circumstances."<sup>27</sup> A surety whose principal is dead may, before paying the debt, file a bill against the creditor and the executor of the debtor, to compel the executor to pay the debt, so as to exonerate the surety from liability. He may enforce, for his exoneration, any lien of the creditor on the estate of the principal, and may bring any suit in equity which the creditor could bring for settlement of accounts and administration of the assets, whether legal or equitable, but the creditor must be a party, that he may receive the money when it is recovered.<sup>28</sup> The fact that an administrator had become in-

a surety who knows that a breach of the bond is inevitable and that the principal is insolvent and is about to dispose of the only property out of which the principal can make good the expenditures the surety must necessarily make, may apply to a court of equity and obtain a receiver and an injunction. In *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. Ed. 825, 8 Sup. Ct. Rep. 1004, a railroad company obtained an injunction restraining the enforcement of a judgment against it, by which all its property would have been swept away. Judgment was obtained against the surety on its injunction bond after proceedings had begun to foreclose a mortgage on all the railroad's property, which mortgage was in default

at the time the injunction bond was executed. It was held that without paying the judgment against him, the surety might intervene in the foreclosure suit and might show the fact of payment of the judgment by a supplemental petition; in this case the surety's claim to reimbursement was held to take precedence of the mortgage on the ground that his becoming such surety had saved the railroad from disintegration and saved its property for the benefit of its mortgagees.

<sup>27</sup> *Woldridge v. Norris* (Law Rep.), 6 Eq. Cas. 410, per Giffard, V. C. See, also, *Miller v. Speed*, 9 Heisk. (Tenn.) 196.

<sup>28</sup> *Stephenson v. Taverners*, 9 Gratt. (Va.) 398. *Brannon, J., in Alderson's Adm'r v. Alderson*,

solvent and wasted the assets, it has been held, will not, before the time for settling the estate has come, entitle the surety of such administrator to file a bill to prevent persons who owed the estate from paying the administrator, and to compel the administrator to give the surety security. The court said payment by the debtors ought not to be enjoined, as they might become insolvent, and the surety, not having originally demanded indemnity, could not demand it subsequently, but after the time for settling the estate arrived, a bill might be filed by the surety to compel the distribution of the assets.<sup>29</sup> A mortgagee who is also surety for the debt secured by the mortgage has no right to have the mortgaged premises sold before the debt becomes due, even though the same are in a state of ruin and decay, in consequence of storms, and are daily getting worse. The court said: "The security was taken with knowledge of the situation and the character of the property, and of the risks to which it was exposed. It does not belong to the court to give a party better security than he elected to take, where there has been no fraud or mistake, nor any abuse or waste of the subject. I am not informed that there exists any precedent for a bill *quia timet* adapted to such a case. All the cases in the English law, in which even a surety may file a bill *quia timet*, are those in which the debt was due from the principal debtor; and I do not know of any principle of equity that will justify us in giving aid to the surety before the debt is due, when the parties have not provided in their contract for such a case."<sup>30</sup> A surety on the bond of an executor or trustee cannot maintain a bill in equity against his principal for an accounting and the appointment of a receiver.<sup>31</sup>

W. Va., Apl., 1903, 44 S. E. Rep. 313, 319, holding that the surety, without paying the debt, may have the estate of his principal applied to exonerate him from liability, and that he need not wait the statutory five years to ascertain if the rents will be sufficient to pay the principal's debt. Citing *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. Rep. 172; *Watson v. Wigginton*, 28 W. Va. 575.

<sup>29</sup> *Delaney v. Tipton*, 3 Hayw. (Tenn.) 14.

<sup>30</sup> *Campbell v. Macomb*, 4 Johns. Ch. 534, per Kent, C. Compare *Guilmartin v. Middle Georgia & Atlantic R. R. Co.*, 101 Ga. 565, 29 S. E. Rep. 189, cited note 12, § 1, *supra*.

<sup>31</sup> *McElroy v. Hatheway*, 44 Mich. 399; *Ridgeway v. Potter*, 114 Ill. 457. Neither can a surety by bill in equity require his principal to give

§ 246. **Cases in which a surety may have relief in equity before paying the debt.**—A surety or guarantor who holds a mortgage on the property of his principal may, after the maturity of the debt, and before paying it, have the mortgage foreclosed, and the proceeds thereof applied to the payment of the debt.<sup>32</sup> It has been held that for any sum which a surety for the price of land purchased by another has paid, or is liable to pay, on that account, he has an equity to be reimbursed or exonerated by a sale of the land, and to that end he has a right to file his bill to prevent a conveyance to the purchaser by the vendor, who has kept the title as a security for the purchase money.<sup>33</sup> Where the surety of an insolvent principal obtains, without fraud, the legal title to a fund belonging to his principal, equity will not compel him to surrender the legal title to his principal, so that the principal may dispose of the fund as he pleases; but, if the surety has not paid the debt, will authorize and compel him to apply the fund to its satisfaction.<sup>34</sup> Where a joint judgment was recovered against a principal and surety, and the principal had property subject to execution, on which the judgment was a lien, and sold such property to a person who was about to remove the same without the jurisdiction of the court, it was held the surety might by suit in chancery prevent the removal of the property.<sup>35</sup> Where a party was surety on a bond given by a deputy sheriff to the sheriff, and had taken a mortgage on personal property for his indemnity, and the sheriff and the deputy had collected money for which the sheriff was sued, and the deputy had departed the jurisdiction, and the mortgaged property had come into the possession of a third party upon a pretended claim of right, which party was charged with an intention of removing it beyond the jurisdiction of the court, it was held that the court would restrain such third party from removing the property, and require bond and security for its forthcoming to

other and additional security, and on his failure to do so have him removed. *Ridgeway v. Potter*, 114 Ill. 457.

<sup>32</sup> *Kramer v. Farmers' & Mechanics' Bank*, 15 Ohio, 253; *Cottes v. Jeffers*, 7 Fla. 284; *Marekell v. Eichelberger*, 12 Md. 78;

*Succession of Montgomery*, 2 La. Ann. 469; *Hellams v. Abercrombie*, 15 S. C. 110.

<sup>33</sup> *Smith v. Smith*, 5 Ired. Eq. (N. C.) 34.

<sup>34</sup> *McKnight v. Bradley*, 10 Rich. Eq. (S. C.) 557.

<sup>35</sup> *Anderson v. Walton*, 35 Ga. 202.

answer the claim of the surety.<sup>36</sup> It is held, however, that, like any other creditor who has not yet reduced his claim to judgment, the surety who has not paid the debt and obtained judgment against the principal cannot maintain a suit in equity to set aside as fraudulent a conveyance made by his principal.<sup>37</sup> It has been held that the administratrix of a deceased partner could maintain a bill for the specific performance by the surviving partner of his agreement to pay a partnership debt that he had assumed upon the theory that after such assumption the surviving partner became the principal debtor and the

<sup>36</sup> *Ontlaw v. Reddick*, 11 Ga. 669.

<sup>37</sup> *Ellis v. Southwestern Land Co.*, 108 Wis. 313, 84 N. W. Rep. 417; *Barnes v. Sammons*, 128 Ind. 596, 27 N. E. Rep. 747; *Williams v. Tipton*, 24 Tenn. 66; *Mugge v. Ewing*, 54 Ill. 236, where it was held that the surety, after paying a judgment against the principal and himself, could not maintain a suit in chancery to set aside fraudulent transfers of the principal's property without first obtaining judgment at law. *Nash v. Burchard*, 87 Mich. 85, 49 N. W. Rep. 492. Contra, *Greene v. Starnes*, 57 Tenn. 582, where the right to maintain such suit is given the surety by the Code, and see, also, *Henry v. Compton*, 2 Head (Tenn.), 552; *Decherd v. Edwards*, 2 Sneed (Tenn.), 102, both decided prior to the Code, and holding that, before paying the debt, the surety might file his bill to restrain the principal from disposing of his property. To the same effect: *Stump v. Rogers*, 1 Ohio 533, citing no authority. In *Reel v. Livingston*, 34 Fla. 377, 16 So. Rep. 284, the maker of a note on which plaintiff was surety, before any default on his part, applied the proceeds of a mortgage on his own property to payment of part of the purchase money for property held by his wife. Held, that the surety, after having been compelled to pay the principal's debt, was entitled to

have the proceeds of insurance policies on the wife's property applied to payment of his claim against the principal to the extent that the principal had so contributed to pay the purchase money, and that without showing that the husband did not have other property sufficient to pay his debts. An existing indebtedness and placing his money in real estate in his wife's name, was held (p. 385) to make out a prima facie case of fraud. The surety's right to protection in a court of equity before he has sustained actual loss is ably debated by a divided court in a case arising in Ohio. In *Compton v. Jesup*, 68 Fed. Rep. 263, 318, 15 C. C. A. 397, 452, 31 U. S. App. 486, 584, the Toledo and Wabash Railroad consolidated with other railroads so as to form the Toledo, Wabash and Western. The Toledo, Wabash and Western expressly and by force of the Ohio statute governing consolidations assumed the indebtedness of each of the constituent companies. Among the debts of the Toledo & Wabash so assumed were two first mortgages on its railroad in Ohio, and two first mortgages on its railroad in Indiana, each running to the Farmers' Loan & Trust Co. Upon foreclosure thereof, the court disagreed as to whether the Toledo & Wabash, which, upon the consolidation, had

estate of the deceased partner a surety.<sup>38</sup> A surety is frequently protected by a court of equity against loss arising from accident and mistake.<sup>39</sup>

**§ 247. Cases in which a surety cannot recover indemnity from the principal.**—The surety who pays a debt for which the principal is not liable cannot generally recover the money so paid from the principal. Thus, where the surety in a bond against incumbrances paid the costs of defending two suits which the bond did not cover, under the mistaken belief that he was liable therefor, it was held he could not recover the same from his principal.<sup>40</sup> So where, in an action of replevin, a bond with surety is filed by the plaintiff, and possession of the property is obtained by him, and afterwards the suit is dismissed by agreement of the parties, the plaintiff agreeing to pay the defendant a certain sum, but no judgment is rendered, if the surety afterwards, without the request of the plaintiff, pays the amount agreed to be paid to the defendant, he cannot recover the same from his principal, as the payment is, in such case, a voluntary one on the part of the

become surety for its mortgage indebtedness as between itself and the Toledo, Wabash and Western, could successfully resist that part of the foreclosure decree which permitted separate redemptions of the Ohio and the Indiana divisions, on the ground that a redemption of the Ohio division would leave the Indiana division, which was worth less than the amount due on the first mortgages on it, as sole security for the remaining indebtedness, and amounted to a release of part of the property that was bound for the debts of the Toledo & Wabash. The question having been certified to the supreme court, was answered in a way which avoided consideration of the questions of suretyship. See *Compton v. Jesup*, 167 U. S. 1, at page 35, 42 L. Ed. 55, at 68, 17 Sup. Ct. Rep. 795. The supreme court held that appellant was entitled to a resale if the purchaser

did not pay its claim and therefore need not resort to redemption.

<sup>38</sup> *Kreling v. Kreling*, 118 Calif. 413, 50 Pac. Rep. 546.

<sup>39</sup> Thus in *Drake v. Sherman*, 179 Ill. 362, guarantors against loss by overdraft were induced to give their notes to cover a supposed overdraft of \$5,272.95, when they were in fact liable for only \$1,419.70, and, judgment by confession having been entered on the notes and partly paid, they filed their bill for an accounting and obtained a decree enjoining the bank to whom the guaranty ran from collecting more than the amount actually due. Same case below: *Drake v. Sherman*, 79 Ill. App. 413.

<sup>40</sup> *Bancroft v. Abbott*, 3 Allen, 524. If surety pays principal's debt with knowledge of facts which would discharge himself or his principal, he cannot recover indemnity. *Noole v. Blount*, 77 Mo. 235.

surety.<sup>41</sup> Where a county court borrowed money without any legal authority so to do, and the plaintiff became the county's surety on the bond for the borrowed money, a part of which he had since been compelled to pay, it was held that such plaintiff had no right to call upon the county to reimburse him for the amount already paid, or to exonerate him from the payment of the balance remaining unpaid. The county was not in any manner bound to the creditor, and could not be to the surety.<sup>42</sup> Where a surety paid a debt after personal property of the principal sufficient to satisfy the debt had been levied upon, it was held he could not recover indemnity from the principal. The levy was *prima facie* a satisfaction of the debt, and the surety had paid a debt which the principal had already paid.<sup>43</sup> A surety being imprisoned on account of the debt of two principals, agreed with one of them that he would pay one-half the debt if such principal would pay the other half, and this was done. The surety then sued both principals for indemnity. Held, he could not recover from the one with whom he had made the agreement. The implied promise of indemnity which the law would have raised was superseded by the express contract.<sup>44</sup> But it has been held that an agreement by a surety that he will surrender a note of the principal, if the principal will procure his release from his obligation as surety, is void for want of consideration, the ground of the decision being that the principal was bound to indemnify the surety, and, in procuring his release, he had only done what he was under a legal obligation to do.<sup>45</sup> The master of a vessel as principal, together with a surety, entered into a bond that the vessel should not take any slave from one of the Bahama Islands. A slave concealed himself in the vessel and was taken to New York, where the surety filed a bill against the principal for a *ne exeat* and indemnity. Held, the bill could not be sustained, as it was not certain that either principal or surety was liable, and the court would never lend its aid to enforce a forfeiture.<sup>46</sup> Where a surety buys a judgment

<sup>41</sup> *Hollinsbee v. Ritchey*, 49 Ind. 261. To a contrary effect, see *Clark v. Bell*, 8 Humph. (Tenn.) 26.

<sup>42</sup> *Davis v. Board of Comm'rs*, 72 N. C. 441; *Davis v. Comm'rs Stokes Co.*, 74 N. C. 374. <sup>44</sup> *Duncan v. Keiffer*, 3 Bin. (Pa.) 126.

<sup>45</sup> *Ritenour v. Mathews*, 42 Ind. 7.

<sup>46</sup> *Brown v. Kidd*, 34 Miss. 291. <sup>46</sup> *Gibbs v. Mennard*, 6 Paige, Ch. 258.



against himself and his principal in the name of another person, he cannot recover indemnity from the principal without first satisfying the judgment. He may either proceed upon the judgment or satisfy the judgment and sue the principal for money paid, but he cannot do both.<sup>47</sup>

**§ 248. Set-off—Surety may bid at execution sale of principal's property—Surety may assign his claim against the principal, etc.**—In a suit by administrators of an insolvent estate against one who was surety in a note for the decedent, such surety is entitled to set off a payment by him of such note, although the payment was made after the institution of the suit by the administrators against him. It is not like a claim brought by a party after suit is brought against him, for, although the surety's right to indemnity from the principal was not perfect till he paid the debt, yet it was "founded upon a contract which existed before."<sup>1</sup> If the surety for a debt pay the same before it is due, the payment will, after the debt has become due, but not before, be a legal set-off against a note of the surety payable to the principal and held by him.<sup>2</sup> Where a surety who had not paid the debt filed a bill against his principal, alleging that the principal was about to remove from the state and carry with him all his property, and prayed for an injunction to prevent the removal, etc., it was held that, in the absence of any statutory provision on the subject, he was not entitled to relief.<sup>3</sup> It has been held that

<sup>47</sup> *Hodges v. Armstrong*, 3 Dev. Law (N. C.), 253. And see, on this subject, *Lewis v. Lewis*, 92 Ill. 237.

<sup>1</sup> *Beaver v. Beaver*, 23 Pa. St. 167, per Lewis, J. Contra, *Walker v. McKay*, 2 Met. (Ky.) 294. In *Whitney v. Cady*, 71 Conn. 166, 41 Atl. Rep. 550, Whitney & Cady sold their partnership business to Whitney & Hines, who agreed to pay existing firm debts and Cady agreed not to engage in the same business in that city for five years. In violation of this agreement he engaged in the same business before the expiration of five years, whereupon plaintiffs refused to pay the firm debts. Held, that Cady's violation

of his agreement could be pleaded in defense of an action to recover damages for plaintiff's failure to pay the firm debts.

<sup>2</sup> *Jackson v. Adamson*, 7 Blackf. (Ind.) 597. For miscellaneous cases illustrating the doctrine of set-off as applied between principal and surety, see *Tyree v. Parham's Ex'r*, 66 Ala. 424; *Lynch v. Hancock*, 14 S. C. 66; *Balser v. Wood*, 69 Ind. 122; *State v. Wylie*, 86 Ind. 396; *Convery v. Langdon*, 66 Ind. 311; *Fisher v. Cassidy*, 49 Ohio St. 421, 34 N. E. Rep. 696.

<sup>3</sup> *Buford v. Francisco*, 3 Dana (Ky.), 68.



a surety, either before or after paying the debt, may file a bill to set aside fraudulent conveyances made by his principal or co-surety,<sup>4</sup> and the contrary has also been held.<sup>5</sup> A surety having property of his principal in his hands may surrender the same on an execution against his principal, and may purchase the same at the sale under the execution,<sup>6</sup> and he may so purchase although the judgment is rendered against him and his principal jointly.<sup>7</sup> But where a principal debtor, with money sufficient to pay the debt in his pocket, suffered the property of his surety to be sold on an execution against him, and the surety and himself became the purchaser, it was held to be doubtful whether, even at law, such sale, as against the surety, was not a mere nullity, and that in a court of equity such a purchaser would not be allowed to set up a title thus acquired against his surety.<sup>8</sup> A bond given by an executor (who had been appointed executor by the will but had not given bond) for the payment to his surety of one-half his commissions from time to time, as they may be allowed, in consideration of his consenting to become such surety, is a valid instrument. It is not an agreement to pay money in order to obtain an appointment, but a legitimate means of carrying out the wishes of the testator.<sup>9</sup> A principal executed a deed of trust to secure certain debts, among them one on which there was a surety. The surety had to pay the debt, and assigned all his interests in the deed of trust to a third person.

<sup>4</sup> Taylor v. Ex'r of Heriot, 4 Dev. Eq. (S. C.) 227; Martin v. Walker, 12 Hun (N. Y.), 46; Pashby v. Mandigo, 42 Mich. 172. In a bill by a surety of a guardian to set aside a fraudulent conveyance of his principal, the complaint is insufficient until there has first been an administration on the guardian's estate. Baugh v. Boles, 66 Ind. 376.

<sup>5</sup> Williams v. Tipton, 5 Humph. (Tenn.) 66. The bill must not fail to show to whom the surety was indebted at the time he made the conveyance, nor that the principal had not, up to the date of the conveyance, faithfully discharged his duties. Robinson v. Rogers, 84 Ind. 539. As to what facts are evidence

of a fraudulent conveyance, see Mason v. Pierron, 69 Wis. 585, 34 N. W. Rep. 921.

<sup>6</sup> Horsefield v. Cost, Addison (Pa.), 152.

<sup>7</sup> Carlos v. Ansley, 8 Ala. 900. But if the principal purchased lands of the surety on execution against them jointly he acquires no title thereto. Madgett v. Fleenor, 90 Ind. 517. Such purchase inures to the surety's benefit. Greer v. Wintersmith, 85 Ky. 516, 4 S. W. Rep. 232.

<sup>8</sup> Perry v. Yarborough, 3 Jones' Eq. (N. C.) 66

<sup>9</sup> Culbertson v. Stillinger, Taney's Decisions (Campbell), 75.

Held, such third person might enforce and have the benefit of the deed of trust.<sup>10</sup> A surety who has two indemnities may usually resort to either, at his option.<sup>11</sup> It is held that a right of action in personam may in a court of chancery, be set off against right of action in rem.<sup>12</sup>

**§ 249. When insolvent principal cannot collect debt due him by surety—Verbal guarantor who pays debt may recover indemnity—Other cases.**—A principal who is insolvent cannot collect a debt which the surety owes him without first indemnifying the surety. “A surety has in respect to his liability the rights of a creditor as against his principal; and upon the insolvency of the principal debtor he may retain any funds belonging to such debtor, by way of indemnity against his liability; otherwise a surety in such a case would be wholly without remedy when the plainest principles of justice are in his favor.”<sup>13</sup> And the assignee of a judgment obtained by the

<sup>10</sup> *York v. Landis*, 65 N. C. 535. Where a surety holds a note and chattel mortgage for indemnity and assigns the same, his assignee cannot enforce the mortgage until the mortgagee has paid the debt for which he was surety, or in some way has been damnified. *Stevens v. Hurlburt*, 25 Ill. App. 124.

<sup>11</sup> *Muller v. Down*, 94 U. S. 444. See, also, *McCoun v. Sperb*, 53 Hun, 165.

<sup>12</sup> In *United States Trust Co. v. Western Contract Co.*, 81 Fed. Rep. 454, 26 C. C. A., 472, at 486, 54 U. S. App. 67, it was held that, in an action to foreclose the lien of certain railway bonds, the defendant might offset damages suffered by it from the plaintiff's failure to perform its contract of guaranty of payment thereof. The fact that the one claim was in rem and the other in personam made no difference. “In courts of the United States sitting in equity,” said Taft, J., “the most liberal rules prevail in the allowance of set-offs to prevent circuity of action. [Citing *Scott v.*

*Armstrong*, 146 U. S. 507, 13 Sup. Ct. Rep. 148; *North Chicago Rolling Mill Co. v. St. Louis Ore & Steel Co.*, 152 U. S. 615, 14 Sup. Ct. Rep. 715.] In New Jersey [citing *White v. Williams*, 3 N. J. Eq. 376; *Dudley v. Bergen*, 23 N. J. Eq. 401; *Dolman v. Cooke*, 14 N. J. Eq. 68; *Bird v. Davis*, 14 N. J. Eq. 471], it is held that a foreclosure of a mortgage is a proceeding in rem, and that the mortgagor cannot, therefore, be permitted to set off in such an action a claim then due him from the mortgagee. This rule finds little or no support in other states, and we cannot understand the justice of it. \* If B is enforcing a lien against A's property, A can remove the lien by paying to B the amount secured by it. If so, why may not he be permitted to cancel the lien by forgiving B the debt B owes him; i.e., by setting it off? We are clearly of the opinion that he may do so. Justice is thereby done and circuity of action avoided.”

<sup>13</sup> *Abbey v. Van Campen*, 1 Freem. Ch. (Miss.) 273. See, also,

principal against the surety will in such case stand in no better position than the principal.<sup>14</sup> An executor, being surety for his testator paid the debt after the testator's death. Held, he had a right to retain this debt, the same as he would have a right to retain any other debt of equal degree due by the testator to him.<sup>15</sup> One who has verbally guarantied the debt of another at his request may pay the same and recover indemnity from his principal, and the Statute of Frauds will be no defense in such case, although it would be a defense to an action on the guaranty. The contract of guaranty was not void, and the guarantor had a right to perform his parol agreement.<sup>16</sup> If the surety, on a note given by an infant for necessities, pay it, he may recover indemnity from the infant. "If the infant is not liable on the note, as he would not be if he elected to avoid such liability, an assumpsit upon the delivery of the goods must be considered as subsisting against him, and the note of the surety be regarded as collateral security for the payment."<sup>17</sup> As long as a judgment against the principal can be enforced in any way, either by scire facias or action of debt, the payment of such judgment by a surety is not voluntary, and he may recover indemnity from the principal.<sup>18</sup>

**§ 250. Surety on note who pays without notice of failure of consideration may recover indemnity—When surety, who has joined in fraudulent scheme with principal, may recover indemnity—Other cases.—**A payment made by a surety in com-

Mattingly v. Sutton, 19 W. Va. 19. And to like effect, Walker v. Dicks, 80 N. C. 263, wherein is also established the proposition that the surety before suffering loss may use his liabilities as such, as an equitable counterclaim or set-off against a debt he owes his insolvent principal. And see Merwin v. Austin, 58 Conn. 22, 18 Atl. Rep. 1029.

<sup>14</sup> Williams v. Helme, 1 Dev. Eq. (N. C.) 151. See, also, directly in point, Walker v. Dicks, 80 N. C. 263, and Scott v. Timberlake, 83 N. C. 382.

<sup>15</sup> Boyd v. Brooks, 34 Beav. 7. Contra, Anonymous, Godbolt, 149.

<sup>16</sup> Beal v. Brown, 13 Allen, 114.

To similar effect, see Lee & Co. v. Stowe, 57 Tex. 444; Board of Comm'rs v. Jameson, 86 Ind. 154. A verbal guaranty that a note is genuine, made by the assignor at the time of its assignment upon a sufficient consideration, is valid. King v. Summitt, 73 Ind. 312.

<sup>17</sup> Conn v. Coburn, 7 N. H. 368. But see Ayers v. Burns' Adm'r, 87 Ind. 245. In Fagin v. Goggin, 12 R. I. 398, it is held that where a surety pays a judgment on a recognizance given by an infant, the latter is bound to reimburse the surety.

<sup>18</sup> Randolph v. Randolph, 3 Rand. (Va.) 490.

promise of his supposed liability upon a disputed claim against him and his principal may be recovered by the surety from the principal if it turns out that there was an actual liability, and the principal has or is entitled to the benefit of the payment in discharge of so much of the original claim against him.<sup>19</sup> A surety who, without notice of the failure of consideration of a note, pays it after it is due, may, notwithstanding such failure of consideration, recover indemnity from the principal.<sup>20</sup> After judgment against the surety in a replevin bond, he paid the judgment and sued his principal for indemnity. The principal set up that he had no title to the property replevied, and the surety knew it at the time, and the replevin was sued out by collusion between him and the surety to get the property, and that they were joint tort-feasors and neither could recover from the other. Held, no defense. The court said: "If the giving of the bond was a fraud it was one of singular character, for it indemnified the intended victim. This suit is not brought upon any illegal contract."<sup>21</sup> Where a bond with A as surety is given to the United States, and B is mentioned in the bond as the importer, and A pays the bond, he may maintain an action for indemnity against B, although in fact a third person was owner of the goods. The claim of the United States was extinguished by the bond, and the surety has a right to sue the principal in such bond.<sup>22</sup> A principal placed in the hands of his surety certain securities for his indemnity. The surety paid a portion of the debts for which he was liable, and collected from the securities in his hands an amount as great as he had paid out, but he still remained liable for other debts of the principal. Held, he must apply the money so collected to indemnifying himself for the money already paid by him for the principal, and that he could not then sue the principal for indemnity.<sup>23</sup>

**§ 251. Other cases as to rights of surety against principal—**  
**Agreement not to sue as a defense.**—If several parties sign a note as principals and one of them pays it, he may sue the others for indemnity and show by parol that they were prin-

<sup>19</sup> *Bancroft v. Pearce*, 27 Vt. 668.

<sup>21</sup> *Smith v. Rines*, 32 Me. 177, per

<sup>20</sup> *Gasquet v. Oakey*, 19 La. Howard, J.

(Curry), 76. See on this subject,

<sup>22</sup> *Sluby v. Champlain*, 4 Johns.

*Gates v. Renfroe*, 7 La. Ann. 569.

461.

<sup>23</sup> *Whipple v. Briggs*, 30 Vt. 111.

cipals and he a surety.<sup>24</sup> So where two of three parties who signed a note added to their names the word "surety," and one of them paid it, he may, in a suit for indemnity against the other, show that he was a principal notwithstanding the addition to his name of the word "surety."<sup>25</sup> The same thing was held where a principal, during his minority, contracted a debt for which a surety gave his note; and after his majority, the principal, on the bottom of the note, acknowledged himself holden as co-surety.<sup>26</sup> It has been held that the fact that after a note becomes due a new surety signs it will not prevent the original surety, who afterwards pays the note, from recovering indemnity from the principal. The payment was not voluntary, the addition of the name of the new surety not annulling the original liability on the note.<sup>27</sup> A husband and wife owned real estate, each one-half in fee, and made a mortgage to secure the debt of the husband, which was not properly acknowledged, and did not convey the wife's interest. Subsequently they made another mortgage to secure a debt of the husband to another party, which was duly acknowledged and the mortgaged property was sold. Held, the proceeds should be applied, first, to pay the last mortgage, and the overplus should be applied to reimburse the wife for her land so sold; she being as to it the surety of her husband, and her equity as such surety being to have all the property mortgaged by her husband applied to pay the debt for which she was surety before her property was touched.<sup>28</sup> If an official bond, given by a sheriff and his sureties, be so worded as not to be joint and several, but joint only, a court of chancery is the proper tribunal to give the sureties relief against the estate of the sheriff after his death, upon their being compelled to pay a sum of money on account of the delinquency of such sheriff in his life-time.<sup>29</sup> It is not necessary for the principal to make the surety a party to a suit in chancery which he may bring to assert any equity he may have against the demand for which he and the surety are bound at law.<sup>30</sup> It has

<sup>24</sup> Dickey v. Rogers, 19 Mart. Ell. 136. See, also, Mersman v. (La.) 7 N. S. 588. Werges, 112 U. S. 139.

<sup>25</sup> Apgar's Adm'r v. Hiler, 4 Zab. (N. J.) 812.

<sup>28</sup> Johns v. Reardon, 11 Md. 465.

<sup>29</sup> Mountjoy v. Bank's Ex'rs, 6

<sup>26</sup> Thompson v. Linscott, 2 Munf. (Va.) 387. Greenl. (Me.) 186.

<sup>30</sup> Bently v. Gregory, 7 T. B. Mon.

<sup>27</sup> Catton v. Simpson, 8 Adol. & (Ky.) 368.

been held that a surety when sued at law upon his contract of suretyship may set up by way of defense that the plaintiff made an agreement with him not to sue him; such an agreement would, of course, have to be based upon a valid consideration.<sup>31</sup>

**§ 252. Statute of limitations as between surety and principal.**—Ordinarily, the statute of limitations begins to run in favor of the principal, and against the surety who pays the

<sup>31</sup> In *McChesney v. Bell*, 59 Ill. App. 84, *McChesney*, the appellant, one of the sureties on an injunction bond, being sued at law, alone, by *Bell*, for the use of the receiver of the Park National Bank, pleaded that the injunction had been obtained, and the bond given, at the request of the president of the bank to delay a certain judgment so that the bank might get in ahead and secure payment of a judgment, that it owned, against the same creditor, and that the bank, by its president, at the time of obtaining his signature as surety to such bond, verbally agreed that he should not be held liable by the bank and that the bank would save and protect him from all loss and damages that might grow out of giving the bond, and that, relying upon that understanding, he signed it. The trial court sustained a demurrer to this plea and entered judgment against the surety which the appellate court reversed. "If such a defense be not good," said Mr. Justice Gary, "it must be because of some inexorable rule of law which cannot be evaded; and while hard cases tend to make bad law, the law should not multiply hard cases. That the bank should have the benefit of an act procured by its president to be done, upon other terms than he procured it upon, is contrary to multitudes of cases, as well as to justice. *Union Mutual Life Ins. Co. v. Kirchoff*, 133 Ill.

368, 27 N. E. Rep. 91, is one of the cases. In this state defenses on equitable grounds are available to sureties at law. *Flynn v. Mudd*, 27 Ill. 323; *Hawkins v. Harding*, 37 Ill. App. 564, 141 Ill. 572, 31 N. E. Rep. 307. The objection made to the defense is that 'it is an attempt to vary or contradict the terms of a written agreement by a prior or contemporaneous oral agreement between the parties to it.' This objection is based upon a confusion of ideas. It is true that an agreement never to sue upon a particular demand is a bar to an action upon that demand, not because it varies the obligation by which the demand is shown, but because the damages upon a breach of the agreement would be the amount recovered upon the demand, and to avoid circuitry of action, the law is that such agreement may be pleaded in bar, and will have the effect of, though not in fact, a release. *Guard v. Whiteside*, 13 Ill. 7. And the same consequence follows on a contract to indemnify. *Clark v. Bush*, 3 Cowen, 151. Contrary to the ancient rule (*Chandler v. Parkes*, 3 Esp. 76), a defense personal to one defendant may here be put in as to himself only. *Morrow v. People*, 25 Ill. 330. \* \* We therefore hold that if in any form the appellant may have the benefit of the agreement with the bank, it is a defense here." Compare § 241, note 8.



debt, from the time of such payment, and not from the time when the debt becomes due, because, until the surety has been compelled to make such payment, there is no breach of the implied promise of the principal to indemnify him.<sup>32</sup> When a surety has paid money for the principal, part inside and part outside the statute of limitations, on account of the same debt, all payments outside the statute are barred thereby.<sup>33</sup> On a contract to indemnify a plaintiff against costs, which he is afterwards called on to pay, the cause of action arises when he pays, and not when the costs are incurred, or the attorney's bill delivered to such plaintiff, and the statute of limitations, therefore, begins to run from the time of such payment.<sup>34</sup> A and B were sureties of C, and shortly after the debt became due A paid it. Four years afterwards B paid A one-half the sum A had paid. All these payments were made without suit. After the statute of limitations had run from the time A paid, and before it had run from the time B paid, B sued C for indemnity. Held, B's claim for indemnity was not barred by the statute. The cause of action of B against C accrued at the time of the payment by B to A.<sup>35</sup> Where a party upon whom a bill of exchange was drawn paid it for accommodation of the drawer, and after the statute of limitations would have barred an open account, and before it would have barred a suit on the bill of exchange, he sued the drawer for indemnity, it was held he could recover, because he was entitled to subrogation to the rights of the creditor against the principal, and his claim was therefore on the bill of exchange. The court said: "The rights to which he is entitled

<sup>32</sup> Thayer v. Daniels, 110 Mass. 345; Burton v. Rutherford, Adm'r, 49 Mo. 255; Bauer v. Gray, Adm'r, 18 Mo. App. 164; Scott v. Nichols, 27 Miss. 94; Shepard v. Ogden, 2 Scam. (Ill.) 257; Wesley Church v. Moore, 10 Pa. St. 273; Bullock v. Campbell, 9 Gill (Md.), 182; Walker v. Lathrop, 6 Iowa (Clarke), 516; Barnsback v. Reiner, 8 Minn. 59; Reid v. Flippen, 47 Ga. 273; McLane v. Ragsdale, 31 Miss. 701; Rucks v. Taylor, 49 Miss. 552; Considine v. Considine, 9 Irish Law Rep. 400. See, also, on this subject, Kel-

ler v. Rhoads, 39 Pa. St. 513; Bushong v. Taylor, 83 Mo. 660; and Harrah v. Jacobs, 75 Iowa, 72.

<sup>33</sup> Davies v. Humphreys, 6 Mees. & Wels. 153. The contrary has been held where the principal was not notified of the payment of the first instalments. See Williams, Adm'r, v. Williams, Adm'r, 5 Ohio, 444. Supporting the rule in the text, see Arbogast v. Hays, 98 Ind. 26.

<sup>34</sup> Collinge v. Heywood, 9 Adol. & Ell. 633.

<sup>35</sup> Odlin v. Greenleaf, 3 N. H. 270.



to be thus subrogated are those which the creditor had while the obligation of the contract subsisted, not such as he had after the debt had been paid. \* \* The doctrine is that the payment entitles the surety to be subrogated to all the rights of the creditor. It was his right to sue upon the contract. The surety upon payment is subrogated to this right, and may in like manner maintain his action.' ' <sup>36</sup> When a surety pays the creditor the amount of a judgment against him and the principal, and the creditor assigns the judgment to the surety, he may avail himself of the judgment, and the statute of limitations will not apply to the judgment as it would to the implied assumpsit that would accrue to him upon paying off the judgment.<sup>37</sup>

**§ 253. When surety may replevy property of principal.—** Where a surety signed the principal's notes, and in consideration thereof the principal orally agreed to convey personal property to him for the purpose of saving him harmless against any loss or damage by reason of his suretyship, and afterwards a receiver of the principal in another action took possession of such personal property, it was held that the surety, after the maturity of the notes, was entitled to replevy the property, and this, too, even though he had not actually been damaged.<sup>38</sup> A surety on a replevin bond, however, has not such a legal interest in his principal's property as will give him a right to replevy against one wrongfully dispossessing the principal of his property.<sup>39</sup>

**§ 254. When surety has lien on property of principal.—** Where a club by resolution authorized a committee to raise funds for the purpose of improving and adding to their buildings and furnishing them, and the committee, being unable to raise the money even by a mortgage of the club property, borrowed the same from a bank, several individual members of the committee becoming guarantors to the bank, who were afterwards compelled to pay the amount, it was held that the

<sup>36</sup> Sublett v. McKinney, 19 Tex. 438, per Wheeler, J.

<sup>37</sup> Morrison v. Page, 9 Dana (Ky.) 428.

<sup>38</sup> Bates v. Wiggin et al., 37 Kan. 44.

<sup>39</sup> Jinnerson v. Green, 7 Neb. 26.

Neither can a surety on a stay bond replevy his unexempt property levied on to collect a judgment, even where his principal had no property. McGlothlin v. Madden, 16 Kan. 466.

guarantors upon payment had a lien on the premises so added to and improved.<sup>40</sup> The master of the rolls said: "In the name of common sense could the club say, 'We will not allow you to be repaid it, for we did not authorize you to advance it; though it is true we authorized the improvements to be made, we only authorized them to be so made by borrowed money; we have availed ourselves of them, we have played in the new billiard-rooms and slept in the new bed-rooms built with your money; but we will not recoup you?' I think that the club could not be listened to for a moment in putting forward such an unconscionable proposition." <sup>41</sup>

<sup>40</sup> Minnitt v. Lord Talbot, Law Rep. (Irish), 1 Ch. Div. 143. And see the same case, Law Rep. Irish (7 Ch. Div.), 407. Compare § 1, note 12. In Wood v. Wood, 124 Ind. 545, it is held that a surety who pays his principal's debt has no lien on land purchased with the money for which it was contracted, though induced to become such by the principal's promise that he should have a lien.

<sup>41</sup> Minnitt v. Lord Talbot, Law Rep. Irish (1 Ch. Div.), 143, at page

152. Citing Bristowe v. Whitmore, 9 H. of L. Cas. 391, at 404, where the court said that the principle is of universal application that "when a contract has been entered into by one man as agent for another, the person on whose behalf it has been made cannot take the benefit of it without bearing its burdens. The contract must be performed in its integrity." See also notes 43 and 44 to § 278, and note 17 to § 325.

## CHAPTER X.

### OF THE RIGHTS OF THE SURETY OR GUARANTOR AGAINST THE CREDITOR AND THIRD PERSONS.

- § 255. Surety not discharged by lawful act of creditor—Instances.
256. How fraud of the creditor operates on liability of the surety.
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259. Whether surety may avail himself of set-off in favor of principal and against creditor.
260. Creditor not bound to exhaust securities put up by principal before suing surety—When surety without paying may enforce securities for the debt.
261. Surety may compel creditor to proceed against principal.
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263. Requisites of the request to sue.
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- § 266. Surety may make the same defense at law as in equity—Whether he must make his defense at law when sued at law.
267. Whether surety, having failed to make defense at law, can have relief in equity.
268. If creditor lead a surety to believe debt is paid and surety is injured, he is discharged.
269. Same continued.
270. When surety not discharged although he believe debt is paid.
271. Rights of surety against third persons—Indemnity of surety.
272. Surety entitled to benefit of collaterals after creditor has been paid—Creditor not bound to notify surety, when.
273. Surety not discharged because creditor tells him his signing is a mere matter of form—Other cases.
274. Surety may defend suit against principal—How liability of surety affected by fraud—Other cases.
275. When surety cannot recover money paid by him to creditor—Party who is indebted may become surety, and secure suretyship debt to exclusion of other creditors—Other cases.

•§ 276. Surety may enforce trust made for his benefit without his knowledge—Other cases.

277. Surety may compel specific performance by principal—Cannot enjoin creditors until indemnity realized—Has no lien against prin-

cipal's property—May enforce reimbursement from principal's mortgagee—May release indemnity.

§ 278. When surety for a portion of a debt entitled to share in dividend of estate of insolvent principal—Other cases.

§ 255. **Surety not discharged by lawful act of creditor—Instances.**—Under the general head rights of the surety against the creditor might properly be treated most of the grounds for the discharge of the surety, as it is an invasion of those rights which furnishes the grounds for such discharge. Separate chapters have, however, been devoted to an examination of the most important of those grounds, and it is proposed here to treat only of those rights of the surety against the creditor which do not properly fall under other subdivisions of this work. "A creditor discharges a surety by any dealing or arrangement with the principal debtor without the surety's assent, which at all varies the situation, rights or remedies of the surety."<sup>42</sup> But "the act of the creditor which injures the surety, or increases his risk, or exposes him to greater liability, which will operate as a discharge, must be some act which the law does not authorize or sanction, or the omission of some act specially enjoined by the law."<sup>43</sup> Thus, the fact that a creditor, after principal and surety are bound for a certain sum, lends the principal a much larger sum, and takes a bond from the principal for such larger sum, does not discharge the surety.<sup>44</sup> So where the proprietor of a newspaper sold it, together with its press, type, good-will, etc., and the purchaser gave notes with surety for the purchase money, and the vendor afterwards started in the same town another newspaper, which took so much patronage from the newspaper he had sold that the purchaser was unable to pay his notes, it was held the surety was not discharged, as the starting and carrying on of the new newspaper, there being no agreement

<sup>42</sup> Per Lord Truro, C., in *Owen v. he is not discharged. Burns v. Homan*, 3 Macn. & Gor. 378. See, *Parks*, 53 Ga. 61.

also, *Watkins v. Worthington*, 2 <sup>43</sup> *Stewart v. Barrow*, 55 Ga. 664, *Bland's Ch. (Md.)* 509. If the per *Warner*, C. J.

surety consent to the injurious act <sup>44</sup> *Eyre v. Everett*, 2 Russell, 381.

to the contrary, was a legal and permissible act on the part of the vendor.<sup>45</sup> Where a creditor, who was an attorney, obtained, as attorney for other creditors, an adjudication in bankruptcy against the principal judgment debtor, and thus prevented a lien from attaching on part of his property, it was held the surety was not discharged thereby. The act of the creditor was lawful, and even if it worked an injury to the surety he could not complain.<sup>46</sup> A decedent directed by his will that all his real estate should be sold, and the proceeds divided among certain of his children. One of his daughters married A, and he purchased a tract of the decedent's land at the executor's sale, and gave a note, with B as surety, for the purchase money. The surety and all parties then expected that the note would be paid by the distributive share of A's wife. She afterwards commenced a suit for divorce against A, in which she was successful, and had most of her distributive share decreed to her. The note was not paid, and the surety claimed to be discharged, because the fund he had relied upon for payment had been diverted from its purpose. Held, he was not discharged, as the diversion of the fund was not the act of the creditor but was the result of the wrongdoing of the principal.<sup>47</sup>

**§ 256. How fraud of the creditor operates on liability of the surety.**—If a surety is induced to become such by a fraud perpetrated on him by the creditor, as by false representations as to material facts, that will be a good defense; but "the representation to avoid the contract as to the surety must be a fraud on him as such, and in that character."<sup>48</sup> If the creditor intrusts the note of the principal and sureties to the principal for some fraudulent purpose, and consents that he shall make the sureties believe the debt is paid, and they are thus induced to forego any advantage they would otherwise have had, the sureties will be discharged. But it is otherwise if the note was intrusted to the principal for an honest purpose and the creditor did not know of or consent to the false represen-

<sup>45</sup> Rupp v. Over, 3 Brewster (Pa.), 133.

<sup>46</sup> Thornton v. Thornton, 63 N. C. 211.

<sup>47</sup> Ross v. Clore, 3 Dana (Ky.), 189.

<sup>48</sup> Evans v. Keeland, 9 Ala. 42, per Ormond, J. To similar effect, see Waterbury v. Andrews, 67 Mich. 281.

tations.<sup>49</sup> On a composition between a debtor and creditor, they induced a third person to become surety for the payment of one-half the debt, by representing to him that this was to be in full of all demands; and the debtor in pursuance of a previous arrangement, of which the surety was unapprised, gave his own note for an additional sum. Held, the note was void and could not be enforced against the maker, who was the principal debtor, on the ground that the taking of such note was a fraud on the surety, of which the principal might avail himself.<sup>50</sup> But where a party bought a team for \$700, and requested a surety to sign a note for \$500 in payment for the same, and the seller, in answer to an inquiry by the surety, told him the price of the team was \$500, and the surety thereupon signed the note, and the purchaser, without the knowledge of the surety, gave the seller a note for \$200 in addition, it was held that this last note was binding on the purchaser. The court said: "The surety has no interest in the transaction between the principal and creditor beyond his own indemnity. He is not supposed to stipulate or assume that the principal shall receive any specific benefit from the transaction, analogous to that which parties to a creditor's composition arrange for their common debtor. The principal stands in no relation of tutelage or wardship to the surety that lays the foundation of any presumption that the latter, in assuming suretyship, is arranging an advancement or the like for the principal."<sup>51</sup> A surety for the price of property bought by the principal cannot usually set up as a defense that a fraud was perpetrated on the principal in making the sale, unless the principal himself

<sup>49</sup> *Adm'r of Wilson v. Green*, 25 Vt. 450. In *Matthews v. Everett*, 84 Ga. 472, 11 S. E. Rep. 135, the holder of a note employed the maker under an agreement that his fees should apply on the indebtedness, but instead of so applying them, permitted the maker of the note to hold the fees earned until he became insolvent and left the state, meantime telling the surety that the principal's debt was settled and so causing him to part with property of the principal out of which he might have made the debt. Held, that the

surety was discharged. The court said (p. 476), that, "though a mere assurance to the surety that he is exposed to no further liability for the debt will not protect him from a subsequent change of purpose on the part of the creditor, yet if such assurance has resulted in producing positive injury, it will have that effect to the extent of such injury."

<sup>50</sup> *Weed v. Bentley*, 6 Hill (N. Y.), 56.

<sup>51</sup> *Mead v. Merrill*, 30 N. H. 472, per Woods, C. J.; re-affirmed, 33 N. H. 437.

repudiates the transaction. This is on the principle that the contract of the surety is accessory to the principal debt, and if the debtor himself admits the debt to be due, the surety cannot be permitted to deny it, for that would be to permit the principal to "retain the fruits of the contract, whilst the surety would avoid the performance of his obligation on the ground of its invalidity." <sup>52</sup>

**§ 257. The same continued—Contracts of suretyship avoided by fraud.**—The president and chief stockholder of a national bank had caused it to be guilty of several acts prohibited by the banking law, and for which it might have been wound up. While the bank was in this condition he sold it, and was in such sale guilty of other violations of the banking law, for which the bank might have been wound up. A third party, without the knowledge of these facts, became the surety of the purchaser on certain notes for part of the purchase price, and gave a mortgage on her property to secure the purchase money. The bank soon after failed, and the surety upon learning the facts filed a bill to obtain relief from the notes and mortgage. Held, the relief should be granted. It was urged that the purchasers did not seek to rescind the sale, and that it would be inequitable to allow them to retain the property and discharge the surety. But the court said that through the violation of law by the bank president, who was the creditor, the bank was rendered substantially worthless, and proceeded: "Indeed, it may be deduced from settled principles in this country and in England, in accordance with what is distinctly affirmed in the civil law, that the agreement of the surety is not binding where the bargain between the primary parties out of which it springs is contaminated by positive irregularities. \* \* Having been induced to become surety in the purchase of a bank, when her principals and the seller without her knowledge adopted terms and conditions which were illegal, greatly injurious to the bank, prejudicial to her interests and serving to impair her chance of protection and indemnification, she ought not, on applying for relief from her undertaking, to have the doors of the court closed against her, upon the objection that the seller and her principals have al-

<sup>52</sup> *Evans v. Keeland*, 9 Ala. 42, per Ormond, J.; *Brown v. Wright*, 7 T. B. Mon. (Ky.) 396.



lowed the matter to stand. \* \* Here we have positive illegality, a violation of public policy, and a fraud of a public nature, which was adapted to operate, and did operate, against complainant with all the severity and mischief of a direct fraud upon her."<sup>1</sup> Other cases illustrating the effect of fraud in procuring the execution or continuance of a contract of suretyship are cited in a note.<sup>2</sup> The fraud of a co-surety alone of which the obligee has no knowledge will not release the surety.<sup>3</sup> The mere fact that an employee is in default at the time of the execution of a fidelity bond does not render the surety's contract void, at least in the absence of an express stipulation

<sup>1</sup> Denison v. Gibson, 24 Mich. 187, per Graves, J. A wife may invoke equitable intervention in her behalf where she has executed a mortgage on her lands to secure notes given by her husband, and where such mortgage was procured by fraud. Henry et al. v. Sneed et al., 99 Mo. 407.

<sup>2</sup> In U. S. v. American Bonding and Trust Co., 89 Fed. Rep. 925, 32 C. C. A. 420, 61 U. S. App. 584, defendant company was surety on a government building contractor's bond under the act of Aug. 13, 1894, conditioned for the payment to all persons supplying the contractor labor and materials, as well as for the performance of the contract. Heise, Bruns & Co. furnished the contractor materials to the amount of \$2,474.51, and during the work received from the contractor \$6,500, which they applied to payment of the contractor's previous indebtedness to them, taking the contractor's notes for the \$2,474.51. They had induced defendant company to become surety by falsely representing to it that the contractor owed them nothing. Held, that they could not recover. St. Louis Brewing Assn. v. Hayes, 107 Fed. Rep. 395, 46 C. C. A. 370, was a suit upon a brewery sales agent's bond conditioned for

the payment of all moneys that should become due the brewing company for the year ending Nov. 18, 1894, and referring to a contract in which it was provided that all goods should be paid for on delivery. In April, 1894, the sureties made inquiry of Waterman, traveling salesman, and Panzer, traveling auditor of the brewery, and were assured by them that the agent was prompt pay, "all right," and only \$100 or \$125 behind. As a matter of fact he was then about \$3,000 in arrears, and possessed of property by resorting to which the sureties might have protected themselves against loss. Held, that the jury were justified in finding that the sureties were discharged. Same case on previous appeals: 17 C. C. A. 634, 71 Fed. Rep. 110, and 38 C. C. A. 449, 97 Fed. Rep. 859. In Lauer Brewing Co. v. Riley, 195 Pa. St. 449, 46 Atl. Rep. 71, it was held that where the obligee conceals from the surety the fact that the principal is a defaulter at the time of the execution of the bond and the surety signs it in ignorance of that fact, he is not bound.

<sup>3</sup> Hollingshead v. American National Bank, 104 Ga. 250, 30 S. E. Rep. 728.

that it shall have that effect.<sup>4</sup> An officer procured a woman to become surety on a note for the amount of an alleged embezzlement by a man who was then in his charge under arrest by promising to obtain employment for him as policeman; held, that this did not amount to fraud that vitiated her contract.<sup>5</sup> A defense of fraud to be availed of should be specially pleaded.<sup>6</sup>

**§ 258. Surety may avail himself of defense of usury.**—The surety on a note may avail himself of the defense of usury to the same extent that the principal can. If it was otherwise, the principal would stand in a better position than his surety, and the surety could either not recover indemnity from the principal for the usury paid by him, or the statute against usury would be evaded.<sup>7</sup> Principal and surety signed a replevin (stay) bond, and the principal paid large amounts of usurious interest at various times for extensions. Held, the surety might, by a separate bill filed for that purpose, with or

<sup>4</sup> *Dr. Blair Medical Co. v. United States Fidelity & Guaranty Co.*, Iowa, Feb., 1902, 89 N. W. Rep. 20.

<sup>5</sup> *Graham v. Marks*, 98 Ga. 67, 25 N. E. Rep. 931.

<sup>6</sup> In *American Car Co. v. Atlanta Street Ry. Co.*, 100 Ga. 254, 28 S. E. Rep. 40, defendants as principal and sureties were sued on a note for \$2,025 given in renewal of another note which had been given for part of the price of car bodies. The defense of all alike was that the consideration had failed in that the cars were not properly constructed. Held, that such defense was not sufficient, inasmuch as it appeared that the defects were known to the principal before the renewal of note was given. The court said that if the sureties in fact had a complete defense to the first note and that the holder knew it, and, concealing the facts, procured them to become sureties on the second note, they might be released upon specially pleading and proving such facts.

<sup>7</sup> *Gray's Ex'rs v. Brown*, 22 Ala. 262; *Stockton v. Coleman*, 39 Ind. 106; *Huntress v. Patten*, 20 Me. 28; *Weimer v. Shelton*, 7 Mo. 237; *Conger v. Babbet*, 67 Iowa, 13; *Keim & Co. v. Avery*, 7 Neb. 54. If the principal cannot plead usury the surety cannot. *Pugh v. Cameron's Adm'r*, 11 W. Va. 523. That surety cannot avail himself of defense of usury, see *Savage v. Fox*, 60 N. H. 17; *Culver v. Wilbern*, 48 Iowa, 26. A Georgia statute provides that a waiver of homestead exemption in a note that is tainted with usury is void. A surety on such a note who became such surety without knowledge of such usury is discharged because his risk is thereby increased without his consent. In *First National Bank v. McEntire*, 112 Ga. 232, 37 S. E. Rep. 381, it was held that this statute does not apply to notes which are payable to a national bank since the penalty for usury (loss of all interest) imposed by the National Banking Act is exclusive and it is beyond the power

without the consent of the principal, be allowed as credits on his bond the usurious interest paid by the principal.<sup>8</sup> Where a judgment was entered on a bond tainted with usury, of which usury the surety had no knowledge when he became bound, and the creditor filed a bill to subject equities of the surety to the payment of the judgment, it was held that the surety could not by cross-bill allege the usury and have relief against it without a tender of the amount due in equity.<sup>9</sup> It has been held that, after a principal has been discharged in bankruptcy, a surety when sued for the debt cannot set off usury paid by the principal to the creditor on contracts other than the one sued on, and this upon the ground that by the terms of the bankrupt act all debts due the bankrupt pass to his assignee.<sup>10</sup> Where a surety, knowing a debt was usurious, paid it, and the principal paid him by a transfer of property, and then sued the creditor to recover the usury, which he might have done if he had himself paid the usury in money, it was held he was not entitled to recover.<sup>11</sup> It will not be presumed that a note made in another state is void on account of usury.<sup>12</sup> Usury is not a defense to a bottomry bond unless it amounts to fraud on the owners or extortion.<sup>13</sup>

of a state to impose further penalties. In this case the accommodation indorser of a note payable to plaintiff bank, which was secretly tainted with usury, and contained a waiver of homestead, was held bound. In *Ford v. Scruggs*, 97 Ga. 228, 22 S. E. Rep. 590, the evidence was held insufficient to make out a case of usury. In *Tenney v. Porter*, 61 Ark. 329, 33 S. W. Rep. 211, the surety on a note bearing usurious interest executed a new note, as principal, in payment of a balance due thereon. Held, that the usury in the original note could not be pleaded by him in bar of a suit on the new note.

<sup>8</sup> *Curtcher v. Trabue*, 5 Dana (Ky.), 80. But in *Lamoille Co. Nat. Bank v. Bingham*, 50 Vt. 105, it was held that payment by the principal of usurious interest on a note did

not enable the surety to insist that such excess above lawful interest be applied as a payment of the note pro tanto.

<sup>9</sup> *Bank of Wooster v. Stevens*, 6 Ohio St. 262.

<sup>10</sup> *Woolfolk v. Plant*, 46 Ga. 422.

<sup>11</sup> *Whitehead v. Peck*, 1 Kelly (Ga.), 140.

<sup>12</sup> In *Craven v. Boles*, 96 Ga. 78, 23 S. E. Rep. 202, the note sued on bore 8 per cent interest. It was admitted that 6 per cent was the legal rate in Tennessee, where the note was made and payable. Held, that it would not be presumed that the note was void on account of usury under the Tennessee law and that judgment should be entered for principal and interest at 6 per cent.

<sup>13</sup> *The Northern Light* (D. C., Wash.), 106 Fed. Rep. 748, in which case a captain bound from

§ 259. **Whether surety may avail himself of set-off in favor of principal and against creditor.**—As to whether a surety, when sued for the debt of his principal, can at law avail himself of a set-off existing in favor of the principal against the creditor, the cases do not agree, but the weight of authority is that he may so avail himself of such set-off.<sup>14</sup> The reasoning upon which these decisions proceed has been thus expressed: “Although by our statute proper matters for set-off are mutual demands only, \* \* yet it is not considered as conflicting with this rule to offset a note signed by a principal and his surety against a note running to such principal alone; the debt in such case being considered as the debt of the principal.”<sup>15</sup> In an action at law against a principal and surety on a note, it has been held competent to recoup the damages of the principal growing out of the contract to the same extent as if the note had been given by the principal and he alone were sued.<sup>16</sup> The same thing has been held to be a good equitable defense to an action at law under a statute allowing equitable defenses to be made at law.<sup>17</sup> In debt on the bond of a city marshal, against the principal and sureties, it was held that the claim of the marshal alone against the city for services was admissible as a set-off, notwithstanding the fact that the bond was under seal.<sup>18</sup> Judgment was recovered

Nome to Seattle borrowed \$2,200 at Dutch Harbor, Alaska, at 10 per cent premium and 8 per cent interest for provisions, and the terms were held reasonable. See also *The Packet*, Fed. Cas. No. 10,654; *Carlington v. Pratt*, 18 How., U. S. 63.

<sup>14</sup> *Andrews v. Varrell*, 46 N. H. 17; *Hollister v. Davis*, 54 Pa. St. 508; *Cole v. Justice*, 8 Ala. 793; *Bronaugh v. Neal*, 1 Rob. (La.) 23; *Concord v. Pillsbury*, 33 N. H. 310. See, to similar effect, *Himrod v. Baugh*, 85 Ill. 435; *Hayes v. Cooper*, 14 Bradw. (Ill. App.) 490; *Becker v. Northway*, 44 Minn. 61; *Pierce v. Atwood*, Neb., Mch., 1902, 89 N. W. Rep. 669; *Flagg v. Locke*, Vt., May, 1902, 52 Atl. Rep. 424, where by statute the surety may avail himself of every defense that the prin-

cipal has, including set-off. And see *Coffin v. McLean*, 80 N. Y. 560, wherein it seems to be held that in an action against principal and surety the insolvency of the plaintiff is a sufficient ground in equity for the allowance of a set-off existing in favor of the principal against the plaintiff.

<sup>15</sup> Per Sargent, J., in *Andrews v. Varrell*, 46 N. H. 17.

<sup>16</sup> *Waterman v. Clark*, 76 Ill. 428. To same effect, see *Stratman v. Stookey*, Adm'r, 3 Bradw. (Ill. App.) 336.

<sup>17</sup> *Beehervaise v. Lewis*, Law Rep. 7 Com. Pleas, 372.

<sup>18</sup> *Concord v. Pillsbury*, 33 N. H. 310. See, also, to like effect, *Spencer v. Almoney*, 56 Md. 551, 562.

by a creditor against a principal and surety, and the principal recovered a judgment against the creditor, who was insolvent. Held, the surety might, by a suit in chancery, have the one judgment set off against the other, as the debts were in reality mutual, and equity would look beyond the form of the debt to the actual facts.<sup>19</sup> A held the note of B, on which C and D were sureties. A sued B and recovered a judgment, but for a less amount than he claimed, in consequence, as he alleged, of B's false swearing. A then swore out a warrant for the arrest of B on a charge of perjury, and B fled the state. In consideration that A would drop the prosecution, B gave A the note of one Mills for \$500, which was all the property B had. Held, that C and D might, by suit in chancery, have the note applied to the payment of the debt for which they were liable.<sup>20</sup> On the other hand, it has been held that a surety cannot at law avail of a set-off recoupment or counter-claim existing in favor of the principal against the creditor.<sup>21</sup> This is put upon the ground that the principal has a right to bring a separate action for his claim against the creditor, and that he could not do this if the surety was allowed to set it up as a defense, and thus he might lose a much larger sum than that for which the surety was liable.<sup>22</sup> It was, however, admitted in those cases, that the surety might have relief in equity by a suit to which the principal was a party. It has also been held that the creditor cannot at law set off a debt which he claims to be due him from a guarantor against a debt which he owed such guarantor.<sup>23</sup>

<sup>19</sup> Downer v. Dana, 17 Vt. 518.

<sup>20</sup> Breese v. Schuler, 48 Ill. 329.

<sup>21</sup> Gillespie v. Torrance, 25 N. Y. 306; Lafarge v. Halsey, 1 Bosw. (N. Y.) 171; Emery v. Baltz, 22 Hun (N. Y.), 434; Lasher v. Williamson, 55 N. Y. 619; Davis v. Toulmin, 77 N. Y. 280; Thalheimer v. Crow, 13 Colo. 397. If the surety pleads as a set-off a demand due his principal, he must show that the demand has been assigned to him, or that he makes it with the principal's consent, and the consent must be such as to bind the principal. Graff v. Kahn, 18 Bradw. (Ill. App.) 485;

Wieland v. Oberne, 20 Bradw. (Ill. App.) 118; Baltimore & Ohio R. R. Co. v. Bitner, 15 W. Va. 455; Beard v. The Union & Am. Pub. Co., 71 Ala. 69. On this subject, see Poorman v. Goswiler, 2 Watts (Pa.), 69; Osborne v. Bryce (Cir. Ct. E. D. Wis.), 23 Fed. Rep. 171; Aultman v. Hefner, 67 Tex. 54.

<sup>22</sup> And also upon the principle that a surety cannot set up defenses personal to the principal. Henry v. Daley, 17 Hun (N. Y.), 210.

<sup>23</sup> Morley v. Inglis, 4 Bing. N. C. 58; Id., 5 Scott, 314.

§ 260. **Creditor not bound to exhaust securities put up by principal before suing surety—When surety without paying may enforce securities for the debt.**—According to the English law, the creditor cannot be compelled, before proceeding against the surety, to exhaust a mortgage or other security which he may hold from the principal for the payment of the debt, although it is otherwise by the civil law.<sup>24</sup> The remedy of the surety is to himself pay the debt, and he will then be subrogated to, and may enforce, all liens held by the creditor for the payment of the debt. A creditor in New Jersey, where the parties resided, took from B, the holder of a promissory note indorsed by the plaintiff, on a loan of money alleged to be usurious, a bond and mortgage, which was, if valid an ample security for the debt, and, instead of resorting to the bond and mortgage or to the principal, sued the plaintiff in New York on his indorsement. The plaintiff filed a bill to enjoin the suit at law till the bond and mortgage were exhausted in New Jersey, and it was held he was entitled to relief. The court held the law to be as above stated, and granted the relief solely on the ground that there was reason to believe that the bond and mortgage had been rendered frail and insecure by the illegal act of the holder of the note, and the court would not permit the surety to be forced to pay the money and then litigate this doubtful question with the maker of the bond and mortgage, as it was more equitable that the creditor should first litigate it.<sup>25</sup> Where principal and surety have both mortgaged property for the debt of the principal, the surety is entitled to have the property of the principal sold first to satisfy the debt.<sup>26</sup> When the principal is insolvent, the surety has,

<sup>24</sup> *Watson v. Sutherland*, 1 Cooper, Ch. (Tenn.) 208; *Hayes v. Ward*, 4 Johns. Ch. 123; *Buck v. Sanders*, 1 Dana (Ky.), 187; *Allen v. Woodward*, 125 Mass. 400. See on same subject, *Gary v. Cannon*, 3 Ired. Eq. (N. C.) 64. See, also, *Irick v. Black*, 2 C. E. Green (N. J.), 189. See the civil law rule in *Hill & Co. v. Bourcier & Pond*, 29 La. Ann. 841. In Virginia it is held that the principal's lands must first be exhausted before subjecting that of the sureties. *Moore v. Friedenwald*,

77 Va. 57; *Stovall v. Border Grange Bank*, 78 Va. 138; *Horton v. Bond*, 28 Gratt. (Va.) 815. But if principal's lands are so incumbered that nothing can be realized, lands of surety may be held. *Bell v. McConkey*, 82 Va. 176. See on this subject, also, *Booth v. Wiley*, 102 Ill. 84.

<sup>25</sup> *Hayes v. Ward*, 4 Johns. Ch. 123.

<sup>26</sup> *Neimcewicz v. Gahn*, 3 Paige Ch. 614; *James v. Jacques*, 26 Tex. 320. To precisely similar effect, see



under certain circumstances, a right, before paying the debt, to file a bill to enforce a lien for its payment. This was held where a slave was sold under a decree of court and a lien retained for the purchase money, for which a surety also became bound, and the slave was levied on by other creditors;<sup>27</sup> where land belonging to an estate was sold and a lien retained on it for the purchase money;<sup>28</sup> and where certain persons had in their hands funds belonging to a clerk of a court in his representative capacity.<sup>29</sup> Where a judgment had been rendered against principal and surety, and the principal was insolvent, it was held that a court of chancery would entertain jurisdiction of a suit brought by the surety for the purpose of reaching credits of the principal in the hands of third parties, and appropriating them in payment of the judgment, although the surety had not paid the debt.<sup>30</sup>

**§ 261. Surety may compel creditor to proceed against principal.**—It is settled by a long-continued and unvarying current of authorities that the surety may, by a suit in chancery, after the debt becomes due and before he pays it, compel the creditor to proceed to collect the debt from the principal, provided he indemnify the creditor against loss from a fruitless suit against the principal.<sup>31</sup> As the mere passive delay of the creditor in proceeding against the principal, however long

Keel v. Levy, 19 Oreg. 450; Pacific Guano Co. v. Anglin, 82 Ala. 492; Gresham v. Ware, 79 Ala. 192; Bruce v. Laing, Tex. Civ. App., Oct., 1901, 64 S. W. Rep. 1019, citing James v. Jacques, 26 Tex. 320, 82 Am. Dec. 613, and Schneider v. Sellers, 61 S. W. Rep. 541, 2 Tex. Ct. Rep. 192, Tex. Civ. App., Dec., 1900.

<sup>27</sup> Henry v. Compton, 2 Head (Tenn.), 549.

<sup>28</sup> Polk v. Gallant, 2 Dev. & Bat. Eq. (N. C.) 395. To same effect, see Green v. Crockett, 2 Dev. & Bat. Eq. 390; Arnold v. Hicks, 3 Ired. Eq. (N. C.) 17; Egerton v. Alley, 6 Ired. Eq. (N. C.) 188. A surety upon a note for the purchase money of land sold under a decree of court has the right, on default of his prin-

cipal, to require a resale in exoneration of his liability. Ex parte Pettillo, 80 N. C. 50.

<sup>29</sup> Bunting v. Ricks, 2 Dev. & Bat. Eq. (N. C.) 130.

<sup>30</sup> McConnell v. Scott, 15 Ohio, 401. Supporting the right of the surety who has not paid the debt, to avail himself of collateral security, see Dixon v. Steel, 2 L. R. Ch. Div. 1901, 602, distinguishing South v. Bloxam, 2 H. & M. 457.

<sup>31</sup> Ranelagh v. Hays, 1 Vernon, 189; Hays v. Ward, 4 Johns. Ch. 123; Antrolus v. Davidson, 3 Merivale, 569-79; King v. Baldwin, 2 Johns. Ch. 554; Lee v. Rook, Moseley, 318; Whitridge v. Durkee, 2 Md. Ch. 442; Nisbet v. Smith, 2 Brown's Ch. Ca. 579; Hogaboom v.



continued and however injurious to the surety, will not ordinarily discharge him,<sup>32</sup> this right to accelerate the movements of the creditor is of great importance. Even if the surety should suffer no injury by the delay, it is unreasonable that he should always have such a cloud as the debt of the principal hanging over him. It is likewise settled that the surety may, upon the terms of bringing the amount due into court, compel the creditor to prove the debt in bankruptcy against the estate of the principal.<sup>33</sup>

**§ 262. Cases holding that surety by request and without suit may compel creditor to proceed against principal.**—As to whether the surety may without suit accelerate the movements of the creditor against the principal there is great conflict of authority. There is a numerous and well-considered class of authorities which hold that if, after the debt is due, the surety, verbally or in writing, request the creditor to sue the principal, who is then solvent, and the creditor fail to do so, and the principal afterwards becomes insolvent, the surety is thereby discharged. The reasoning upon which these decisions are founded is that equity will compel the creditor to sue the principal and make the money from him, because he is primarily liable for it, and it is the duty of the creditor to get payment from him if possible. If it is his duty to do this there is no reason why he should not be compelled to do it upon the request of the surety in pais, as well as by filing a bill in chancery against him. Where the creditor does any act injurious to the surety, or omits to do an act when required which equity and his duty to the surety enjoin it upon him to do, and the omission is injurious to the surety, in either case the surety will be discharged. To delay under such circumstances is against conscience, and in its effect is a fraud upon the surety.<sup>34</sup>

Herrick, 4 Vt. 131; Rees v. Burlington, 2 Ves. Jr. 540; Huey v. Pinney, 5 Minn. 310; Kent v. Matthews, 12 Leigh (Va.), 573; Rice v. Downing, 12 B. Mon. (Ky.) 44; In re Babcock, 3 Story, 393. And see, also, Norton v. Reid, 11 S. C. 593. The fact that a surety or guarantor had an interest in prosecuting the principal by the creditor does not render him guilty of maintenance.

Board Comm'rs v. Jameson, 86 Ind. 154; Macfie v. Kilauea Sugar Co., 6 Hawaii, 440.

<sup>32</sup> Pharr v. McHugh & Union, 32 La. Ann. 1280; People v. White, 28 Hun (N. Y.), 289; Newton v. Hammond, 38 Ohio St. 430.

<sup>33</sup> Wright v. Simpson, 6 Vesey, 714; Ex parte Rushforth, 10 Vesey, 409; In re Babcock, 3 Story, 393.

<sup>34</sup> Pain v. Packard, 13 Johns.

The fact that there was a statute providing for the discharge of the surety, if the creditor failed to sue, upon being required in writing by the surety to do so, has been held to make no difference, the statute being held to be merely cumulative, and not to impair the right of a surety to be discharged upon a verbal request.<sup>35</sup> In order that the request may have this effect, the principal must, at the time thereof, be solvent and able to pay all his debts, according to the ordinary usage of trade.<sup>36</sup> The request need not be accompanied by an offer

174; *King v. Baldwin*, 17 Johns. 384, reversing the decision of Chancellor Kent, in *King v. Baldwin*, 2 Johns. Ch. 554, by the casting vote of Lieut. Gov. Taylor, a layman. The two first-named cases are the leading authorities on the view of the subject which they hold. They have been followed, or decisions to the same effect rendered, in *Manchester Iron Manuf. Co. v. Sweeting*, 10 Wend. 163; *Hempstead v. Watkins*, 6 Ark. (1 Eng.) 317; *Thompson v. Robinson*, 34 Ark. 44; *Martin v. Shekan*, 2 Col. 614; *Hancock v. Bryant*, 2 Yerg. (Tenn.) 476; *Cope v. Smith Ex'r*, 8 Serg. & Rawle (Pa.), 110; *Hopkins v. Spurlock*, 2 Heisk. (Tenn.) 152; *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Colgrove v. Tallman*, 67 N. Y. 95; *Wheeler v. Benedict*, 36 Hun (N. Y.) 478; *Bruce v. Edwards*, 1 Stew. (Ala.) 11. See *Trimble v. Thorne*, 16 Johns. 152, as to application of this principle to the indorser of a promissory note. And to this latter point, see, also, *Converse v. Cook*, 25 Hun, 44; same case again, 31 Hun, 417, wherein it was held that an accommodation indorser was not a surety in such a sense as to enable him to discharge himself from liability on a note by proving a request to the holder thereof to enforce payment by the maker, and the failure of the holder so to do.

<sup>35</sup> *Thompson v. Watson*, 10 Yerg. (Tenn.) 362; *Strader v. Houghton*, 9 Port. (Ala.) 334; *Herbert v. Hobbs*, 3 Stew. (Ala.) 9; *Goodman v. Griffin*, 3 Stew. (Ala.) 160. In *Howle v. Edwards*, 97 Ala. 649, 11 So. Rep. 748, it was held that the statutory provision does not abrogate the common law, but is cumulative and the court said that, "The rule at common law was that notice to the holder of the note, thought not in writing, and request to sue the principal, operated to discharge the surety, when by the negligence of the creditor, the means of recovering the debt from the principal had been lost, or damage accrued to the surety, and is a good plea in bar of an action on the note against the surety." In *Souter v. Bank of S. W. Georgia*, 94 Ga. 713, 20 S. E. Rep. 111, it was held that notice by the surety to quicken creditor into action, must be in writing, a verbal notice insufficient where statute specifies writing. See, also, § 263.

<sup>36</sup> *Herrick v. Borst*, 4 Hill (N. Y.), 650. To similar effect, see *Huffman v. Hulbert*, 13 Wend. 377; *Merritt v. Lincoln*, 21 Barb. 249; *Field v. Cutler*, 4 Lans. (N. Y.) 195. The liability of the surety to a note is not lessened or terminated by the failure of the holder to sue the maker, upon the surety's request, when it appears that the maker was

to pay the expenses of the suit, unless the creditor expressly puts his refusal to sue upon these grounds.<sup>37</sup> If the creditor have a mortgage on property of the principal for the security of the debt, which is ample for that purpose when the debt becomes due, and refuse after request by the surety to foreclose the mortgage till the property greatly depreciates in value it has been held that the surety is thereby discharged.<sup>38</sup> It has also been held that if the creditor, after request by the surety, fail to present his claim against the estate of an insolvent principal, and the debt is thereby lost, the surety is released *pro tanto*.<sup>39</sup> A guaranty given by the defendant was to be void if the plaintiff should omit to avail himself to the utmost of any security he held of R. He held a bill drawn by R and accepted by an insolvent, still in prison. Held, he was not bound before suing on the guaranty to prosecute the in-

at the time of the request, and at all times thereafter, insolvent. *Marsh v. Dunkel*, 25 Hun (N. Y.), 167.

<sup>37</sup> *Wetzel v. Sponsler*, 18 Pa. St. 460.

<sup>38</sup> *Remsen v. Beekman*, 25 N. Y. 552, where the doctrine of *King v. Baldwin*, although previously questioned by judges in the same state, was approved on principle and followed as authority. If the principle of *King v. Baldwin* is correct, it would seem clear that the above decision is also correct. The precise opposite has, however, been held in *Branch Bank at Montgomery v. Perdue*, 3 Ala. 409, and in *Haden v. Brown*, 18 Ala. 641, by a court which held the doctrine of *King v. Baldwin*. The same court held that, after judgment against principal and sureties, the sureties were not discharged by the failure of the creditor upon request to levy on the property of the principal, and the subsequent insolvency of the principal. *Buckalew v. Smith*, 44 Ala. 638. And also that a lessor was not bound to distrain property of the lessee upon the request of the

surety; the distinction seeming to be made between forcing the creditor to proceed generally and forcing him to proceed in a particular way against particular property. *Brooks v. Carter*, 36 Ala. 682. To the same effect as the last case, see *Ruggles v. Holden*, 3 Wend. 216. It has also been held that a creditor is not bound upon request to arrest a principal who is insolvent, but had friends who would probably have paid the debt if he had been arrested. *Warner v. Beardsley*, 8 Wend. 194. It has been held by another court that a creditor was not bound at the request of the surety to levy on property of the principal. *Newell v. Hamer*, 4 How. (Miss.) 684. On this subject, see, also, *Bank v. Klingensmith*, 7 Watts (Pa.), 523; *Weiler v. Hoch*, 25 Pa. St. 525; *Baldwin v. Gordon*, 12 Martin (La.), O. S. 378.

<sup>39</sup> *McCollum v. Hinkley*, 9 Vt. 143. The general doctrine of *King v. Baldwin* is repudiated by the same court. *Hogaboom v. Herrick*, 4 Vt. 131; *Hickok v. Farmers' & Mechanics' Bank*, 35 Vt. 476.

solvent.<sup>40</sup> A was indebted to B for one year's rent of certain premises, for which B had lost his landlord's lien, by lapse of time. A was also indebted to C for rent for the current year, for which C had a lien if he chose to enforce it, and for which last rent D was surety. The property of A was levied on by execution at the suit of third parties, and D notified C to file his claim for rent with the sheriff, by which the lien would have been preserved and the debt made. C refused to do this, and the debt was lost. Held, the surety D was discharged.<sup>41</sup> Upon the sale of a guarantied bond and mortgage the guarantor was held not released from liability because of the failure of an assignee of the bond and mortgage to comply with a notice requiring him to proceed to collect the debt by legal proceedings, and the property after such notice depreciated in value and the obligor became insolvent. It was held the duty of the guarantor to pay the debt himself and make the money out of his principal.<sup>42</sup> It has been held that the surety cannot compel the creditor to sue the principal in a state other than that in which the creditor resides.<sup>43</sup> Statutes for the acceleration of suits against principals apply only to conventional suretyship.<sup>44</sup>

<sup>40</sup> *Musket v. Rogers*, 5 Bing. N. C. 728; *Id.*, 8 Scott, 51.

<sup>41</sup> *Lichtenthaler v. Thompson*, 13 Serg. & Rawle (Pa.), 157.

<sup>42</sup> *Newcomb v. Hale*, 90 N. Y. 326.

<sup>43</sup> *Hightower v. Ogletree*, 114 Ala. 94, 21 So. Rep. 934. Suit against the surety on a promissory note. Defense: that surety had given payee notice in writing to sue the maker at the next court and maker had neglected to sue. Replication: that at the time of such notice the maker had removed to Georgia and had not returned to Alabama until after the present suit had been begun. Held, that the replication was good. Citing the following Missouri and Indiana cases, where similar statutes are in force: *Phillips v. Riley*, 27 Mo. 386; *Rowe v. Buchtel*, 13 Ind.

381; *Conklin v. Conklin*, 54 Ind. 289. Under those statutes the surety cannot force the payee to go outside of the state and sue.

<sup>44</sup> In *Fish v. Glover*, 154 Ill. 86, 39 N. E. Rep. 1081, it was held that the Illinois statute, which provides that when "any person bound as surety for another fears that his principal may become insolvent, he may require the creditor forthwith to bring suit against the principal," has no application to cases where the relation of principal and surety arises by implication. Magruder, J., speaking for the court, said that this statute "refers to contracts in writing, binding sureties, and not to contracts of suretyship arising by implication," and in that case it was held not to apply where, by the sale of mortgaged property and

§ 263. **Requisites of the request to sue.**—The notice to the creditor to sue, which will discharge the surety if not complied with, should be so clear and distinct that the meaning of the surety can be at once apprehended without explanation or argument.<sup>1</sup> A request to “push (the surety) and keep pushing him,” when it is understood by both parties to be a request to collect the debt by legal means, is sufficient. A request to collect the money by dunning, or in any other way than by legal proceedings, is not sufficient.<sup>2</sup> A notice by the surety in a note to the holder “to collect it, as he would not stand bail any longer,” is sufficient.<sup>3</sup> It has been held that the request to sue must be accompanied by an explicit declaration that unless suit is brought the surety will no longer remain liable. Therefore, where a surety wrote to a creditor, as follows: “I therefore notify you that I will be no longer considered bail. Please take another bond for him or payment,” it was held that the request was not sufficient.<sup>4</sup> The request to sue a note when due avails nothing if made before the note is due. The request must be made at the time of, or after, the maturity of the obligation.<sup>5</sup> The surety may make the request by agent, and if he has a general agent who transacts all his business, it is the duty of such agent to make such request without any special directions. Where the creditor is not in the neighborhood, and has left the note in the hands of an agent for collection, the request may be made of such agent.<sup>6</sup> The request may be made of the counsel of an absent or non-resident plaintiff in a judgment.<sup>7</sup> Where a married woman is the owner of a note, a request made of her husband

the assumption of the mortgage debt by the vendee, the vendee became the principal debtor and the vendor the surety. Same case below: 51 Ill. App. 566.

<sup>1</sup> Wolleshlare v. Searles, 45 Pa. St. 45; Shimer v. Jones, 47 Pa. St. 268; Conrad v. Foy, 68 Pa. St. 381; Fidler v. Hershey, 90 Pa. St. 363; Denick v. Hubbard, 27 Hun (N. Y.), 347; Thayer v. King, 31 Hun (N. Y.), 437; Goodwin v. Simonson, 74 N. Y. 133.

<sup>2</sup> Singer v. Troutman, 49 Barb. (N. Y.) 182.

<sup>3</sup> Stickler v. Burkholder, 47 Pa. St. 476.

<sup>4</sup> Greenawalt v. Kreider, 3 Pa. St. 264. To similar effect, see Erie Bank v. Gibson, 1 Watts (Pa.), 143, and Fidler v. Hershey, 90 Pa. St. 363.

<sup>5</sup> Hellen v. Crawford, 44 Pa. St. 105. And see Fidler v. Hershey, 90 Pa. St. 363.

<sup>6</sup> Wetzel v. Sponslers' Ex'rs, 18 Pa. St. 460. See, also, on this point, Geddis v. Hawk, 10 Serg. & Rawle (Pa.), 33.

<sup>7</sup> Thomas v. Mann, 28 Pa. St. 520.

to put the note in suit will not avail the surety. The husband is not ipso facto the agent of the wife in that regard.<sup>8</sup> It has been held that the request to sue would not avail the surety if the principal lived in another county.<sup>9</sup> But it has also been held that the surety might avail himself of such request when the principal lived in another state, but had property in the state in which the creditor resided, which might have been subjected to the payment of the debt.<sup>10</sup> Where the creditor has failed to sue upon request, it has been held that the burden of proof is on him to show, in a suit against the surety, that the money could not have been collected if suit had been brought against the principal when the request was made.<sup>11</sup> It has been held that where the remedy is governed by statute the surety to avail himself of his rights must comply with the terms of the statute.<sup>12</sup> The surety's plea of discharge by the neglect of the creditor, after due notice to sue, should state facts showing that the surety has been damnified by such failure to sue.<sup>13</sup>

**§ 264. Same continued—Sufficiency of notice.**—A surety cannot, it is held, claim his release from an obligation on a verbal notice to the creditor to proceed against the principal. A notice under such circumstances must, to be available, be in

<sup>8</sup> *Shimer v. Jones*, 47 Pa. St. 268.

<sup>9</sup> *Alcorn v. The Commonwealth*, 66 Pa. St. 172.

<sup>10</sup> *Hancock v. Bryant*, 2 Yerg. (Tenn.) 476.

<sup>11</sup> *Stickler v. Burkholder*, 47 Pa. St. 476.

<sup>12</sup> That the statute must be strictly complied with to release the surety, see *Barnes v. Mowry*, 129 Ind. 568, 28 N. E. Rep. 535. The Alabama code, sec. 3282, gives the surety the power to compel the debtor to institute a suit against the principal "to the first court to which suit can be brought after the receipt" of notice therein provided for. Held, that this is complied with by bringing a suit in which the summons will be returnable to the first court after such notice;

case need not be at issue for that court. *Guttery v. Pickett*, 125 Ala. 434. In *Alabama National Bank v. Hunt*, 125 Ala. 512, the surety on a note wrote to the holder, "you must sue Mr. Hunt as the law requires and sue at once." Held, that this was sufficient notice to bring suit at the next court and failure to bring suit discharged the surety, in accordance with statutory provision. See also note to § 262. That the Alabama statute is not complied with by a notice to "collect," see *Darby v. Berney Nat'l Bank*, 97 Ala. 643, 11 So. Rep. 881. Nor is a verbal notice sufficient there: *Howle v. Edwards*, 113 Ala. 187, 20 So. Rep. 956.

<sup>13</sup> *Darby v. Berney Nat'l Bank*, 97 Ala. 643, 11 So. Rep. 881.



writing.<sup>15</sup> And where the creditor fails to sue after notice to him to sue, the surety must show clearly the nature and terms of the notice before he can be discharged.<sup>16</sup> Judicial notice will be taken of the date of a notice, and, if given on Sunday, it will be held void.<sup>17</sup> In a suit to foreclose a mortgage it appeared that the surety sought to be charged told the plaintiff to collect the mortgage "and not to let it run over the time it is due." Held, the notice was insufficient, and delay in bringing foreclosure did not discharge him.<sup>18</sup> So, a notice by a surety to a note to the holder thereof that he "must make Daniel (the principal) come to time this fall" was held not such a notice as would constitute a defense upon failure of the holder to sue.<sup>19</sup> The following notice, however, to the payee and holder of a note by a surety thereon, "to at once proceed to collect the note you hold, upon which I am surety; I will stand no longer," was held sufficient.<sup>20</sup>

**§ 265. Cases holding that the surety cannot, by request alone, accelerate the movements of the creditor against the principal.**—The great majority of cases on the subject hold, in the absence of any statutory provision, that if after the debt is due the surety request the creditor to sue the principal, who is then solvent, and the creditor fails to do so, and the principal afterwards becomes insolvent, the surety is not thereby discharged. The ground upon which these decisions rest is, that the principal and surety are both equally bound to the creditor, who may have taken a surety in order that he might not have to sue the principal. If the surety desires a suit brought against the principal, he may himself pay the debt, and immediately sue the principal. The contrary doctrine is an innovation, and was unknown to the common law.<sup>21</sup> The

<sup>15</sup> Petty v. Douglass, 76 Mo. 70.

<sup>16</sup> King v. Haynes et al., 35 Ark. 463.

<sup>17</sup> Chrisman v. Tuttle, 59 Ind. 155.

<sup>18</sup> Hunt v. Purdy, 82 N. Y. 486.

<sup>19</sup> Lawson v. Buckley, 49 Hun (N. Y.), 329.

<sup>20</sup> Iliff v. Weymouth, 40 Ohio St. 101.

<sup>21</sup> Jenkins v. Clarkson, 7 Ohio, 72; Carr v. Howard, 8 Blackf. (Ind.) 190; Halstead v. Brown, 17 Ind.

202; Ex'rs of Dennis v. Rider, 2 McLean, 451; Davis v. Huggins, 3 N. H. 231; Pickett v. Land, 2 Bailey, Law (S. C.), 608; Nichols v. McDowell, 14 B. Mon. (Ky.) 5; Frye v. Barker, 4 Pick. 382; Stout v. Ashton, 5 T. B. Mon. (Ky.) 251; Gage v. Mechanics' Nat'l Bank of Chicago, 79 Ill. 62; Dillon v. Holmes, 5 Neb. 484; Huff v. Slife, 25 Neb. 448; Inkster v. First Nat'l Bank of Marshall, 30 Mich. 143;



surety on the bond of a note clerk of a bank was informed by the bank of an embezzlement committed by the clerk, and, before paying any portion of the amount embezzled, requested the bank to cause the arrest of the clerk, which it refused to do. Held, the surety was not, in the absence of any indication of a fraudulent connivance at the escape of the clerk, discharged thereby.<sup>22</sup> Where the holder of two notes made by the same party commenced an action against him, declaring on the common counts for a greater sum than the aggregate of both notes, and attached property sufficient to satisfy both, but did not intend to include in the action one of the notes, which was signed by a surety, and there were subsequent attachments of the same property by other creditors, it was held that the plaintiff was not bound to comply with the request of the surety, to put into the action the note signed by him, even though he offered to indemnify the plaintiff for so doing.<sup>23</sup> Much may be said in favor of both views of this question concerning the right of the surety, by request and without suit, to accelerate the movements of the creditor against the principal. The objection that the rule permitting it is an innovation might, with equal propriety, be urged against most of the causes which are now recognized as entitling the surety to his discharge. These causes are the outgrowth of equitable principles inherent in the relation of principal and surety; and several of the most important of them, which are now nowhere disputed, have been established by decisions of the

Langdon v. Markle, 48 Mo. 357; 42 Wis. 687; Pintard v. Davis, 1 Hartman v. Burlingame, 9 Cal. 557; Spencer (N. J.), 205; affirmed, Pintard v. Davis, 1 Zab. (N. J.) 205; Dane v. Corduan, 24 Calif. 157; Findley v. Hill, 8 Oreg. 247; May v. Bank, 35 Vt. 476; Hogaboom v. Reed, 125 Ind. 199; Wilds v. Attix, Herrick, 4 Vt. 131; Caston v. Dunlap, Rich. Eq. Cas. (S. C.) 77; 4 Del. Ch. 253. And see, generally, that mere delay of creditor to sue Croughton v. Duval, 3 Call (Va.) principal when requested to do so 69; Boutte v. Martin, 16 La by surety will not discharge surety. (Curry), 133; Taylor v. Beck, 13 Trustees v. Southard, 31 Ill. App. Ill. 376. On same subject, see Huey 359; Newton v. Hammond, 38 Ohio v. Pinney, 5 Minn. 310; Benedict St. 430; Quillen v. Quigley, 14 Nev. v. Olson, 37 Minn. 431; Bizzell v. 215; Ingels v. Sutliff, 36 Kan. 444; Smith, 2 Dev. Eq. (N. C.) 27; Miller v. Arnold, 65 Ind. 488. Thompson v. Bowne, 39 N. J. Law <sup>22</sup> Louisiana State Bank v. Le- (10 Vroom), 2; Hogshead v. Wil- doux, 3 La. Ann. 674. liams, 55 Ind. 145; Jerauld v. Trip- <sup>23</sup> Adams Bank v. Anthony, 18 pet, 62 Ind. 122; Harris v. Newell, Pick. 238.

courts during the present century. The rule under consideration was first announced by the supreme court of New York, in the year 1816, and is a doctrine recognized only by some of the American courts, no decisions to a similar effect having been made by the courts of England. Although repudiated by a majority of the courts of the United States, the rule is supported by strong equities, and is in harmony with the general well-recognized rules governing the relation of principal and surety. Recognizing the justice and equity of this rule, the legislatures of many of the United States have, by statute, provided that the surety may, by notice, require the creditor to proceed against the principal.

**§ 266. Surety may make the same defense at law as in equity—Whether he must make his defense at law when sued at law.**—"The subject of equitable relief in behalf of sureties is one of original jurisdiction in a court of chancery. The peculiar rights of a surety originated in, and are exclusively the outgrowth of, equity. Formerly it was held in several instances that the remedy of the surety was only in equity and could not be made available in courts of common law. But it is now held, as a general rule, that the liability of sureties is governed by the same principles at law as in equity. And probably with few exceptions the same considerations which are sufficient in equity to discharge the surety will be available for the same purpose at law."<sup>24</sup> On the ground that the surety can make the same defense at law that he can in equity, it has been held that when sued at law the surety must avail himself of such defenses as he can there make, and if he does not, that he cannot afterwards avail himself of such defenses in equity, unless he was prevented from so doing by fraud, accident or the wrongful act of the other party, without any negligence or other fault on his part.<sup>25</sup> On the other hand

<sup>24</sup> Per Isham, J., in *Viele v. Hoag*, 24 Vt. 46. To same effect, see *Heath v. Derry Bank*, 44 N. H. 174; *Samuell v. Howarth*, 3 Meriv. 272; *Baker v. Briggs*, 8 Pick. 122; *Rogers v. School Trustees*, 46 Ill. 428; *Watriss v. Pierce*, 32 N. H. 560; *State Bank v. Watkins*, 6 Ark. (1 Eng.) 123; *Smith v. Clopton*, 48 Miss. 66; *The People v. Jansen*, 7 Johns, 332; *Shelton v. Hurd*, 7 R. I. 403; *Maxwell v. Connor*, 1 Hill, Eq. (S. C.) 14; *Wayne v. Kirby*, 2 Bailey, Law (S. C.), 551; *Springer v. Toothaker*, 43 Me. 381. Contra, *Ex'r of McCall v. Adm'r of Evans*, 2 Brev. (S. C.) 3.

<sup>25</sup> *Vilas v. Jones*, 1 N. Y. 274; *Schroepel v. Shaw*, 3 N. Y. 446; *Ramsey v. Perley*, 34 Ill. 504; *Ken-*

it has been held that if a surety when sued at law does not there make his defense and judgment is recovered against him, he can afterwards come into equity and have relief. The reason is that the discharge of a surety was a matter of original equity jurisdiction, and the fact that courts of law now entertain jurisdiction of the matter does not oust equity of its original jurisdiction. "Where the jurisdiction of courts of chancery and courts of law is concurrent in consequence of courts of law having enlarged their jurisdiction by their own acts, or of its having been enlarged by act of the legislature without prohibitory words, the party may make his election as to the tribunal in which he will make his defense."<sup>26</sup>

**§ 267. Whether surety, having failed to make defense at law, can have relief in equity.**—It has been held that, where there is no question that the defense of a surety can be made at law, then it must be made there, and the decision of that tribunal is conclusive. "But if it be doubtful whether a court of law can take cognizance of the defense, and there exists no doubt of the jurisdiction of a court of equity, and if in such a case a defendant at law, under the influence of such doubt, omits to make his defense, or if he bring it forward and it be overruled under the idea that it is no defense at law, it is not granting a new trial for a court of equity to afford relief, notwithstanding the trial at law."<sup>27</sup> A surety being sued at law might have made his defense there, but did not, and pending

ner v. Caldwell, Bailey, Eq. Cas. (S. C.) 149; Maxwell v. Connor, 1 Hill, Eq. (S. C.) 14; M'Grew v. Tombeckbee Bank, 5 Port. (Ala.) 547; Herbert v. Hobbs, 3 Stew. (Ala.) 9; Dickerson v. Comm'rs Ripley Co., 6 Ind. 128; Smith v. McLain, 11 W. Va. 654.

<sup>26</sup> Hempstead v. Conway, 6 Ark. (1 Eng.) 317, per Oldham, J.; Wayland v. Tucker, 4 Gratt. (Va.) 267; Harlan v. Wingate, 2 J. J. Marsh. (Ky.) 138; Smith v. Crease's Ex'r, 2 Cranch, C. C. 481. On this subject, see, also, Saily v. Elmore, 2 Paige Ch. 497.

<sup>27</sup> King v. Baldwin, 17 Johns. 384, per Spencer, C. J. To similar effect,

see Rathbone v. Warren, 10 Johns, 587. It has, however, been held that a party who failed to make his defense at law because he was advised and believed that he could not do so, could not afterwards have relief in equity. Dickerson v. Commissioners of Ripley County, 6 Ind. 128. In an action upon a bond conditioned for the performance of a decree, a surety cannot, either in law or equity, avail himself of a defense which his principal might have, but did not, set up in the case in which such decree was rendered. Griswold v. Hazard, 28 Fed. Rep. 597, following Hazard v. Griswold, 21 Fed. Rep. 178.

such suit filed a bill in chancery for discovery, and setting up his defense as surety, and it was held he was entitled to the relief sought by his bill.<sup>28</sup> It has been held that, if a surety is sued at law and makes an unsuccessful defense there, he cannot afterwards set up the same defense in equity.<sup>29</sup> But it has also been held that, if he sets up one defense at law and is unsuccessful in that, he may afterwards set up another defense in equity.<sup>30</sup> Judgment was recovered against principal and surety, and the creditor afterwards gave time to the principal. The creditor afterwards sued the principal and the surety on the judgment, and the surety defended on the ground that the giving of time discharged him, but was unsuccessful in his defense, and judgment was rendered against him. He then filed a bill to restrain the second judgment at law, setting up the same matter of defense that he had urged at law, and it was held that he was entitled to relief. This was put upon the ground that, after the first judgment at law, the relation of principal and surety was so far merged that the surety could not make his defense at law.<sup>31</sup> Much of the confusion of the cases on this subject has arisen from the fact that originally most of the defenses of a surety had to be made in equity, and could not be set up as a defense to a suit at law, and the rule permitting the same defense to be made at law that would avail the surety in equity was adopted by various courts at different times, and is not even now fully recognized by all of them. Where the surety can and does make his defense at law, the great weight of authority is that the decision of the court of law is conclusive on him. The weight of authority also is that if he can make his defense at law, but does not, and judgment is rendered against him, he cannot afterwards have relief against such judgment on any ground which he might have relied on in the suit at law. Where the case is such that a court of law will not entertain his defense, then if he had a good equitable defense he will be relieved from the judgment by a court of chancery. A sheriff received certain claims for collection, and collected them and paid the proceeds over to the person entitled to them, but did not take up his receipt given for the claims. The sheriff died, and

<sup>28</sup> *Viele v. Hoag*, 24 Vt. 46.

<sup>30</sup> *Davis v. Stainbank*, 6 De Gex,

<sup>29</sup> *Cooper v. Evans*, Law Rep. 4 M. & G. 679.  
Eq. Cas. 45.

<sup>31</sup> *Dunham v. Downer*, 31 Vt. 249.

his receipt came into the hands of the successor of the person who gave the claims to him for collection, and he sued the sureties of the sheriff for the amount of the claims, and recovered, and they paid the judgment. Afterwards, learning the facts, they filed a bill to have the money they had paid returned to them, and it was held that they, having been guilty of no laches, and not knowing of their defense when the judgment was rendered, were entitled to relief.<sup>32</sup>

**§ 268. If creditor lead a surety to believe debt is paid and surety is injured, he is discharged.**—If the creditor tells the surety that the debt is paid when in fact it is not, and the surety in consequence thereof releases a security, or omits to secure himself, or is in any manner injured thereby, the surety is discharged.<sup>33</sup> And this is true even though the creditor is honestly mistaken in the statement which he makes.<sup>34</sup> The creditor having caused the injury should suffer by it. The same thing was held where the surety on a sealed note was given by the payee a release not under seal, and induced to believe for several years, and until the principal became insolvent, that he was discharged.<sup>35</sup> So where, after joint judgment against principal and surety, the creditor, by his statements to the surety, led him to believe the debt was paid and he would not be troubled about it, and these statements were made under such circumstances as to justify the surety in believing and acting on them, and he was thereby induced to

<sup>32</sup> Hickman v. Hall, 5 Little (Ky.), 338.

<sup>33</sup> Bank v. Haskell, 51 N. H. 116; High v. Cox, 55 Ga. 662; Waters v. Creagh, 4 Stew. & Port. (Ala.) 410; Thornburgh v. Marden, 33 Iowa, 380. And to same effect, see, also, Rowley v. Jewett, 56 Iowa, 492. If a surety is given to understand that the principal alone will be looked to for payment and is lulled into security to his loss, he will be discharged. West v. Brison, 99 Mo. 684. So fraudulent conduct that lulls the surety into groundless confidence to his loss discharges him: Harmon v. Hule, 1 Wash. Terr. (N. S.) 422.

<sup>34</sup> Baker v. Briggs, 8 Pick. 122; Carpenter v. King, 9 Met. (Mass.) 511. And involving the same principle, see Canadian Bank of Commerce v. Green, 45 Up. Can. (Q. B.) 81. Also: Atkins v. Payne, 190 Pa. St. 5, 42 Atl. Rep. 378, in which case a party was held bound by the showing of fictitious receipts given by him.

<sup>35</sup> Teague v. Russell, 2 Stew. (Ala.) 420. Sureties on a note having been induced to believe for nearly five years that the note had been satisfied, and thereby deprived of seeking indemnity, are released. Brooking v. Farmers' Bank, 83 Ky. 431.

abstain from securing himself, when he might easily have done so, until the principal became insolvent, it was held he was discharged.<sup>36</sup> The surety on a note applied to the holder, and told him that if he had to pay the note he wished to do it soon, as he could then secure himself; to which the holder replied that he would look to the principal for payment and he need give himself no trouble about it. The surety took no steps in the matter, but it did not appear that the principal became insolvent. Held, the surety was discharged.<sup>37</sup> The holder of a promissory note, believing it was paid in a trade he supposed he had made with the principal, so informed the surety, who knew nothing to the contrary for five years. It was not clear whether the circumstances of the principal had become better or worse. Held, the surety was discharged, and that it made no difference what the circumstances of the principal had become. The court said the language of the code was, not only "injures the security," but also "exposes him to greater liability or increases his risk." The surety had a right to notify the creditor, or to pay the debt himself and sue the principal; he might have obtained additional security, etc. All these he was deprived of and lulled to sleep for five years. If the principal remained solvent the creditor was not injured, but the surety was discharged.<sup>38</sup> In an action against the surety on a sewing machine agent's bond it appeared that at the time the surety gave notice to the company to whom the bond was executed not to deliver any more machines to the agent on the credit of the bond; the company's general agent stated to the surety that he need give himself "no uneasiness on account of the bond," saying, "I have never sued a bondsman yet; I shall get it out of Davis (the principal) and

<sup>36</sup> *Roberts v. Miles*, 12 Mich. 297. To similar effect, see *White v. Walker*, 31 Ill. 422.

<sup>37</sup> *Harris v. Brooks*, 21 Pick. 195. Contra, see *Mahurin v. Pearson*, 8 N. H. 539; *Auchampaugh v. Schmidt*, 77 Iowa, 13. See, also, *Michigan State Ins. Co. v. Soule*, 51 Mich. 312, wherein it was held that a creditor's mere statement to his debtor's surety that the debtor's responsibility was suffi-

cient security for the debt, and that he would not be called upon, did not estop the creditor from resorting to the surety if the claim was not renounced and the surety was not misled by the assurance to his disadvantage.

<sup>38</sup> *Whitaker v. Kirby*, 54 Ga. 277. On this subject, see *Hogaboom v. Herrick*, 4 Vt. 131; *Bullard v. Ledbetter*, 59 Ga. 109; *Taylor v. Lohman*, 74 Ind. 418.



you need not trouble yourself further about it." Held, these statements did not estop the company from recovering.<sup>39</sup>

**§ 269. Same continued.**—This subject has become of importance in connection with fidelity bonds of employees. The cashier of the Citizens National Bank of Grand Island, Neb., having taken title in his own name to a large tract of land, one of the sureties on his official bond made inquiries, in behalf of all the sureties, whether the bank claimed any liability upon the bond by reason of the cashier's borrowing money to pay for it, and was assured by the bank's president, vice president, cashier and one of its directors that the cashier's purchase was a deal on behalf of the bank and that there was no violation of the bond. Held, in a suit by the bank's receiver on the cashier's bond, to recover moneys of the bank wrongfully used for the purchase of said land, that the bank was estopped from asserting any liability therefor on the part of the sureties.<sup>40</sup> An employer certified to a surety corporation that it had examined the accounts of the employee and had found them correct, whereupon an existing fidelity bond was renewed. The employer, as a matter of fact, had made no examination. Held, that the surety was not liable for a defalcation existing at the time which was afterwards discovered.<sup>41</sup>

<sup>39</sup> *Howe Machine Co. v. Farrington*, 82 N. Y. 121.

<sup>40</sup> *Mohrenstecher v. Westervelt*, 87 Fed. Rep. 157, 30 C. C. A. 584, 57 U. S. App. 618.

<sup>41</sup> *Monongahela Coal Co. v. Fidelity & Deposit Co. of Md.*, 94 Fed. Rep. 732, 36 C. C. A. 444. Compare *First Nat'l Bank of Nashville v. United States Fidelity & Guaranty Co.*, Sup. Ct., Tenn., July, 1903, 75 S. W. Rep. 1076, cited in note 14 to § 15, *supra*, in which case the renewal of a fidelity bond of a bank's bookkeeper was procured upon a like certificate stating that his books and accounts "were examined by us and we found them correct in every respect." An examination a year before had disclosed an apparent shortage of \$421, and there was an actual shortage of

over \$7,000 when the renewal was made. The surety was held bound. See also: *Missouri, K. & T. Trust Co. v. German Nat'l Bank*, 77 Fed. Rep. 117; *Supreme Council Catholic Knights of America v. Fidelity & Casualty Co.*, 63 Fed. Rep. 59; *Guaranty Co. of North America v. Mechanics' Savings Bank & Trust Co.*, 183 U. S. 402; *American Surety Co. v. Pauly*, 170 U. S. 133; *Guaranty Co. v. Muir*, 115 Fed. Rep. 264; *Guaranty Co. v. First Nat'l Bank, Va.*, 28 S. E. Rep. 913; *Graves v. Lebanon Nat'l Bank*, 10 Bush (Ky.) 23, 29; *Fidelity & Deposit Co. of Md. v. Commonwealth*, 20 Ky. Law Rep'r 788, 47 S. W. Rep. 579; *Franklin Bank v. Cooper*, 36 Me. 179, 197; *Domestic Sewing Machine Co. v. Jackson*, 15 Lea (Tenn.) 418.



**§ 270. When surety not discharged although he believe debt is paid.**—If a note be delivered up to be canceled by mistake, and the payee before its maturity notify the makers of the mistake, and that he still looks to them for payment, it has been held that he may recover upon the note as well against the surety as against the principal, provided the surety has not, prior to such notice, relying upon the surrender of the note, relinquished securities held by him for his indemnity, or been in some manner damnified.<sup>42</sup> Where a creditor told a surety that he considered the principal possessed of property sufficient to discharge the liability, that he had given or would give him time, that the principal would pay the debt, and that he did not want the surety any longer, it was held the surety was not discharged, there being no evidence that he relied on such representations or was injured thereby.<sup>43</sup> The same thing was held where the surety said to the creditor that he must make the debt out of the principal, and the creditor replied that he need put himself to no further trouble about the debt, as he had made a present of it to the principal, there being no evidence that the surety was injured thereby.<sup>44</sup> The holder of a note commenced suit on it, and levied an attachment on the property of the principal. The surety was informed thereof, and in consequence neglected to secure himself. Afterwards the creditor dismissed the attachment suit and sued the surety. Held, the surety was not discharged, as the creditor made no agreement with, nor representation to, him that he would rely solely on the attachment or prosecute the suit.<sup>45</sup> Where the creditor knew that the surety was negotiating a loan for the principal, for the purpose of paying off therewith the debt for which the surety was liable, and the creditor promised the principal without consideration to give him further

<sup>42</sup> *Blodgett v. Bickford*, 30 Vt. 731.

<sup>43</sup> *Brubaker v. Okeson*, 36 Pa. St. 519. See, also, *Michigan State Ins. Co. v. Soule*, 51 Mich. 312.

<sup>44</sup> *Driskell v. Mateer*, 31 Mo. 325. See, also, *Michigan State Ins. Co. v. Soule*, 51 Mich. 312.

<sup>45</sup> *Barney v. Clark*, 46 N. H. 514. And where a judgment creditor, in a judgment against principal and

surety, levied upon real estate of the principal and surety, subject to a prior attachment, and on account thereof and defects in the levy the creditor made nothing, held, on scire facias to revive the execution, that the proceedings under the prior execution did not discharge the surety. *Somersworth Savings Bank v. Worcester*, 76 Me. 327.

time, and the surety in consequence desisted from his attempt to raise the money, and the principal failed to pay the debt, it was held the surety was not discharged.<sup>46</sup> A having sent an order to B for certain goods, C agreed to guaranty payment to B upon an undertaking of D to indemnify C. B accordingly informed C that the goods were preparing, and afterwards shipped them to A without notifying C that they were shipped. Afterwards D desired to recall his indemnity, upon which C wrote to B to know whether he had executed the order, to which no answer was given by B for a considerable time, he having gone abroad in the interim. Upon this, C, supposing from the silence of B that the order was not executed, gave up his indemnity to D. Held, C was not discharged from his guaranty.<sup>47</sup>

**§ 271. Rights of surety against third persons—Indemnity of surety.**—The principal may, before the debt has been paid by the surety, confess a judgment in favor of the surety for his indemnity, and the lien of such judgment will be valid as against the creditors of the principal.<sup>48</sup> So a conveyance made by the principal to the surety, in consideration of an agreement by the surety to pay the debt, is valid as against the creditors of the principal.<sup>49</sup> The surety to whom a chattel has been mortgaged by the principal for his indemnity may, before paying the debt, maintain trover against creditors of the principal who have taken and converted the chattel.<sup>50</sup> And in such case one of three sureties has a right to recover damages, if the property is of sufficient value, to the full extent of

<sup>46</sup> *Tucker v. Laing*, 2 Kay & Johns. 745.

<sup>47</sup> *Oxley v. Young*, 2 H. Black. 613.

<sup>48</sup> *Miller v. Howry*, 3 Pen. & Watts (Pa.), 374; *Pringle v. Sizer*, 2 Rich. N. S. (S. C.) 59; *Tennell v. Jefferson*, 5 Harr. (Del.) 206. But a judgment by confession under such circumstances is invalid where the surety has simply signed his note for the amount of the debt and agreed to pay it, but had not paid it at the time of the entry of the confessed judgment. *Adams v. Tator*, 57 Hun, 302.

<sup>49</sup> *M'Whorter v. Wright*, 5 Ga. 555. And to similar effect, see *Kendall v. Baltis*, 26 Mo. App. 411, wherein it was held that such conveyance was good, even though the principal may have intended to hinder and delay creditors, provided the surety did not participate in his principal's intent. In such case the surety is not entitled to notice of non-payment because by his own act he has substituted himself in his principal's place. *Wright v. Andrews*, 70 Me. 86.

<sup>50</sup> *Bellume v. Wallace*, 2 Rich. Law (S. C.), 80.

the debt for which he is liable, notwithstanding the fact that the consideration mentioned in the mortgage is only one-third of the debt.<sup>51</sup> Where property is mortgaged by the principal to a creditor to secure his debt, and the mortgage is also conditioned that such creditor shall indemnify a surety for any money which he may be obliged to pay to another creditor of the principal to whom such surety is liable, such condition will be enforced.<sup>52</sup> Where a surety has become bound, but has a right to withdraw from his obligation, an agreement for his indemnity, afterwards given by a third person in consideration of his remaining bound, is a valid contract, and the consideration is sufficient.<sup>53</sup> But where, after a surety had become bound, a third person, in consideration that he would remain bound an indefinite time, agreed in writing to indemnify him from loss, it was held that the agreement for indemnity was void for want of consideration, as the surety had assumed no liability beyond that which existed when the agreement for indemnity was made.<sup>54</sup> A surety who holds the written agreement of a third person conditioned for his indemnity does not waive such agreement by afterwards taking security for his indemnity from the principal.<sup>55</sup> The principals in a note agreed with their surety that, if he would sign it, they would keep him indemnified by the use and application of a particular fund, as the surety might desire, or that they would secure him in any other way he might suggest. Held, this did not give the surety a lien on the particular fund, and it could not afterwards be assigned to him when the principal was in failing circumstances, so as to cut off other creditors. The surety having an option to take the particular fund or some other security, no lien was created.<sup>56</sup>

**§ 272. Surety entitled to benefit of collaterals after creditor has been paid—Creditor not bound to notify surety, when.—** Where bank bills have been received from the principal by the creditor as a collateral security for the debt, it lies on the cred-

<sup>51</sup> *Barker v. Buel*, 5 Cush. 519.

<sup>52</sup> *Rodes v. Crocket*, 2 Yerg. (Tenn.) 346.

<sup>53</sup> *Carroll v. Nixon*, 4 Watts & Serg. (Pa.) 517; *Carman v. Noble*, 9 Pa. St. 366.

<sup>54</sup> *Rix v. Adams*, 9 Vt. 233.

<sup>55</sup> *Drury v. Fay*, 14 Pick. 326.

Generally, on the subject of indemnity, see *Seaver v. Young*, 16 Vt. 658.

<sup>56</sup> *Elliott v. Harris*, 9 Bush (Ky.), 237.

itor, in a suit against a surety for the same debt, to show what has been done with them.<sup>1</sup> A creditor who holds railroad bonds as collateral security does not lose his right to hold the bonds by suing the principal and imprisoning him upon getting judgment. Nor does he waive his lien on such bonds if he promise, without consideration, to give them up.<sup>2</sup> Where the note of a stranger is received by a creditor from his debtor as collateral security for a debt, the creditor is not bound to notify the debtor of a proposition of the maker of the note to discharge it in property, though by a failure of the creditor to receive such property the amount of the note is ultimately lost.<sup>3</sup> Where a submission to arbitration is made by a written agreement, a surety in the agreement need not be notified of the sitting of the arbitrators. "The reasons for such notice are no stronger than they would be for notice to bail of the progress of the cause against the principal."<sup>4</sup> The payee of a note is not bound to notify one of several makers of a note who is a surety of non-payment by the principal, and an agreement with the principal not to notify the surety will not be such a fraudulent concealment as will discharge him. "If the plaintiff's not giving notice could not be fraudulent, could his agreement not to do it be so? Could his agreement not to do what he was under no moral or legal obligation to do be a fraudulent concealment? \* \* An agreement not to inform and an agreement to conceal are two very different things."<sup>5</sup> The surety has no right to any of the collateral until the creditor has been fully paid.<sup>6</sup> Nor is the surety entitled to credit for any money

<sup>1</sup> Spalding v. Bank, 9 Pa. St. 28.

<sup>2</sup> Smith v. Strout, 63 Me. 205. The surety has a right to insist that a collateral security shall be so applied as to relieve him. Kirkman v Bank of America, 2 Cold. (Tenn.) 397.

<sup>3</sup> Rives v. McLosk, 5 Stew. & Port. (Ala.) 330.

<sup>4</sup> Farmer v. Stewart, 2 N. H. 97, per Woodbury, J.

<sup>5</sup> Grover v. Hoppock, 2 Dutcher (N. J.), 191, per Vredenburgh, J.

<sup>6</sup> In Kortlander v. Elston, 52 Fed. Rep. 180, 2 C. C. A. 657, 6 U. S. App. 283, Elston sold a hotel for

\$12,000, payable in installments of \$200 and \$300 per month, and Kortlander guaranteed payment of the first \$3,000 of the purchase price, and the purchaser insured the buildings for the benefit of Elston. Three months later the buildings were destroyed by fire. Held, that Elston was entitled to apply the whole of the insurance money on that portion of the price the payment of which was not guaranteed by Kortlander. "The equity which a surety or a guarantor has in the collateral," said the court, by Mr. Justice Taft, "is merely the right, accruing only

recovered from a defaulting principal until after the claim of the creditor against the principal has been satisfied.<sup>7</sup> The surety may maintain his suit upon a collateral note when it becomes due, whether the debt of the principal has become due or not and whether it has been paid or not, but he cannot appropriate the proceeds of the note to himself until the creditor has been paid.<sup>8</sup>

**§ 273. Surety not discharged because creditor tells him his signing is a mere matter of form—Other cases.**—Where the creditor has no security for his debt but the joint and several bond of sureties with their principal, he has a right to call upon any one of the sureties to pay it, and a court will not delay enforcing his claims until the several remedies against the other sureties may be exhausted.<sup>9</sup> Where the surety on a note given for property purchased at administrator's sale, when requested by the principal to sign it, was told by the payee that his signature was only wanted as a form to comply with the requirements of the ordinary, it was held that no fraud was thereby practiced on the surety which avoided the note as to him. The court said it was so common to say to a surety, when getting him to sign, that it was a mere matter of form, that it deceives no one.<sup>10</sup> Where the payee of a note merely advises the principal to carry his property to a better market out of the state, and sell it and pay his debts, and if unable to pay all to pay pro rata, it is not a fraud upon, and will not operate as a release of, the sureties on the note.<sup>11</sup> The

after the principal debt is fully paid, to be subrogated to the right of the creditor in respect of the collateral security. \* \* Kortlander, therefore, could have no right to the insurance money for the buildings, until Elston had been paid all the purchase price which the buildings and insurance on them were intended to secure."

<sup>7</sup> Upon this principle it was held in *Alexander v. United States*, 57 Fed. Rep. 828, 6 C. C. A. 602, 15 U. S. App. 158, that where the sureties of a defaulting postmaster recovered moneys from him and paid them to the United States, such moneys

should be applied not to the liability of the sureties to the government, but to the general account of the postmaster, and when the unpaid balance due from the postmaster exceeded the penalty of the bond, it was held that a verdict was properly directed for the government.

<sup>8</sup> *Klein v. Funk*, 82 Minn. 3, 84 N. W. Rep. 460.

<sup>9</sup> *Lowndes v. Pinckney*, 2 Strob. Eq. (S. C.) 44. Note 4, § 277.

<sup>10</sup> *Singley v. Head*, 2 Rich. Law (S. C.), 590. But see *Molson's Bank v. Turley*, 8 Ont. (Can.) 293

<sup>11</sup> *Hawkins v. Ridenhour*, 13 Mo. 125.

deed or bond of a surety under seal for the simple contract debt of a principal, in which the principal does not join, does not, by operation of law, extinguish the simple contract debt of the principal.<sup>12</sup>

**§ 274. Surety may defend suit against principal—How liability of surety affected by fraud—Other cases.**—A surety has a right for his own protection to defend an action against his principal.<sup>13</sup> The holder of a mortgage assigned it with a guaranty that there was a certain amount due on it. The assignee in his own name sued the maker, and recovered a less amount than that guarantied to be due, and the guarantor made and desired to argue a motion for new trial, and told the assignee that, unless he was allowed to argue the motion, he should consider himself discharged. The assignee stated that he did not want a new trial in the case, and refused to allow the guarantor to argue the motion, and judgment was thereupon entered for the smaller sum. It did not appear whether there was sufficient ground for a new trial, but the court said the guarantor had a right to argue the motion, and it was a valuable right of which the assignee would not be permitted to deprive him, and it was held that he was discharged.<sup>14</sup> A bond with surety was conditioned that a lessee

<sup>12</sup> *White v. Cuyler*, 6 Durn. & East, 176. Where a note is under seal and a guaranty by indorsement thereon is not under seal, the guarantor is a simple contract debtor and, in Georgia, must be sued within six years: *Ridley v. Hightower*, 112 Ga. 476, 37 S. E. Rep. 733.

<sup>13</sup> *Jewett v. Crane*, 35 Barb. (N. Y.) 208. And on the same principle it was held that where a person brought replevin, gave bond and received the property, and before trial became insolvent and did not appear, and judgment went against him, the surety on the replevin bond, in order to protect himself, should have been allowed to prosecute the action brought by his principal after the latter had abandoned it. *Hoffman v. Steinau*, 34 Hun (N. Y.), 239. In such cases the pleadings are suf-

ficient without amendment. *Pool v. Ellison*, 56 Hun (N. Y.), 108. See next note.

<sup>14</sup> *Stark v. Fuller*, 42 Pa. St. 320. In this case it does not appear that the guarantor was vouched in to defend the suit against his principal. The court found no case precisely in point but cited as decisive against the plaintiff in principle: *Cope v. Smith*, 8 S. & R. (Pa.) 110; *Geddis v. Hawk*, 10 S. & R. (Pa.) 33; *Gardner v. Ferrel*, 15 S. & R. (Pa.) 28; *Erie Bank v. Gibson*, 1 Watts (Pa.) 143; *Johnston v. Thompson*, 4 Watts (Pa.) 446; *Miller v. Stern*, 2 Barr (Pa.) 286; *Greenawalt v. Kreider*, 3 Barr (Pa.) 264; *Wetzell v. Spangler's Exrs.*, 6 Harris (Pa.) 460; *Thomas v. Mann*, 4 Casey (Pa.) 520; *Hoffman v. Hurlburt*, 13



would complete certain improvements on premises therein described within four years. Before the expiration of that time the lessor lawfully ejected the lessee from the premises. Held, the surety was not bound for the completion of the improvements, as the lessor had, although lawfully, prevented them

Wend. (N. Y.) 337; Row v. Pulner, 1 Cowan (N. Y.) 246; Haga-boom v. Herrick, 4 Vt. 131; Fullam v. Valentine, 11 Pick. (Mass.) 156; Richards v. Commonwealth, 4 Wright (Pa.) 149, and Schuylkill Bank v. Macalester, 6 W. & S. (Pa.) 149, in which case the court refused to allow the obligee to discontinue its suit in the defense of which the sureties had joined. It was conceded that a discontinuance would release the sureties both at law and in equity, but there was a fund in court to indemnify the sureties against loss and the obligee was required to prosecute its suit to final judgment so that the fund might be distributed. Stark v. Fuller, 42 Pa. St. 320, supra, was cited and followed by Adams, J., in American Surety Co. v. Ballman (C. C., Mo.), 104 Fed. Rep. 634, where an indemnitee vouched in his indemnitor to defend a suit, the indemnitor appeared and defended it upon an understanding that the indemnitee would appeal if the judgment should be adverse to it, the indemnitee refused to appeal and paid the judgment. Held, that the indemnitor was not only not bound by that judgment, but also was released from all liability to the indemnitee. The indemnitee by putting the indemnitor to the expense of defending the suit and then depriving it of opportunity for making a full defence had estopped itself from holding the indemnitor liable upon its contract. Affirmed in 115 Fed. Rep. 292, 53 C. C. A. 152; see also note 38 to

§ 5, supra. Citations: Washington Gaslight Co. v. District of Columbia, 161 U. S. 316, 16 Sup. Ct. Rep. 569, 40 L. Ed. 719; City of Boston v. Worthington, 10 Gray (Mass.) 496; Oceanic Steam Navigation Co. v. Campania Transatlantica Espanola, 144 N. Y. 666, 39 N. E. Rep. 360; Eaton v. Seymour, 26 Wis. 61; Strong v. Phoenix Insurance Co., 62 Mo. 289 at 295; Garrison v. Babbage Transportation Co., 94 Mo. 130 at 137, 6 S. W. Rep. 701; City of St. Joseph v. Union Ry. Co., 116 Mo. 636 at 643, 22 S. W. Rep. 794; Kansas City Etc. R. Co. v. Southern Ry. News Co., 151 Mo. 373 at 390, 52 S. W. Rep. 205, in which case the indemnitee, after the indemnitor had refused to defend the suit against the indemnitee, settled it without the indemnitor's consent, and it was held that the indemnitor was not released, but was not bound by that judgment; Ladd v. Kuhn, 154 Ind. 313, 56 N. E. Rep. 671, holding that defendant in a partition suit could not himself dismiss his appeal after he had vouched in his warrantor to defend the title and the warrantor had engaged in its defence. Compare Boyle v. Edwards, 114 Mass. 373, in which case the indemnitee after the indemnitor had refused to defend a personal injury suit against indemnitee, settled it for \$5,000, and it was held that the indemnitor was not released but might show that the settlement was too large. A discontinuance in proceedings under an assignment for



from being completed.<sup>15</sup> Although the release of the principal in a bond may have been obtained by a fraud practiced by him upon the obligee, yet if the surety was not a party to the fraud, and the obligee suffers several years to elapse without bringing suit or notifying the surety of the fraud, during which time the principal becomes insolvent, these circumstances will discharge the surety.<sup>16</sup> After a surety had in fact been discharged by time given the principal, the attorney of the principal represented to the surety that he was not discharged, and the surety, relying thereon, deposited certain title deeds as security for the debt, and afterwards, in order to regain possession of such deeds, gave certain notes. Held, the surety was not liable on such notes. The court said that money paid by mistake might be recovered back, and on the same principal the surety had a defense to the notes.<sup>17</sup> Where F was induced through fraudulent representations of the vendor to purchase a patent-right, and W was also induced thereby to deposit with the vendor a government bond as security, that F would pay the purchase price, and the patent was worthless, and F repudiated the sale, it was held that W might recover the amount of the bond in an action against the vendor, and that his remedy was not alone against F, his principal.<sup>18</sup> Joint judgment having been recovered against principal and surety, the surety pointed out property which he said belonged to the principal and told the sheriff to levy on it, which he did, and it was sold to the creditor for the amount of the debt. Two years afterwards the surety released a mortgage which he held for his indemnity. The principal had in fact no title to the property sold, and became insolvent. Held, the surety was not discharged. He had not been misled and injured by the creditor, but on the contrary had misled and injured the creditor.<sup>19</sup>

the benefit of creditors, that was vacated at the same term it was entered, was held not to affect the liability of the surety on the assignee's bond. It was the same as if no discontinuance had been made. *Mellon v. People*, 59 Ill. App. 467, Gary, J. Compare *People v. Hathaway*, 102 Ill. App. 628. Note 65, § 124.

<sup>15</sup> *Trustees of Section Sixteen v. Miller*, 3 Ohio, 261.

<sup>16</sup> *Gordon v. McCarty*, 3 Wharton (Pa.), 407; *McCarty v. Gordon*, 4 Wharton (Pa.), 321.

<sup>17</sup> *Bristow v. Brown*, 18 Irish Com. Law Rep. 201.

<sup>18</sup> *Wile v. Wright*, 32 Iowa, 451.

<sup>19</sup> *Chambers v. Cochran*, 18 Iowa, 159; *Page v. Krekey*, 137 N. Y. 307, 33 N. E. 311, 21 L. R. A. 409, with

§ 275. When surety cannot recover money paid by him to creditor—Party who is indebted may become surety, and secure suretyship debt to exclusion of other creditors—Other cases.—If a surety, with full knowledge of facts which will discharge him, pays the debt, he cannot recover the amount so paid from the creditor. He had a right to waive his defense, and by paying does so.<sup>20</sup> A surety who pays a judgment rendered by a court below against the principal, which is afterwards reversed on error at the suit of the principal, cannot recover the amount so paid from the creditor. The payment, although in fact made by the surety, is in law a payment by the principal.<sup>21</sup> A surety who has paid the debt of the principal cannot recover indemnity from a party who has agreed with the principal to pay the debt, there being no privity between the surety and such party.<sup>22</sup> Money was loaned to a corporation on its bond and mortgage, and the stockholders became individually liable as sureties for the repayment of the loan. Held, that other creditors of the corporation had no equity to compel the lender to exhaust his remedy against the sureties before resorting to the corporation for payment.<sup>23</sup> In consideration of an extension of time given to one firm, another firm executed a mortgage on its property to secure the debt. At that time the firm which executed the mortgage had creditors who afterwards filed a bill to set aside the mortgage as fraudulent against them. Held, they were not entitled to relief. The court said the mortgage was not voluntary, but was founded on a good consideration, viz.: the extension of time to the principal debtor. A person or firm that is indebted may become surety for another, the same as if such person or firm was not indebted, and such suretyship debt will be as valid as any other debt, and may be secured by the surety the same as any other debt.<sup>24</sup>

note by Henry P. Farnham. In this case it was held no defense that the signature of the surety had been procured by the fraud of the principal, of which the obligee had no notice.

<sup>20</sup> Geary v. Gore Bank, 5 Grant's Ch. 536. Nor from his principal, note 52 to § 63. Nor from his co-surety, note 36 to § 293.

<sup>21</sup> Garr v. Martin, 20 N. Y. 306. Hatch v. Hamlin, 12 Daly (N. Y. Com. Pl.), 272.

<sup>22</sup> Hoffman v. Schwaebe, 33 Barb. (N. Y.) 194.

<sup>23</sup> South Carolina Mfg. Co. v. Bank, 6 Rich. Eq. (S. C.) 227.

<sup>24</sup> Allen v. Morgan, 5 Humph. (Tenn.) 624. To contrary effect, when the firm became surety for one

§ 276. Surety may enforce trust made for his benefit without his knowledge—Other cases.—Where a conveyance of land is made by absolute deed, and the grantee gives back to the grantor a written contract, promising to sell the land at a certain time, and to pay two notes with the proceeds, and to pay the balance to the grantor, such grantee holds the land in trust, and it is his duty to sell the same at the time specified and apply the proceeds as provided by the contract; and if a third person be a surety on one of the notes, although he might not have known of the trust when it was undertaken, yet, after he is informed of it and can enforce its execution, the original parties to it cannot annul it, and he can enforce it in equity.<sup>25</sup> Real property was mortgaged by a debtor to his surety to indemnify him against his indorsements, and also to secure \$3,000 due from the principal to the surety. Held, the creditors might, by suit in chancery, reach the property thus mortgaged, but the surety, as to the \$3,000, should share with the creditors pro rata.<sup>26</sup> Where the principal assigns a fund to trustees to pay a creditor whom the surety afterwards pays, and the proceeds of the fund are then paid over in money by the trustees to the administrator of the principal, the surety is entitled to the benefit of the fund, and may recover it from the administrator in an action in his own name for money had and received.<sup>27</sup> Where lands are conveyed to a trustee by the principal, to be sold for the benefit of his sureties, the sureties may bid and purchase at the trustees' sale the same as a stranger.<sup>28</sup> The creditors of a party resolved to accept a composition, payable in three instalments, there being a surety for the payment of the third instalment. Before the resolution accepting the composition was passed the debtor had agreed with the surety to indemnify him by depositing goods with him, and this agreement was not made known to the creditors. After the resolutions were registered the surety accepted bills of exchange for the amount of the third instalment of the composition, and certain goods were deposited with him by the principal. The principal paid the first instalment, but

of its members, see *Kidder v. Page*,  
48 N. H. 380.

<sup>25</sup> *Pratt v. Thornton*, 28 Me. 355.

<sup>26</sup> *New London Bank v. Lee*, 11  
Conn. 112.

<sup>27</sup> *Miller v. Ord*, 2 Binney (Pa.),  
382.

<sup>28</sup> *Landis v. Curd*, 63 Mo. 104.

failed to pay the second, and thereupon filed a liquidation petition. Afterwards the surety paid the third instalment. Held, the agreement with the surety for indemnity was valid, and he was entitled to retain the goods as against the trustee, under the liquidation. The creditors had no specific lien on the property, and after the composition was accepted the principal might do as he pleased with it.<sup>29</sup> A became surety for B, who agreed orally to give A a mortgage on a house and lot for indemnity, and to insure the house for his benefit, which he did, the policy of insurance being payable to A. Afterwards B sold the house and lot to C, who took it with a knowledge of the foregoing facts. C canceled the policy of insurance on the house and took out a new one, payable to himself. The house was burned, and it was held that A was entitled in equity to have the insurance money applied in exoneration of his liability for B.<sup>30</sup> It has been held that the principal, or, if he be dead, his personal representative, is a necessary party to a suit in chancery against the surety on a lost note.<sup>31</sup> It has also been held that the cashier of a bank has no authority, by virtue of his office, to release a surety upon a negotiable instrument held by the bank, unless he is specially empowered so to do.<sup>32</sup>

**§ 277. When surety for a portion of a debt entitled to share in dividend of estate of insolvent principal—Other cases.**—If a party gives a guaranty in which his liability is limited to a specified sum, to secure to that extent any floating balance which may become due the creditor from the principal, and the principal becomes insolvent, owing the creditor more than the amount limited in the guaranty, such guarantor is entitled to share in the dividend out of the estate of the principal, where there is not enough of such estate to pay the balance,

<sup>29</sup> *Ex parte Burrell*, In re Robinson, Law Rep. 1 Ch. Div. 537.

<sup>30</sup> *Miller v. Aldrich*, 31 Mich. 408.

<sup>31</sup> *Greathouse v. Hord*, 1 Dana (Ky.), 105.

<sup>32</sup> *Daviess Co. Sav. Ass'n v. Sailor*, 63 Mo. 24; *Merchants' Bank v. Rudolf*, 5 Neb. 527. These two cases do not agree as to whether the surety is discharged by representations made by the cashier to the

surety that the debt is paid. An attorney at law, in virtue of his employment to make collections, has no authority to release a surety on a promissory note without payment; such authority must be proved. *Stoll v. Sheldon*, 13 Neb. 207. As to the power of an attorney at law, by virtue of his office, to do acts which will discharge a surety, see *Givens v. Briscoe*, 3 J. J. Marsh. (Ky.) 529.

above the amount of the guaranty due the creditor.<sup>33</sup> But if the intention is to guaranty the whole debt to the extent of the amount mentioned in the guaranty, then the guarantor is not entitled to a share in such dividend. Upon this subject the court said it was a mere question of construction of the guaranty, and proceeded: "The class of cases referred to do not lay down any general doctrine that where there is a surety with a limit on the amount of his liability for the whole debt exceeding that limit, he is entitled to the benefit of a ratable proportion of the dividends paid on the whole debt, but only where the surety has given a continuing guaranty, limited in amount, to secure the floating balance which may from time to time be due from the principal to the creditor, the guaranty is, as between the surety and the creditor, to be construed both at law and in equity as applicable to a part only of the debt, co-extensive with the amount of his guaranty; and this upon the ground at first confined to equity, but afterwards extended to law, that it is inequitable in the creditor, who is at liberty to increase the balance, or not to increase it, at the expense of the surety."<sup>34</sup> It has been held that, upon the insolvency of the principal, a surety is considered in equity as a creditor, and may retain against an assignee for value, and without notice, any funds of the principal which he has in his hands.<sup>35</sup> But where an attachment act provided that if the debtor was "truly indebted" to the person in whose hands the property was at the time of the service of the attachment writ, such person might retain it to pay his debt, and an attachment was levied on property of the principal, in the hands of a surety, which had not been pledged to the surety, for his indemnity, and the surety had not then paid the debt, it was held the surety could not retain the property.<sup>36</sup> Where a surety guaranties a limited part of a debt and not an unpaid balance thereof, with a limitation as to the amount of the liability in case of insolvency, whatever is paid as a dividend arising from that part of the debt must, it is held, be applied to discharge that portion; but when the

<sup>33</sup> *Hobson v. Bass*, Law Rep. 6 C.) 31. To similar effect, see *Scott v. Timberlake*, 83 N. C. 382. See Ch. App. Cas. 792.

<sup>34</sup> *Ellis v. Emmanuel*, Law Rep. note 5, § 277.

<sup>1</sup> Exch. Div. 157, per Blackburn, J. <sup>36</sup> *Yongue v. Linton*, 6 Rich. Law

<sup>35</sup> *Battle v. Hart*, 2 Dev. Eq. (N. (S. C.), 275.

guaranty contemplates the protection of the creditor against any ultimate balance that may arise upon the dealings between the debtor and creditor, this rule does not apply.<sup>37</sup>

**§ 278. Surety may compel specific performance by principal—Cannot enjoin creditors until indemnity realized—Has no lien against principal's property—May enforce reimbursement from principal's mortgagee—May release indemnity.**—At the instance of the surety a court of chancery will, when other remedies are inadequate, decree specific performance by the principal of his contract. In an Illinois case, Street, Chatfield & Co., upon leasing certain dock property, agreed with the lessor to buy a lot of planking from an outgoing tenant, which the landlord was already under obligation to buy, at a price to be fixed by arbitration, but when the arbitrators fixed the price \$500 higher than had been offered before to them, they refused to take it. It was held that the effect of the agreement was to make the landlord a surety, and Street, Chatfield & Co., principals for the performance of the agreement with the outgoing tenant and that the landlord as surety was entitled to maintain a bill to compel Street, Chatfield & Co. to pay the value of the planking at the appraised valuation.<sup>38</sup> It has already been pointed out that in the absence of statute or agreement to that effect the creditor has no lien upon the property of the surety for the performance of his contract of suretyship.<sup>39</sup> It is likewise true that the surety, in the absence of an agreement to that effect, has no lien upon the property of the principal to secure any of his rights under the contract of suretyship. The principal may therefore make a valid assignment of the fruits of his contract, and, in the absence of fraud or other circumstances that call for the interposition of a court of equity, the surety cannot interfere.<sup>40</sup> The surety, being directly liable to the creditor

<sup>37</sup> *Dumont v. Fry* (Cir. Ct. S. D. N. Y.), 14 Fed. Rep. 293.

<sup>38</sup> *Street v. Chicago Wharfing Co.*, 157 Ill. 605, 41 N. E. Rep. 1108. Affirming *Chicago Wharfing Co. v. Street*, 54 Ill. App. 569.

<sup>39</sup> Note 12, § 1, *supra*, citing *Guilmartin v. Middle Georgia and Atlantic Railroad Co.*, 101 Ga. 565, 29 S. E. Rep. 189.

<sup>40</sup> *U. S. Fidelity & Guaranty Co. v. Omaha Building & Construction Co.*, 116 Fed. Rep. 145, 53 C. C. A. 465, in which case a building contractor assigned to a bank the contract price. Held, that the liability of his sureties was not affected thereby, since such assignment was not forbidden by the statute, the contract or the provisions of the bond.



upon the principal's default, cannot restrain action by the creditor against it until the surety has had time to realize on an indemnity bond. Its duty is to pay first and proceed against its indemnitors afterwards.<sup>41</sup> It has been held that an insolvent principal may make a valid transfer of part of his property by way of security to a surety on his note which is not yet due.<sup>42</sup> When the surety of a railroad has been compelled to make good its default, and has thereby preserved its property, or contributed to increase the value of its property, or to keep it in operation, his right to reimbursement in the event of foreclosure is superior to the lien of a pre-existing mortgage.<sup>43</sup> The same is true of the surety on a bottomry bond; the reason-

<sup>41</sup> *American Surety Co. v. Lawrenceville Cement Co.* (C. C. Me.), 96 Fed. Rep. 25, at 30; note to § 273, supra.

<sup>42</sup> *Baer v. Rooks*, 50 Fed. Rep. 898, 2 C. C. A. 76, 4 U. S. App. 399, holding also that such transfer cannot be void as to the surety unless the surety participates in the fraud. See note to § 278.

<sup>43</sup> In *Rome & Decatur R. R. Co. v. Sibert*, 97 Ala. 393, 12 So. Rep. 69, Sibert, as surety on an appeal bond, was compelled to pay judgments against appellant railroad in proceedings for condemnation of its right of way because at the time of the affirmance of the judgments, the railroad was in the hands of a receiver apparently appointed under a bill to foreclose. The mortgage included all property to be acquired by the company after its execution and therefore included that portion of the right of way which the surety had paid for. Held, that the receiver must repay the money paid out by the surety. The court said: "The payment was an indispensable condition to the vesting and perfection of the title. The payment was made by the sureties of the railroad, and if they had not made the payment, the receiver would have

been required to pay, and would have paid the assessed damages, out of the money in his hands, proceeds of the sale under the chancellor's decree. \* \* Claiming and realizing the benefit of the payments so made by them, he must be held to have adopted them cum onere. In other words, claiming and enjoying the benefit, the enhanced value of the mortgaged property secured and secured only by the payment, he must lift the burden from the shoulders of the sureties who paid the money." *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. Ed. 825, 8 Sup. Ct. Rep. 1004, is an application of the same principle for the benefit of a surety on an injunction bond through whose suretyship the collection of a judgment was postponed and thereby the property of a weak railroad was saved for its bondholders. But in *New York Security & Trust Co. v. Louisville, Evansville & St. Louis Consolidated R. R. Co.* (C. C. Ind.), 79 Fed. Rep. 386, it was held that the president of defendant railway who, as its surety, had signed its supersedeas bond and against whom judgment had been obtained in a suit upon such bond for over \$11,000, was not entitled



ing upon which decisions to this effect rest is stated in a note.<sup>44</sup> It has been held that the surety may release property that has been pledged for his indemnity and so place it beyond the reach of the creditor, and that, without a showing of fraudu-

to have that judgment paid by a receiver appointed in a proceeding to foreclose. It appeared that the surety had not paid the judgment, was insolvent and was largely indebted to defendant railway.

<sup>44</sup> "It is undoubtedly true that at common law the first lien acquired by contract or by operation of law has precedence," said Mr. Justice Caldwell in *Farmers' Loan & Trust Co. v. Kansas City, Wyandotte & North Western R. R. Co.*, 53 Fed. Rep. 182, at 190, "but that rule never had any application in the maritime law, and equity has largely modified it in its application to suits to foreclose railroad mortgages. By the maritime law, speaking generally, seamen's wages held the first rank, a bottomry bond next, the claims of material men next, and claims for damages to person and property are preferred to the lien of a mortgage, which holds the lowest rank. The ground upon which these rules proceed is that of giving preference to those last aiding to conserve the property. \* \* Railroads and railroad mortgages are of modern origin. The courts at first failed to distinguish between a mortgage on a railroad and a mortgage on a house and lot, and receivers were appointed without making any provision to pay even the current wages of the employees of the company, or to pay for the most essential supplies, however recently furnished. Experience and observation demonstrated the inequity of this mode of proceeding. \* \* It was perceived that railroads performed on land the same offices that

ships did on the sea. \* \* Unless it is kept in operation, a railroad does not fulfill the purposes of its creation, and is comparatively valueless as a mortgage security; but, like a ship, it cannot be operated and made valuable as an instrument of commerce, or for any other purpose, without incurring daily expenses for work, supplies and materials. These debts are never paid at the time they are contracted. \* \* For these and other like reasons there has been a growing tendency among the courts and legislatures in this country to give such debts of a railroad company priority over the lien of a mortgage." In this case, decided in 1892, the trustee for the bondholders had filed its bill to foreclose, asking for the appointment of a receiver on the ground that parties claiming payment for labor and material used in the construction of the road were about to file liens, which, if done, would embarrass the road and endanger the bondholders' security. The court appointed a receiver, but not until the trustee had first consented that all debts incurred in the construction and operation of the road, including claims for injury to person or property, subsequent to the execution of the mortgage, should constitute a lien on the railroad property superior to the lien of the mortgage. But see *Illinois Trust & Sav. Bk. v. Doud*, 105 Fed. Rep. 123 (1900), where the same court held that one furnishing money to pay off prior liens against a railroad had an equity inferior to that of a subsequent mortgagee, Caldwell, J., dis-

lent intent at least, neither creditor nor co-surety can interfere.<sup>45</sup>

sending. See, also, cases cited in note 17 to § 324, and in notes 40 and 41 to § 254.

<sup>45</sup> In *Poole v. Lowe*, 24 Colo. 475, 52 Pac. Rep. 741, the principal, by way of indemnifying his sureties against loss, conveyed to them certain land, which the sureties subsequently conveyed to a third party. After that, the creditor filed his bill to subject the land to the payment of his debt. Held, that he was too late. "When a debtor has given security to his surety for the indemnity of the latter only," said the court, "the creditor is entitled to the benefit of the same, and may, by proceedings commenced in equity, before the surety has, in good faith, surrendered or discharged such security, subject it to the payment of his debt. \* \* In such case the right of the creditor is derived through and not independent of, the surety, and the creditor seeking to enforce his claim against the surety, is in equity, entitled to subject to the payment of his debt security then subsisting for the personal indemnity of the surety to the same extent the latter would had he discharged the debt. There is no element of trust in a security of this character in favor of the creditor until he takes steps, by an appropriate action, to subject it to the payment of his claim; such a security is not, by its own vigor, devoted or appropriated to the payment of the debt, but only to the indemnity of the surety in the event he should sustain loss by reason of his guaranty of the principal debt; and as courts enforce contracts, or give redress for violation of them, as made by the parties, and cannot,

by construction, enlarge them beyond their fair intent and meaning, it follows that in subrogating the creditor to the surety's place as to any security given him, the rights of the former, in such security, will be limited to that existing in favor of the surety at the time action is commenced against him to recover the debt, and subject to the payment thereof the security by him then held as indemnity against loss on account of his suretyship." In *Fertig v. Henne*, 197 Pa. St. 560, 47 Atl. Rep. 840, the principal mortgaged land to the surety to indemnify him against loss by reason of his suretyship. Held, that the creditor, and upon like reasoning a co-surety, had no power to prevent the surety from satisfying and releasing the mortgage. Citing *Worrall's Appeal*, 41 Pa. St. 524, 527, in which case Hare, J., said that,— "Securities given by a principal debtor, as an indemnity against the debt, to those who have become jointly bound with him as sureties for its payment, have sometimes been said to be trusts for the creditor. If this were so, it would follow that they could not be returned to the principal, without applying to the creditor, and obtaining his consent to the surrender; a conclusion so extreme as to show that the principle which leads to it must be an error. But while such securities are not, in any just sense of the word, trusts, unless made so expressly, they are, notwithstanding, charged with duties and obligations which may render it necessary to award them to the creditor, as the only means of doing justice between the principal and the surety."

## CHAPTER XI.

### OF THE RIGHTS OF SUBETIES AND GUARANTORS BETWEEN THEMSELVES—CONTRIBUTION.

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| <p>§ 279. The right to contribution subsists between co-sureties—Reasons upon which it is founded—When it accrues.</p> <p>280. Whether surety barred from contribution by consenting to principal's improper use of creditor's money.</p> <p>281. Co-sureties bound by different instruments liable to contribution.</p> <p>282. Instances where sureties bound by different instruments held liable to contribution.</p> <p>283. Same continued—When not liable to contribute.</p> <p>284. It make no difference with the right to contribution that one surety does not know that another became bound as such.</p> <p>285. When sureties for the same debt not liable to contribution—Instances.</p> <p>286. When accommodation parties to negotiable instruments are co-sureties.</p> <p>287. The true relation between several sureties may be shown by parol evidence.</p> <p>288. Surety who becomes bound during course of remedy against principal not co-surety with original surety.</p> <p>289. Contribution cannot be recovered when it would be inequitable.</p> | <p>§ 290. When surety, who becomes liable at the request of another surety, not liable to contribution.</p> <p>291. Surety of surety not liable to contribution.</p> <p>292. Surety who becomes principal liable for whole amount paid by former co-surety—Other cases.</p> <p>293. Surety who pays debt for which principal or another surety is not liable cannot have contribution.</p> <p>294. When one surety entitled to benefit of indemnity secured by another surety.</p> <p>295. Instances of indemnity taken by one surety inuring to the benefit of all the sureties.</p> <p>296. Same continued—Cases where indemnity to one surety does not inure to benefit of co-sureties.</p> <p>297. If surety surrender lien for his indemnity on property of principal he discharges co-surety from contribution.</p> <p>298. If surety negligently lose indemnity, co-surety released from contribution.</p> <p>299. Surety who obtains indemnity after all the sureties have paid an equal amount is not obliged to share it with the others.</p> <p>300. When suit for contribution can be brought by surety holding indemnity.</p> |
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| <p>§ 301. Surety may, before paying debt, file bill to compel co-surety to contribute and to restrain him from transferring his property.</p> <p>302. Discharge of surety in bankruptcy does not release him from contribution to co-surety, who pays subsequently.</p> <p>303. When surety who is discharged from liability to creditors liable to contribute to co-surety, who subsequently pays.</p> <p>304. Rights of bail, who pays the debt, against the principal and sureties for the debt.</p> <p>305. When surety who pays judgment may have execution thereon against co-surety.</p> <p>306. How liability to contribution affected by giving of time to one of several co-sureties.</p> <p>307. Contribution as affected by release of principal or of co-surety—Failure of consideration—Set-off, etc.</p> <p>308. How far judgment against one surety evidence against co-surety in suit for contribution—Failure of consideration.</p> <p>309. When surety can recover contribution for costs paid by him.</p> <p>310. Estate of deceased co-surety liable for contribution.</p> <p>311. Surety who pays by his note may recover contribution from co-surety.</p> | <p>§ 312. What contribution surety who pays in land entitled to recover.</p> <p>313. When surety who has paid less than his share of the debt cannot recover contribution.</p> <p>314. In what proportions co-sureties are liable to contribute.</p> <p>315. Surety may recover contribution either at law or in equity.</p> <p>316. Whether surety must show insolvency of the principal in order to recover contribution.</p> <p>317. When suit for contribution should be joint and when several.</p> <p>318. Who not necessary parties to a bill for contribution, etc.</p> <p>319. Surety may without compulsion pay debt when due, and immediately sue co-surety for contribution without demand or notice.</p> <p>320. When liability to contribution attaches.</p> <p>321. When claim for contribution barred by the statute of limitations.</p> <p>322. Rights of sureties as against each other governed by what law—Residence of co-surety in suit for contribution.</p> <p>323. Pleading—Former adjudication—Co-surety as witness—Evidence.</p> |
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**§ 279. The right to contribution subsists between co-sureties—Reasons upon which it is founded—When it accrues.—**The principal question which arises between co-sureties is that of contribution. The right to contribution results from the maxim

that equality is equity.<sup>1</sup> The creditor may collect all the debt from the principal or any one of several sureties, or he may collect from every surety his proper proportion. If, having this right, he collects it all from one surety, the law clothes such surety with the same power and enables him to enforce contribution. "Natural justice says that one surety, having become so with other sureties, shall not have the whole debt thrown upon him by the choice of the creditor, in not resorting to remedies in his power, without having contribution from those who entered into the obligation equally with him. The obligation of co-sureties to contribute to each other is not founded in contract between them, but stood upon a principle of equity until that principle of equity had been so long and so generally acknowledged that courts of law in modern times have assumed jurisdiction. This jurisdiction of the courts of common law is based upon the idea that the equitable principle had been so long and so generally acknowledged and enforced, that persons in placing themselves under circumstances to which it applies may be supposed to act under the dominion of contract, implied from the universality of that principle. For a great length of time equity exercised its jurisdiction exclusively and individually; the jurisdiction assumed by courts of law is comparatively of very modern date."<sup>2</sup> It has also been said that "This right to contribution has been considered as depending rather upon a principle of equity than upon contract; but it may well be considered as resting alike on both for its foundation; for although generally there is no express agreement entered into between joint sureties, yet from the uniform and almost universal understanding which seems to pervade the whole community, that from the

<sup>1</sup> Van Winkle v. Johnson, 11 Oreg. 469.

<sup>2</sup> Lansdale v. Cox, 7 T. B. Mon. (Ky.) 401, per Bibb, C. J. See, also, that courts of law have adopted the equitable doctrine of contribution, Jeffries v. Ferguson, Adm'r, 87 Mo. 244; McDonald v. Whitfield, 27 Can. Sup. Ct. 94 at 100. An action at law is the usual remedy except where, for special reasons, a court of law cannot give adequate relief, as in Washington

v. Norwood, 128 Ala. 383, note 7 below. A surety who has paid the debt can enforce contribution under the common counts. Porter v. Horton, 80 Ill. App. 333. In Britt v. Pitts, 111 Ala. 401, 20 So. Rep. 484, one of two sureties on a forthcoming bond took, and refused to give up, the property when the suit was decided against plaintiff. Held, that the other surety could maintain an action on the case to recover damages occasioned thereby.

circumstance alone of their agreeing to be, and becoming accordingly, co-sureties of the principal, they mutually become bound to each other to divide and equalize any loss that may arise therefrom to each other, or any of them, it may with great propriety be said that there is at least an implied contract."<sup>3</sup> Until the surety has made a payment of the obligation, or assumed more than his share of the debt, he cannot enforce contribution against a co-surety.<sup>4</sup> But it is not neces-

<sup>3</sup> *Agnew v. Bell*, 4 Watts (Pa.) 31, per Kennedy, J.; and see, to like purport, *Drummond v. Yager*, 10 Bradw. (Ill. App.) 380. The right to contribution does not necessarily arise from contract, but, rather, has its foundation in principles of natural justice. *McGehee v. Owen*, 61 Ala. 440; *Bragg v. Patterson*, 85 Ala. 233. See note 12 § 314 post. In *Chappell v. McKeough*, 21 Colo. 275, 40 Pac. Rep. 769, Chappell and John were co-sureties on the note of Burnett. Burnett defaulted and John paid half of the principal and accrued interest and procured appellee, McKeough, to give his note for the other half, on which John became surety, and take up Burnett's note, and bring suit against appellant Chappell to recover the unpaid balance. Held, that the transaction did not constitute a payment of Burnett's note and that McKeough was entitled to recover from Chappell. Citing: *Harbeck v. Vanderbilt*, 20 New York 395. Where two of three sureties paid the principal's debt and took an assignment from the creditors of all their interest, it was held that they might recover judgment against the estate of their deceased co-surety for the full amount of the debt, by statute, but could collect only one-third thereof: *In re Parker* L. R. 1894, 3 Ch. Div. 400.

and to the same effect, see *Gourdin v. Trenholm*, 25 S. C. 362; *Porter v. Horton*, 80 Ill. App. 333; *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. Rep. 157; *Washington v. Norwood*, 128 Ala. 383; *King v. McGhee*, 99 Ga. 621, 25 S. E. Rep. 849; *Pegram v. Riley*, 88 Ala. 399, 6 So. Rep. 753; *Werborn's Adm'r v. Kahn*, 93 Ala. 201, 9 So. Rep. 729. In *Wolmershausen v. Gullick*, 2 L. R. Ch. Div., 1893, 514, it was held that where the claim of the creditor had been allowed against the estate of one of two sureties, his executrix might, without first paying any part of it, and without averring or proving the estate to be insolvent, maintain her action in chancery against the other surety for contribution. In this case the creditor was not, but should have been, made a party; the court declared plaintiff's right to contribution and made a prospective order under which, whenever she has paid any sum beyond her share, she could get it back; and ordered the co-surety to indemnify her against further payment or liability, and, by payment to her or to the creditor or otherwise, to exonerate her from liability beyond the extent of her own share. The Court found no case directly in point but cited *inter alia*, *Lindley on Partnership* 374, *Macdonald v. Whitfield*, 8 App. Cas. 733, 750 (1883); *Ex parte Snowden*, 17 Ch. Div. 44, 46, 47 (1881), S. C.

<sup>4</sup> *Backus v. Coyne*, 45 Mich. 584;



sary that the amount paid by him should be fixed by a judgment.<sup>5</sup> The fact that the judgment paid by the surety was irregular or void, held no defense to a co-surety in a suit for contribution.<sup>6</sup> A right of action for contribution accrues when one surety has paid more than his proportionate share of the principal's debt. In an equitable proceeding for contribution, conveyances made by one surety in fraud of the rights of another may be set aside.<sup>7</sup> It has been held that statutes gov-

50, L. J. (Ch.) 540, 541; 29 Weekly Reporter 654; Hughes-Hallett v. Indian Mammoth Gold Mines Co., 22 Ch. Div. 561, 565; Hobbs v. Wayet, 36 Ch. Div. 256; Lacey v. Hill, Law Rep. 18, Eq. 182, 191, per Jessel, M. K.; Bechervaise v. Lewis, Law Rep. 7 C. P. 372, 377; Cruse v. Paine, Law Rep. 6 Eq. 641, 4 Ch. 441; Wooldridge v. Norris, Law Rep. 6 Eq. 410, and Craythorne v. Swinburne, 14 Ves. 160, as being applicable in principle. In Wright v. Cudahy, 64 Ill. App. 453, one of two partners in a pork deal on the Chicago Board of Trade who had not paid his share of the firm's indebtedness, filed a bill to compel the other partner to pay his share. In affirming a decree dismissing the bill, the Court said (p. 457): "The rule as to the maintenance of a bill for contribution by a co-surety seems to afford a guide in such a case as this. It is only a surety who has paid more than his proportion of the joint obligation who can maintain a bill for contribution by his co-surety. \* \* We are therefore of the opinion that Wright, not having paid his share of the alleged firm's indebtedness, this bill cannot be maintained."

<sup>5</sup> Bright v. Lennon, 83 N. C. 183. The rule determining the right to contribution is thus stated by the Louisiana supreme court: "The three necessary conditions are that the surety who is demanding con-

tribution, and the surety from whom it is demanded, must each have been surety for the same debtor and for the same debt, and satisfaction of the debt must have been enforced against the surety demanding contribution by a lawsuit." Manning, J., in Stockmeyer v. Oertling, 35 La. Ann. 467.

<sup>6</sup> Ross v. Williams, 11 Heisk. (Tenn.) 410.

<sup>7</sup> Sec. 323 post. In Washington Admr. v. Norwood, 128 Ala. 383, on June 1, 1878, letters issued to two administrators who filed their bond as such with Washington, Norwood and others as sureties. In 1893 the administrators made default in payment of the shares of two minor heirs who thereafter, in 1898, by suit compelled the administrator of Washington, who had since died, to make good the deficiency of his principals. In May, 1899, Washington's administrator filed his bill against his co-surety Norton, and Norton's son, to whom Norton had in 1887, long prior to the default, conveyed his real estate, to set aside such conveyance as fraudulent and compel Norton to pay half of the amount which Washington's estate, as surety, had been compelled to pay to the minor heirs. By the Alabama statute a suit to set aside a fraudulent conveyance is barred in 10 years. The Court held that a surety is an existing creditor entitled to protection



erning contribution do not apply when one surety paying the debt takes an assignment of it.<sup>8</sup> The requirements of such a statute must be at least substantially complied with.<sup>9</sup>

against a fraudulent conveyance by a co-surety at any time subsequent to the execution of the common obligation. That such an action can in no case be maintained until the course of action accrues—until the demand becomes due and payable. That the right of action for contribution at law or in equity accrues when one surety pays more than his share of the common liability. That the statute of limitations can in no case begin to run until the cause of action accrues. And further, that the possession of the land in question by Norton's son was not adverse as against the claim for contribution of his co-surety on the bond. His possession of the land was rightful until the payment of Norton's share of the deficiency by Washington's estate created its right to have the conveyance set aside and the land subjected to payment of Norton's share of the deficiency. In *Werborn's Adm'r v. Kahn*, 93 Ala. 201, 9 So. Rep. 729, it was held that one surety on a guardian's bond who had paid \$4,900 in full compromise and settlement of a decree for \$13,000 against the guardian, could maintain a bill for contribution against the estate of his deceased co-surety and in the same proceeding could have set aside fraudulent conveyances which were made by the co-surety in his life time. The latter right, the court said (p. 205), does not depend on the Code. "Before the statute was enacted," said Clopton, J., "this court asserted the principle that a creditor of a deceased debtor, without having obtained judgment and exhausting his legal remedies, may come into

equity to subject to his demand property fraudulently conveyed by the debtor while in life, there being a deficiency of legal assets. Commencing with *Sharis v. Leachman*, 20 Ala. 662, and extending to the present time, this court has uniformly maintained bills of this character. *Houston v. Blackman*, 66 Ala. 559. The equity of bills of this class rests on the principle that when the legal assets are insufficient and the administrator, because bound by the fraud of his intestate, cannot administer the property subject to the claims of creditors, the court of chancery only can grant full and proper relief. Such bills depend upon the original and primary jurisdiction of courts of equity in matters of administration and marshalling the assets of the estate for the enforcement of the claims of creditors—a jurisdiction distinct and independent of that to which creditors of a living debtor, whose claims are not connected with an administration, can resort. \* \* The bill avers a deficiency of legal assets which is all that is required to impart equity: *Battle v. Reid*, 68 Ala 149." See also note to § 321.

<sup>8</sup> In *Williams v. Riehl*, 127 Calif. 365, 59 Pac. Rep. 762, it was held that the statutory mode of enforcing contribution, by notice and claim filed with the clerk, does not apply where part of the sureties, who pay, take an assignment of the judgment against the rest, who do not pay, following a like construction of a similar statute, in Kansas, in *Harris v. Frank*, 29 Kans. 203.

<sup>9</sup> A Georgia statute authorizes

**§ 280. Whether surety barred from contribution by consenting to principal's improper use of creditor's money.**—It has been held that the surety is not barred from the right to contribution by assenting to an improper use by the principal of the creditor's money from which the loss resulted. A guardian, being ordered by the probate court to show what disposition he had made of \$1,300 for which he was accountable, filed the consent of one of his sureties that he be allowed to "retain and use" the ward's money, paying interest at 10 per cent per year, whereupon the court, without authority of law, made an order that he might "retain" such money "until further order." The surety so consenting was subsequently compelled to make good the guardian's deficiency. It was held that such consent to the guardian's use of the ward's money was no bar to a suit against his co-surety for contribution. Such consent, the court said, "was not in the nature of a contract, and furnished no security, distinct from or in addition to that of the bond, against any loss to the ward which might result from the order. It was not made the basis of the recovery had against the plaintiff, and the recitals of the record show that it was not the only inducement to make the order. The order itself was at most only the court's acquiescence in an act unwarranted by the law; and it affected no right of the ward and changed in no respect the liability created by the execution of her guardian's bond. The court did not sustain toward Moore [the guardian] the relation of a creditor; but, if its action could be regarded as having extended the time, in which the law required him to pay or account for the money, the extension was for an indefinite period and did not, for that reason, have the effect to discharge either of his sureties."<sup>10</sup>

one county which builds a "county line" bridge and takes from the builder a bond conditioned to keep it "in good condition" for seven years, to enforce contribution therefor by the adjoining county. In *Forsyth County v. Gwinnett County*, 108 Ga. 510, 33 S. E. Rep. 892, the bond was conditioned that the builders should "keep the bridge in repair for seven years, action of the elements only excepted." Held that no contribu-

tion could be enforced from the adjoining county. For, if Gwinnett county "should be forced to become the unwilling owner of an interest in the bridge which the ordinary of Forsyth county caused to be built without requiring the contractor to keep the same in repair for a period 'not less than seven years,' Gwinnett county would be forced to assume a liability not contemplated by the statute."

<sup>10</sup> *Berton v. Anderson*, 56 Ark.

✓ § 281. **Co-sureties bound by different instruments liable to contribution.**—Co-sureties are liable to contribution, but sureties for the same principal who are not co-sureties are not so liable. Much of the learning on this subject is devoted to who are and who are not co-sureties. Where all the sureties sign the same instrument and become equally bound thereby, they are of course co-sureties and liable to contribute to each other. So, also, when several sureties become bound for the debt, default or miscarriage of the same principal, with reference to the same transaction, even though they become bound by different instruments,<sup>11</sup> at different times and for different amounts, they are generally considered co-sureties and held liable to contribution. In the leading case on this subject the principal was receiver of the fines and forfeitures of the customs of the outports, and to secure the performance of his duties gave three separate bonds in the same penalty, but signed by different sureties. It was held that the sureties in the three bonds were liable to each other for contribution. The court said: "If a view is taken of the cases, it will appear that the bottom of contribution is a fixed principle of justice, and is not founded in contract. \* \* In the particular case of sureties, it is admitted that one surety may compel another to contribute to the debt for which they are jointly bound. On what principle? Can it be because they are jointly bound? What if they are jointly and severally bound? What is severally bound by the same or different instruments? In every one of those cases sureties have a common interest and a common burthen. They are bound as effectually quoad contribution as if bound in one instrument, with this difference only, that the sums in each instrument ascertain the proportions, whereas if they are all joined in the same engagement, they must all

470, 20 S. W. Rep. 250. But see *Scofield v. Gaskill*, 60 Ga. 277; *Henley v. Scofield*, 60 Ga. 450. In *Jacobs v. Juniata Valley Canning Co.*, 183 Pa. St. 17, 38 Atl. Rep. 476, eighteen stockholders of an insolvent corporation became sureties for its indebtedness. Three of them were directors and it was through their acts that the corporation became insolvent. Held, that they were not subject to any

greater liability as sureties on that account. Note 36 to § 285.

<sup>11</sup> And there is no presumption, because a surety or guarantor bound himself by a different instrument, that he did not thereby intend to contribute if one of the others bound on another instrument paid, nor to call on them for contribution if he paid. *Young v. Shunk*, 30 Minn. 503.

contribute equally."<sup>12</sup> Where one pledges property to secure a debt and another becomes surety for the same debt, the property pledged and the surety must each bear its proportionate share of any loss.<sup>13</sup>

**§ 282. Instances where sureties bound by different instruments held liable to contribution.**—Where an administrator upon assuming the duties of his office gave bond with sureties, and eight years afterwards, upon being required to do so, gave an additional bond with other sureties, it was held that the sureties on both bonds were liable to contribute to each other.<sup>14</sup> The same thing was held where an injunction was

<sup>12</sup> *Deering v. The Earl of Winchelsea*, 2 Bos. & Pul. 270, per Eyre, C. B.; *Id.*, 1 Cox 318. See, also, *Mayhew v. Crickett*, 2 Swanston 193; *Breckenridge v. Taylor*, 5 Dana (Ky.) 110. It is immaterial that the sureties are bound by different instruments and without the knowledge of one another, provided they are bound for the same principal and by the same engagement. *Rosenbaum v. Goodman*, 78 Va. 121.

<sup>13</sup> In *Robinson v. Boyd*, 60 Ohio St. 57, 53 N. E. Rep. 494, the trustee of a minor's property upon settlement was found to be in default. Without the knowledge or consent of the two sureties on his official bond, his wife put up an insurance policy on her husband's life, that she owned, by the sale of which the trustee's shortage was made good. Held that she was entitled to contribution from the solvent surety on the official bond. The court said: "Where two or more persons are bound as sureties for the discharge of the same debt though by different modes, its discharge by one, conferring a benefit on the others, raises a right in his favor for contribution." It was urged that there was no mutuality—that if the sureties on the bond had paid the short-

age they could not have compelled the wife to contribute. In reply *Minshall, J.*, said: "This, we think, is a misapprehension. If it were so it would be an anomaly in the doctrine. His right to contribution against her, had he paid the debt, would have rested upon precisely the same principle of equity as does her right against him. His payment would have relieved her property from the pledge, or, what is the same thing, would have relieved her of a burden that was common to both of them. The right does not depend upon the order in which each party became liable. The common liability is the crucial test."

<sup>14</sup> *Cobb v. Haynes*, 8 B. Mon. (Ky.) 137. To precisely similar effect, see *Pickens v. Miller*, 83 N. C. 543. The same thing was held where a guardian under similar circumstances gave two bonds. *Bell's Adm'r v. Jasper*, 2 Ired. Eq. (N. C.) 597. And to the same point, *Stevens v. Tucker*, 87 Ind. 109. When a guardian's surety obtains his release upon the filing of a new bond, in accordance with § 2533, of the George Civil Code, and the surety on the new bond makes good a devastavit which was committed by the principal while the old bond was in force, it is

issued upon a bond given with one surety, which surety was held to be insufficient, and a new bond was given with two other sureties.<sup>15</sup> Where a sheriff had been required, under an act of the legislature, to procure additional security, and had at different times entered into new bonds with new sureties, it was held that all the sureties on all the bonds were liable to contribution.<sup>16</sup> Execution was taken out against D as prin-

held, in *Snow v. Brown*, 100 Ga. 119, 28 S. E. Rep. 77, that the new surety has no right of contribution from the old surety. This ruling is expressly put upon the wording of the statute, the purpose of which is "to release the outgoing surety as far as possible. It is obvious," said the court, "that, as between himself and the obligee of the bond, he cannot be released from liabilities springing from breaches of the bond occurring before his release, but whenever such circumstances exist as will allow him to be released from further liability, he is entitled to as full protection as is obtainable at the time of his release. The privilege to the guardian to continue his trust by giving another bond and surety has the effect to postpone the right of the first surety to have an accounting from his principal, and thus possibly deprives him of means and measures of protection afterwards lost. The original bond being, presumably at least, ample to protect the obligee thereof for all devastavit occurring while it is of force, it could not be said that it was the purpose of the statute, in making the second surety liable for past waste, to alone protect the interests of the obligee of the respective bonds, but the principal object sought to be accomplished by this retroactive feature of the second bond is to afford to the released surety as much indemnity as pos-

sible, in view of the disadvantages to him attendant upon the postponing of his right to have his principal brought to an accounting. \* \* It is apparent, therefore, not only that the first and last sureties are not co-sureties, but that the bond of the last surety stands as an indemnity to the first surety, and that if the latter is forced to pay off and discharge any devastavit of the guardian occurring before his release, he is entitled to recover the same of the second surety." Citing and following *Tittle v. Bennett*, 94 Ga. 405, 21 S. E. Rep. 62; *Sutton v. Williams*, 77 Ga. 570, 1 S. E. Rep. 175; *Bobo v. Vaiden*, 20 S. C. 271. The Georgia statute is essentially the same as that of Illinois and many other states. It provides that, upon petition of the surety or his representative to be released the Ordinary may, in his discretion, after notice to the principal, "pass an order discharging such surety from all future liability, and requiring such guardian to give new and sufficient security or be discharged from his trust," and that "such new sureties shall be liable for past as well as future waste or misconduct of the guardian."

<sup>15</sup> *Bentley v. Harris' Adm'r*, 2 Gratt. (Va.) 358.

<sup>16</sup> *Harris v. Ferguson*, 2 Bailey, Law (S. C.) 397. So where a sheriff was required by statute to give annually a renewal bond, or oftener

cipal, and A and B as sureties; and levied on the goods of D, who gave a forthcoming bond in which A, B and E were bound as sureties for D. Execution was issued on the forthcoming bond, and E was compelled to pay the debt. Held, E was co-surety with A and B, and not a surety for them, and could recover contribution from them as co-sureties, but not full indemnity as if they were principals.<sup>17</sup> A bond was executed by A as principal, and B and C as sureties, with the stipulation that the sureties should not be discharged by any new arrangement between the creditor and the principal. B compounded with his creditors. The bond became due and payable, and the creditor threatening to sue unless A got another surety in place of B, one D, by a separate writing, became liable for the whole amount of the bond, "according to the tenor thereof." D was compelled to pay the bond, and it was held he was entitled to contribution from C. The court said that D became surety for the same debt for which C was surety, "and in that case, in whatever way he became surety, if the other surety is called on to pay, he must contribute."<sup>18</sup> In another case, A and B as principals gave a note to C, with D as surety thereon. C sold and indorsed the note to E. To obtain further time A and B proposed to give a new note with D and F as sureties. E declined to give up the old note or receive the new one in its stead unless C would become a party to the new note, and C thereupon signed it, adding after his name the words "as security." Held, that C, D and F were co-sureties, and that D, who had paid the note, was entitled to contribution from C and F. The court said that: "Whenever several persons are sureties bound for the same duty, they stand in the relation of co-sureties, and are liable to contribution. \* \* Nor will their becoming sureties at different times, without the knowledge of each other, or even by different instruments, affect their obligation."<sup>19</sup>

**§ 283. Same continued—When not liable to contribute.—**  
In an action for contribution against sureties on different in-

if ordered by the court, the sureties on the renewal bond are held to be co-sureties with those on the first bond and liable to contribution. *Ketler v. Thompson*, 13 Bush (Ky.) 287.

<sup>17</sup> *Perrins v. Ragland*, 5 Leigh (Va.) 552.

<sup>18</sup> *Whiting v. Burke*, Law Rep. 6 Ch. App. Cas. 342, per James, L. J.; affirming Law Rep. 10 Eq. Cas. 539.

<sup>19</sup> *Woodworth v. Bowes*, 5 Ind. (3 Port.) 276, per Stuart, J.



struments it is held unnecessary that notice should be given before instituting proceedings.<sup>20</sup> Where a sheriff executed a bond for the collection of general taxes, and another bond for the collection of special taxes, the sureties on the first bond were held as liable for any defalcation on the bond given for the collection of special taxes as on the bond given for the collection of general taxes, and they were held entitled, therefore, to contribution from the sureties on the special tax bond.<sup>21</sup> So the right to contribution exists between the sureties on a sheriff's official bond and those on his bond as tax collector, where the duties of the latter office are by statute incumbent on the sheriff.<sup>22</sup> And where the treasurer of a loan and savings society gave two separate bonds with sureties conditioned for the faithful discharge of his duties, it was held the right to contribution existed between the sureties on the bonds, and the fact that the society was subsequently incorporated and the treasurer's name of office was changed constituted no defense.<sup>23</sup> In an action by a municipality against a surety company on its independent guaranty of the good conduct of a city chamberlain, the defense was that, as the municipality had discharged a co-surety, they (the surety company) were not liable, because in their contract of guaranty they stipulated that they should possess the same right of contribution as any other surety. Held, that even though the co-surety had been discharged, this operated only to relieve the surety company to the extent to which they would have had a right to contribution, and that they would have been discharged to this extent as a matter of equity, independently of their contract, and furthermore, the surety company and the other surety were in no sense joint sureties.<sup>24</sup> An officer holding over, executed a bond for the full term, but having been afterwards re-elected, executed a new bond for the unexpired portion of the term. Held, that the sureties on the first bond were not co-sureties with those on the last bond and could not be compelled to contribute.<sup>25</sup> Where a surety on all of several official bonds is

<sup>20</sup> *Bright v. Lennon*, 83 N. C. 183.

<sup>21</sup> *Cherry v. Wilson*, 78 N. C. 164, 166.

<sup>22</sup> *Burnett v. Millsaps*, 59 Miss. 333.

<sup>23</sup> *Murray v. Gibson*, 28 Grant's Ch. (Can.) 12.

<sup>24</sup> *Corporation of the City of London v. Citizens' Ins. Co.*, 13 Ont. (Can.) 713.

<sup>25</sup> *Boone Co. v. Jones*, 58 Iowa 373. By statute, the principal held office as a holdover only until the election of his successor.



compelled to pay damages on any one of them, he is entitled to contribution from his associates on that bond; but when his associates are different in the other bonds, this right is held to be defeated by a recovery in one action upon more than one bond.<sup>26</sup>

§ 284. It make no difference with the right to contribution that one surety does not know that another became bound as such.—As the right to contribution results from equitable principles, and not from express contract, such right is not at all affected by the fact that the surety seeking contribution, or from whom it is sought, had no knowledge that the other had assumed the obligation of a surety for the same thing. Thus it has been held that a surety, who becomes such without the knowledge of one who is already bound, and pays the debt, may recover contribution from the first surety.<sup>27</sup> A as principal, and B and C as sureties, signed a note, but the fact of suretyship did not appear therefrom. The holder afterwards became dissatisfied with the solvency of the signers of the note, and A procured D to sign the note under the names of the other signers thereof, upon a consideration moving from A to D. Afterwards A became insolvent, and C was obliged to pay the note. Held, he was entitled to contribution from D. The court said that the right to contribution exists only among those sureties who are liable for the same thing. But equity looks at substance more than form, and if several persons enter into contracts of suretyship, which are the same in their legal character and operation, though by different instruments, at different times, and without the knowledge of each other, they will be bound to mutual contribution.<sup>28</sup> In another case, A, B and C signed a note, B and C being sureties; but that fact not appearing from the note, A, being in possession of the note, asked D to sign it, telling him B and C were principals. D thereupon signed it, adding after his name the word “surety.”

<sup>26</sup> Cassady v. Board of Trustees, 93 Ill. 394.

<sup>27</sup> Chaffee v. Jones, 19 Pick. 260. Holding that no agreement is necessary to entitle sureties who sign a note at different times to contribution from each other, see Warner v. Morrison, 3 Allen 566.

<sup>28</sup> Monson v. Drakeley, 40 Conn.

552. But see Matthews v. Millsaps, 58 Miss. 564, where it was held that the sureties on a sheriff's bond, having paid a liability thereon, had no right to call upon a person for contribution who had never been in any manner legally liable thereon, although he may have intended to become a surety.

D was obliged to pay the note, and it was held that he could recover contribution from B and C as co-sureties, but could not recover indemnity from them as principals.<sup>29</sup> In a later case where the note was similar it was held that a person in the position of B or C, upon paying the note, could not force D to contribute without showing that D knew of their suretyship when he became surety.<sup>30</sup>

**§ 285. When sureties for the same debt not liable to contribution—Instances.**—Where, after the principal and surety had signed a note, a third party also signed it, and added to his signature the words “surety for the above parties,” it was held that such third party was not a co-surety with the first surety and was not liable to him for contribution. The court

<sup>29</sup> *Whitehouse v. Hanson*, 42 N. H. 9. To similar effect, see *Norton v. Coons*, 3 Denio 130. See, also, *Warner v. Price*, 3 Wend. 397; *McNeil v. Sanford*, 3 B. Mon. (Ky.) 11; *Beaman v. Blanchard*, 4 Wend. 432. Contra, *Hunt v. Chambliss*, 7 Smedes & Mar. (Miss.) 532; *Keith v. Goodwin*, 31 Vt. 268, and *Bobbitt v. Shryer*, 70 Ind. 513.

<sup>30</sup> In *Bulkeley v. House*, 62 Conn. 459, 26 Atl. Rep. 352, 21 L. R. A. 247, a note read as follows: “\$3,000, Hartford, Feb. 21, 1871. On demand, for value received, we jointly and severally promise to pay to the Society for Savings at the office of said society, in Hartford, three thousand dollars with interest semi-annually. [Sgd.] John K. Williams, William H. Bulkeley, D. A. Rood. Surety: Wm. W. House.” After Williams became bankrupt the creditor obtained judgment against Bulkeley, Rood and House jointly, which was paid by Bulkeley and Rood. Bulkeley having sued House for contribution, it was held incumbent upon him to prove not only the fact of his suretyship but also that House had knowledge of it and since House signed upon the belief

that Bulkeley was a principal, Bulkeley had no right to contribution. “The fallacy of the plaintiff’s claim,” said the court, Hall, J., “is in the assumption that the defendant had agreed to become a surety for the debt of Williams only. He was careful not to do this. In other words he intended to become, and did, in fact, become a surety for a surety, an undertaking by no means rare or infrequent in commercial dealings. As such a surety he is not liable to contribution.” Citing: *Monson v. Drakeley*, 40 Conn. 559, 16 Am. Rep. 74. *Bispham*, Eq. § 330, 5th Ed., *Harris v. Warner*, 13 Wend (N. Y.) 402; *Warner v. Price*, 3 Wend (N. Y.) 397; *Paul v. Berry*, 78 Ill. 158; *Craythorne v. Swinburne*, 14 Ves. Jr. 160; *Sayles v. Sims*, 73 N. Y. 552; *Oldham v. Brown*, 28 Ohio St. 53; *Sherman v. Black*, 49 Vt. 198; *Keith v. Goodwin*, 31 Vt. 268; *Robertson v. Deatherage*, 82 Ill. 511; *Adams v. Flanagan*, 36 Vt. 400; *Bowser v. Rendell*, 31 Ind. 134; *Bobbitt v. Shreyer*, 70 Ind. 517; *Melms v. Werdehoff*, 14 Wis. 21; *Williams v. Glenn*, 92 N. C. 253; *McMahon v. Geiger*, 73 Mo. 149. See also note 21, L. R. A. 247, *supra*.

said: "The defendant had a right to qualify his contract as he pleased, consistent with the rules of law. He refused to sign as a co-surety with the other sureties, but did sign as surety for the whole, in which there was certainly nothing unlawful."<sup>81</sup> It has been held that, "where separate bonds are given with different sureties, and one is intended to be subsidiary to and a security for the other in case of default in the payment of the latter, the sureties in the second bond would not be compellable to aid those in the first bond by contribution."<sup>82</sup> Where several sureties became bound by separate bonds for the same amount on account of one principal to the same creditor, but the amount of all the bonds did not equal the sum due from the principal to the creditor, it was held that every surety being bound for an individual sum, they were not co-sureties, and there was no right to contribution between them.<sup>83</sup> A being indebted to B in £1,200, C, D and E, each separately, agreed to become A's surety by a separate instrument for £400. C and D each executed a separate instrument, with A, to B, in the sum of £400, But E would not execute any instrument. C, being sued, claimed to be discharged, because E had not executed an instrument as agreed. The lord chancellor thought the agreements of C, D and E to become sureties had no connection with each other, and if E had executed the instrument as agreed he would not have been co-surety with C, and C was therefore not discharged.<sup>84</sup> In another case A borrowed money on a mortgage of his estates

<sup>81</sup> *Harris v. Warner*, 13 Wend. 400, per Nelson, J. So where one of two sureties to a sewing machine agent's bond added to his signature the words "security for all prior parties," it was held there was no contribution between said sureties. *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16. See to precisely similar effect, *Sayles v. Sims*, 73 N. Y. 551; *Robertson v. Deatherage*, 82 Ill. 511. Where, however, one signed a note under an agreement with the principal that he was to be liable, not as surety for the principal alone, but for both the principal and a prior surety, it was held that

he could show such agreement by parol, and recover of the prior surety whatever he may have been compelled to pay on account of his suretyship. *Chapeze v. Young*, 87 Ky. 476. See, further, as to when contribution will not be allowed, *Gourdin v. Trenholm*, 25 S. C. 363.

<sup>82</sup> *Salyers v. Ross*, 15 Ind. 130, per Davison, J. To similar effect, see *Whitman v. Gaddie*, 7 B. Mon. (Ky.) 591.

<sup>83</sup> *Pendlebury v. Walker*, 4 Younge & Coll. (Exch.) 424.

<sup>84</sup> *Coope v. Twynam*, 1 Turner & Russ, 426, per Lord Eldon.

D and S, to which B, a prior incumbrancer on estate D, and C, a prior incumbrancer on estate S, were parties, and consented to give the mortgage priority over their respective charges, but it was stated in the mortgage that they joined for no other purpose. The lands were subsequently sold and the mortgage paid out of their joint proceeds. The residue of the fund produced by the sale of estate S was not sufficient to pay C's incumbrance. Held, C was not entitled to contribution against B, there not having been any common liability to pay a common demand. The court said: "The foundation of the right (to contribution) is \* \* a common liability for a demand upon the parties in common. Now, in the present case, there is no common liability for a common demand. Each party agreed upon his own behalf to postpone his own particular charge. It has so turned out that by reason of a deficient fund there is not sufficient to pay all the charges, and therefore the parties giving priority have lost their respective charges. But where is the common liability for the same demand? There being no common liability, there is no foundation for any equities among themselves."<sup>35</sup> Where a surety on an official bond aids his principal in a breach thereof he is not entitled to contribution for damages consequent to said breach.<sup>36</sup> Where a corporation's contract of suretyship is ultra vires it is not liable to contribution.<sup>37</sup> Where the surety of a bankrupt bought his principal's lands at an assignee's sale, he was held not entitled to contribution.<sup>38</sup>

**§ 286. When accommodation parties to negotiable instruments are co-sureties.**—The weight of authority is, that successive accommodation indorsers of negotiable instruments are not, in the absence of an agreement to that effect, co-sureties, nor liable to contribution as between each other.<sup>39</sup> To

<sup>35</sup> In re Keily, 9 Irish Ch. 87, per Brady, C.

<sup>36</sup> Scofield v. Gaskill, 60 Ga. 277; Healey v. Scofield, 60 Ga. 450. See § 280 supra.

<sup>37</sup> Lucas v. White Line Transfer Co., 70 Iowa 541.

<sup>38</sup> Boulware v. Hartsook's Adm'r, 82 Va. 679.

<sup>39</sup> Sherrod v. Rhodes, 5 Ala. 683; McCarty v. Roots, 21 How. (U. S.)

432; McCune v. Belt, 45 Mo. 174; Stillwell v. How, 46 Mo. 589; Hillegas v. Stephenson, 75 Mo. 118; McGurk v. Huggett, 56 Mich. 187; Phillips v. Plato, 42 Hun (N. Y.) 189; Armstrong v. Harshman, 61 Ind. 52. Contra, see Daniel v. McRae, 2 Hawks (N. C.) 590; Richards v. Simms, 1 Dev. & Bat. Law (N. C.) 48; Stovall v. Border Grange Bank, 78 Va. 188; Janson v.

constitute the relation of co-sureties between such indorsers there must be an agreement to that effect between them, or some fact or circumstance must exist from which such an agreement can be inferred. If a binding agreement to that effect is established, such indorsers will be held liable to contribution as co-sureties. But it has been held that such an agreement made between such indorsers after they have signed, and without any new consideration, is not binding. And where, after a note was due, the first and second indorsers wrote a letter to the creditor, stating they were jointly liable, and asking for time, it was held that this did not render them co-sureties.<sup>40</sup> It has been held that the accommodation indorser of a note is not, in the absence of an agreement to that effect, liable as co-surety with a surety who signed the note on its face, as maker.<sup>41</sup> So it has been held that a stranger who, in terms, guaranties a note on its back, is not, in the absence of an agreement to that effect, a co-surety with a surety who had previously signed it on its face.<sup>42</sup> A, for the purpose of raising money for himself, drew a bill on B, which B accepted for A's accommodation. Being unable to get the bill discounted without a third name, A procured C to indorse it. The bill being unpaid at maturity, the holder agreed to renew it, and accordingly a new bill was drawn by B upon A, and indorsed by C. Held, that B, who had the bill to pay, was entitled to contribution from C.<sup>43</sup> It has been held that the mere fact that one party drew and another indorsed a bill of exchange for the sole accommodation of another did not es-

Paxton, 22 Up. Can. (C. P.) 505. In *Dillenbeck v. Dygert*, 97 N. Y. 303, it was held that where one of several accommodation makers of a joint and several promissory note paid the same, and then subsequently transferred the note for value to a third person, he also transferred therewith the right to demand contribution from the other makers, and the transferee's possession of the note will be evidence of its payment. In *Drummond v. Yager*, 10 Brad. (Ill. App.) 380, it was held that a person might be so situated as not to be liable to the

holder of a note, and yet retain to the sureties thereon such relation that in the event of payment by one he would be liable to contribution.

<sup>40</sup> *Cathcart v. Gibson*, 1 Rich. Law (S. C.) 10. See, also, on this point, *Dunn v. Wade*, 23 Mo. 207.

<sup>41</sup> *Smith v. Smith*, 1 Dev. Eq. (N. C.) 173; *Dawson v. Pettway*, 4 Dev. & Bat. Law (N. C.) 396; *Briggs v. Boyd*, 37 Vt. 534. But see *Houck v. Graham*, 106 Ind. 195.

<sup>42</sup> *Longley v. Griggs*, 10 Pick. 121.

<sup>43</sup> *Reynolds v. Wheeler*, 10 J. Scott (N. R.) 561.

tablish the fact that they were co-sureties, but it might be shown by parol that they were co-sureties.<sup>44</sup> Prima facie, an indorser of a promissory note is not a co-surety with a surety who signs the note as maker, but it may be shown by parol evidence that they were, in fact, co-sureties.<sup>45</sup>

**§ 287. The true relation between several sureties may be shown by parol evidence.**—It is a general rule that the true relation subsisting between the several parties bound for the performance of a written obligation may be shown by parol evidence. An unwritten agreement made between such parties prior to, or contemporaneously with, their executing an instrument as sureties, by which one promises to indemnify the other from loss, may be proved by parol, and the surety who made the agreement cannot, in such case, recover contribution from the other.<sup>1</sup> In such a case the court said: “The legal effect of a written contract is as much within the protection of the rule which forbids the introduction of parol evidence as its language. \* \* But we think it is limited to the stipulations between the parties actually contracting with each other by the written instrument.” The liability to contribution does not arise from contract, but from equitable principles. There is no agreement between the sureties contained in the obligation signed by them. The agreement is between the obligors and the obligee. As between the various sureties there is no written agreement; there is only an equitable presumption, raised by the fact of payment, that the sureties ought to contribute equally for the default of the principal. This equity can be rebutted by parol.<sup>2</sup> Where several parties sign an obligation, and one of them adds after his name the word “surety,” it may be shown by parol he is surety for, or co-surety with, the other. The word “surety” indicates that he is surety for somebody, but does not show for whom.<sup>3</sup> It is competent for one of two sureties on a prom-

<sup>44</sup> *Dunn v. Sparks*, 7 Ind. 490.

effect, see *Norton v. Coons*, 6 N. Y.

<sup>45</sup> *Nurre v. Chittenden*, 56 Ind.

33.

462. And to like effect, see *Houck v. Graham*, 106 Ind. 195.

<sup>2</sup> *Barry v. Ransom*, 12 N. Y. 462, per *Dennis and Dean, JJ.* To same effect, see *Paulin v. Kaighn*, 3 Dutcher (N. J.) 503.

<sup>1</sup> *Craythorne v. Swinburne*, 14 Ves. 160; *Hunt v. Chambliss*, 7

*Smedes & Mar. (Miss.)* 532; *Rae v. Rae*, 6 Irish Ch. 490. To contrary,

<sup>3</sup> *Robinson v. Lyle*, 10 Barb. (N. Y.) 512; *Adams v. Flanagan*, 36



issory note to prove by parol that he signed as surety both of his principal and the other surety, and on an undertaking by the other surety to indemnify him. The court, in deciding such a case, said: "It is not offering parol evidence to vary or explain the written contract; it was a collateral contract, independent of and consistent with it. The law regards all joint signers of an obligation as principals. It is by assuming an equitable jurisdiction that evidence is admitted of some of the parties having signed as sureties, and there is nothing to forbid the further evidence of their having fixed and arranged their respective liabilities as between themselves by their own contract."<sup>4</sup> The surety on the face of a note and an accommodation indorser may, as between themselves, be shown by parol to be co-sureties by virtue of a verbal understanding to that effect.<sup>5</sup> So several successive accommodation indorsers of a negotiable instrument may be shown by parol to be co-sureties.<sup>6</sup> In an action by one surety against another for contribution, parol evidence of the payment made by the plaintiff is admissible and sufficient, notwithstanding it was made upon an execution, which is not produced, issued on a judgment against the principal and sureties.<sup>7</sup> Parol evidence is admissible to show the intention of the parties to a note, and they will be held liable according to their intention.<sup>8</sup> Thus, where it appeared on the face of a note that certain persons thereon were sureties, it was held in an action for contribution that parol evidence was admissible to show that they were really principals or joint makers.<sup>9</sup>

**§ 288. Surety who becomes bound during course of remedy against principal not co-surety with original surety.**—A surety

Vt. 400; *Bobbitt v. Shryer*, 70 Ind. 513, 516. See, also, to this point, *Fernald v. Dawley*, 26 Me. 470; *Crosby v. Wyatt*, 23 Me. 156.

<sup>4</sup> *Anderson v. Pearson*, 2 Bailey, Law (S. C.) 107.

<sup>5</sup> *Harshman v. Armstrong*, 43 Ind. 126.

<sup>6</sup> *Clapp v. Rice*, 13 Gray 403; *Smith v. Morrill*, 54 Me. 48. So, parol evidence is admissible in a contest between so-called indorsers, who are in reality sureties, to show

their actual relation to one another. *Camp v. Simmons*, 62 Ga. 73.

<sup>7</sup> *Hayden v. Rice*, 18 Vt. 353.

<sup>8</sup> *Thompson v. Taylor*, 12 R. L. 109. And where a note does not conclusively show the relation between the parties thereto, parol evidence is admissible to show it. *Klepper v. Borchsenius*, 13 Bradw. (Ill. App.) 318.

<sup>9</sup> *Williams v. Glenn*, 92 N. C. 253; *Mansfield v. Edwards*, 136 Mass. 15.



who becomes bound for a debt during the course of legal proceedings against the principal for the collection of the same is not a co-surety with the original surety for the debt, nor entitled to contribution from him; and if such original surety afterwards has to pay the debt, he is entitled to subrogation to the creditor's rights against such subsequent surety, and may collect the whole amount that he has paid from such subsequent surety.<sup>10</sup> Where a judgment was recovered against principal and surety, and the principal alone appealed, giving a different surety on the appeal bond, and the judgment was affirmed, and was paid by the surety in the appeal bond, it was held that he could not recover contribution from the original surety.<sup>11</sup> Judgment was rendered against A and B in the county court, and they appealed to the circuit court, giving C as surety on the appeal bond. Judgment was rendered against all three of them in the circuit court, and they all appealed to the supreme court, and gave an appeal bond as principals, with D as their surety. The judgment was affirmed in the supreme court, and was paid by C. Held, C could not recover contribution from D.<sup>12</sup> If, after separate judgments are obtained against principal and surety, a third person interposes and gives his note for the debt to obtain a stay of execution, and judgment is obtained on the note, and then the first surety is obliged to pay the debt, he is entitled to have an assignment of the judgment on the note of such third

<sup>10</sup> Where a judgment against a principal and surety has been appealed by the principal alone, giving a different surety on the appeal bond, and the original surety pays the judgment, he is equitably entitled to be subrogated to the rights of the judgment creditor against the surety on the appeal bond. *Friberg v. Donovan*, 23 Ill. App. 58.

<sup>11</sup> *Chaffin v. Campbell*, 4 Sneed (Tenn.) 184. On the other hand, if the original surety paid the judgment he would be subrogated to the rights of the judgment creditor against the surety on the appeal bond. *Friberg v. Donovan*, 23 Ill. App. 58.

<sup>12</sup> *Cowan v. Duncan*, Meigs (Tenn.) 470. To a similar effect, in the case of sureties on a supersedeas and stay bond, see *Smith's Ex'rs v. Anderson*, 18 Md. 520; *Kellar v. Williams*, 10 Bush (Ky.) 216. Where a surety, against whom judgment was rendered, failed to object to a stay of execution taken by the principal, it was presumed that he consented thereto; and in that case the surety on the stay bond, as between him and the original surety, was held not chargeable with primary liability to pay the judgment. *Chase v. Welty*, 57 Iowa 230.

person, to indemnify him for such payment. The surety is entitled to subrogation to every security which the creditor obtains for the payment of the debt. The second "surety stipulating at the instance of the principal to pay the debt suffers no absolute injustice in being obliged to do so, since he is compelled to perform no more than he undertook, and has no right to complain that he is not allowed to use as payment by himself the money which proceeds from another person whom his principal was previously bound to save harmless.

\* \* It is sufficient that it is settled that if the interposition of the second surety may have been the means of involving the first in the ultimate liability to pay, the equity of the first surety decidedly preponderates."<sup>13</sup> An execution was issued against a principal and sureties, and the principal alone obtained an injunction to stay the judgment, and gave an injunction bond with a different surety. The surety in the injunction bond having been compelled to pay the judgment, it was held that he could not recover contribution from the original sureties. Without their solicitation he had prolonged their liability, by preventing the money being made out of their principal, as it would have been but for his interference. To make them contribute would be grossly inequitable.<sup>14</sup> Judgment was recovered against a principal and sureties, and execution was levied on the property of one of the sureties, who executed a forthcoming bond with another of the sureties (whose property had not been levied on) as his surety in the forthcoming bond, and the bond was forfeited. The surety in the forthcoming bond paid the debt, and it was held that he was entitled to contribution from all the sureties for the debt.<sup>15</sup> It has been held that where a judgment is recovered against one surety, the suing out a writ of error to the supreme court by him, and giving bond for its prosecution, does not destroy his right to contribution from a co-surety bound within him for the debt on which the judgment was recovered.<sup>16</sup> Where

<sup>13</sup> *Pott v. Nathans*, 1 Watts & Serg. (Pa.) 155, per Sargent, J.; see *Mitchell v. De Witt*, 25 Tex. (Supplement) 180.

*Clay v. Schnitzell*, 5 Phila. (Pa.) 441; *Schnitzell's Appeal*, 49 Pa. St. 23. And see *Wolff v. Stover*, 107 Pa. St. 206. Holding the same thing in the case of an original surety and a surety on an appeal bond, <sup>14</sup> *Brandenburg v. Flynn's Ex'r*, 12 B. Mon. (Ky.) 397; *Bohannon v. Combs*, 12 B. Mon. (Ky.) 563.

<sup>15</sup> *Preston v. Preston*, 4 Gratt, (Va.) 88.

<sup>16</sup> *John v. Jones*, 16 Ala. 454.

successive securities for a debt have been given in judicial proceedings at the request of the debtor alone, to enable him to prolong litigation, it is held that, as between themselves, the sureties will be liable to exoneration in the inverse order of their undertaking.<sup>17</sup>

**§ 289. Contribution cannot be recovered when it would be inequitable.**—As the right to contribution between co-sureties is founded on equitable principles, contribution will not be enforced between them when it would be inequitable. Thus, two parties, A and B, were sureties of C. On one occasion, when some of C's land was being sold, he endeavored to stifle competition at the sale, and the land was sold to B for more than as much less than it was worth as A and B were liable for as sureties. Afterwards B had the debt to pay, and in a suit by him for contribution it was held that he either bought and held the land for C, or bought it for himself by C's efforts, at enough less than it was worth to indemnify him, and he was not entitled to contribution from A. The court said: "The right to contribution amongst sureties rests not in contract, but in natural equity. \* \* If a party base his right to recover upon principles of natural equity, the defendant may appeal to the same principles in his defense."<sup>18</sup> A, B and C were sureties for D in a bond, and judgment was recovered against A, B and D, but not against C. Execution was sued out and levied on the property of D, who gave a forthcoming bond, in which A, B and a third party joined as sureties. Execution was awarded on the forthcoming bond, and levied on the property of A. Held, he could not recover contribution from C. The money would have been made from the property of the principal if the last bond had not been given, and it was inequitable that C should suffer by the giving of such bond.<sup>19</sup> So, where A, B and C were co-sureties, and judgment was recovered against them all, and execution was levied on property of A, who gave a forthcoming bond, with B as surety, and this bond was forfeited and the property lost, and A became insolvent, and B paid the debt, it was held that

<sup>17</sup> *Chrisman v. Jones*, 34 Ark. 73. *Miller*, 66 N. Y. 255; *Glasscock v.*

<sup>18</sup> *Dennis v. Gillespie*, 24 Miss. Hamilton, 62 Tex. 143.

581, per Fisher, J. For special <sup>19</sup> *Langford's Ex'r v. Perrin*, 5 cases on this subject, see *McGehee Leigh* (Va.) 552.

*v. McGehee*, 12 Ala. 83; *Wells v.*

B could only recover from C, as contribution, one-third of the amount paid by him, instead of one-half, which he would otherwise have been entitled to recover.<sup>20</sup> Where property is conveyed to a trustee, to indemnify a surety for various indorsements, and by agreement between the principal and surety the property is sold in a certain way, and in consideration thereof the surety agrees to pay all the debts of the principal for which he is bound as surety, and does pay a debt contemplated by the agreement on which there is a co-surety, he cannot recover contribution from such co-surety.<sup>21</sup>

**§ 290. When surety, who becomes liable at the request of another surety, not liable to contribution.**—If one surety, in order to induce another to become bound as surety, agrees to indemnify him from all loss which he may suffer in consequence thereof, such an agreement is valid and will be enforced.<sup>22</sup> The weight of authority is, also, that if one surety becomes bound at and solely because of the request of another surety, even though there be no express agreement on the part of the latter to indemnify the former, yet the surety making the request, if he is compelled to pay the debt, cannot recover contribution from the surety who signed in consequence of such request. With reference to this it has been said: “Where one has been induced to become surety at the instance of the other, though he thereby renders himself liable to the person to whom the security is given, there is no pretense for saying that he shall be liable to be called upon by the person at whose request he entered into the security.”<sup>23</sup> If the jury finds that a surety became bound, in fact, at the principal’s request, although another surety also asked him, it has been held that he is liable for contribution to the surety who joins with the principal in making the request.<sup>24</sup> It has also been held that the mere fact that one surety became such

<sup>20</sup> Preston v. Preston, 4 Gratt. (Va.) 88.

<sup>21</sup> John v. Jones, 16 Ala. 454.

<sup>22</sup> Jones v. Letcher, 13 B. Mon. (Ky.) 363. In an action between two co-sureties for contribution defendant may show by parol that plaintiff agreed, for a consideration, to save him harmless and that agreement if proven is a sufficient

defense: Bronson v. Marsh, Mich., June, 1902, 90 N. W. Rep. 686.

<sup>23</sup> Turner v. Davies, 2 Esp. 478, per Lord Kenyon; Cutter v. Emery, 37 N. H. 567; Byers v. McClanahan, 6 Gill & Johns. (Md.) 250; Danel v. Ballard, 2 Dana (Ky.), 296.

<sup>24</sup> Hendricks v. Whittemore, 105 Mass. 23, at 25, 31.

at the request of another did not release the former from liability to contribute to the latter. This was in one case put on the ground that there was an implied contract between co-sureties to contribute, and a simple request by one to the other to become surety was not sufficient to rebut the presumption of such implied contract.<sup>25</sup> As already seen, the right to contribution results from equitable principles, and contribution will not, in the absence of express contract, be enforced contrary to equity. It may well be said that it would be inequitable to compel the party who became bound at the request of another, to contribute to that other, if a loss is sustained in consequence of the assumption of such liability.

**§ 291. Surety of surety not liable to contribution.**—The surety of a surety is not generally liable to contribution at the suit of the party for whom he is surety. Thus, the plaintiff signed a note as surety, upon the erroneous supposition, springing from the deceit and falsehood of the principal, and in no way imputable to the defendants, that the defendants would sign as co-sureties with him. Afterwards the defendants, in good faith and without any knowledge of what the plaintiff supposed as to their signing, signed the note, upon the distinct understanding with the principal and the payee that they signed as sureties for the plaintiff and other previous signers, and not as co-sureties with the plaintiff. Held, they did not thereby become co-sureties with the plaintiff, nor were they liable to him for contribution.<sup>26</sup> Where, after certain sureties had signed a note, another signed it, and added to his name the words “security to above,” it was held that the first sureties could not recover contribution from the latter unless it was made satisfactorily to appear that he intended to become co-surety with them.<sup>27</sup> A being indebted, and the cred-

<sup>25</sup> Bagott v. Mullen, 32 Ind. 332; McKee v. Campbell, 27 Mich. 497. To similar effect, see Burnett v. Millsapps, 59 Miss. 333. And money already paid, but whatever he might be liable to pay on account of his suretyship. Hayden v. Thrasher, 18 Fla. 795.

where a surety became such at the request of a co-surety, who agreed to indemnify and save him harmless, it was held that he might, after the money became due, maintain a bill in equity to compel the co-surety to pay the debt not only as to <sup>26</sup> Adams v. Flanagan, 36 Vt. 400. See, also, Baldwin v. Fleming, 90 Ind. 177.

<sup>27</sup> Thompson v. Sanders, 4 Dev. & Bat. Law (N. C.), 404. See, also, Sherman v. Black, 49 Vt. 198; Oldham v. Broom, 28 Ohio St. 41;

itor pressing for payment, an application was made by B to a bank, which advanced the money on two bonds, one of which was signed by A as principal and C as surety. The other bond recited the first one, and the advance of the money to A and C at the request of B, and was conditioned to be void if A and C, or either of them, paid the first bond. It was understood by parol between B and the bank that he was not to be liable unless both A and C failed to pay, and that he was not a co-surety with either of them. Held, that C upon paying the debt could not recover contribution from B. The court said that B "might limit his engagement with reference to them as he thought proper, and the bond upon the face of it makes him surety only for the principal and the other surety."<sup>28</sup> Where A, the surety in an undertaking for the discharge of an attachment, became fixed by a judgment against his principal and united with him in an undertaking for a supersedeas, and an additional surety was required in the latter undertaking, which the principal with the assent of A procured, and B became such surety, it was held that no right of contribution arose in favor of A against B in case A had to pay the debt.<sup>29</sup>

**§ 292. Surety who becomes principal liable for whole amount paid by former co-surety—Other cases.**—When one of several sureties afterwards assumes the character of a principal he becomes liable to the other sureties as principal for the whole amount paid by them. Thus, R, having contracted to erect a building, assigned his contract to C, who then executed to him a bond with M, G and others as sureties, conditioned to pay R for stone already quarried for the building. Afterwards, with the knowledge and consent of the sureties, C assigned the building contract to M, with a condition that M should perform all the undertakings and assume all risks and liabilities imposed upon C as assignee of the contract. M accepted the assignment, performed the work and received the benefits of the building contract, but failed to pay for the

Baldwin v. Fleming, 90 Ind. 177; v. —, Freeman's Ch. 97. And Bobbitt v. Shryer, 70 Ind. 513. see Chapeze v. Young, 87 Ky. 476.

<sup>28</sup> Craythorne v. Swinburne, 14 Vesey, 160, per Lord Eldon, C. To the effect that a surety of a surety is liable to contribution, see Cooke v. Vallandingham, 13 Smedes & Mar. (Miss.) 526. <sup>29</sup> Hartwell v. Smith, 15 Ohio St. 200. To similar effect, see Knox



stone. G having been compelled to pay the sum due for the stone, it was held that he was entitled to recover from M, as principal, the full amount paid by him.<sup>30</sup> A, being desirous of borrowing \$50 at a bank, applied to B and C to be his sureties, when it was agreed between A and B, in the presence of C, that \$100 should be borrowed, and that B should have half the sum. A note for \$100 was signed by the three and discounted at the bank. B received one-half the money and gave A his note for it. C having paid the note, it was held that he had a right to recover from B, as principal, the whole sum so paid.<sup>31</sup> A promissory note, by its terms payable at a bank, was signed by principal and surety with the expectation that it would be discounted at the bank. The bank refused to discount the note unless the creditor signed the note on its face as a maker. He did this under an express understanding with the bank that he was not thereby to become a co-surety with the other parties, but the surety of all of them. He had to pay the note, and it was held that he could recover the whole amount from the surety.<sup>32</sup> A became surety for B and C, partners in trade, upon their note payable to D for \$2,000, and B conveyed to A certain of his property for indemnity. Shortly afterwards B bought out all C's interest in the business, and agreed to pay all the partnership debts. B became insolvent and did not pay the note, and judgment on the same was obtained against C, who paid it, and A conveyed to C two thousand dollars' worth of the property conveyed by B to him for his indemnity. Held, that this last conveyance might lawfully be made, and could not be impeached by a judgment creditor of B.<sup>33</sup> The owner of imported goods consigned them to a commission merchant for sale, who entered them at the custom-house, giving his bond for the import duties, upon which bond the owner and another became sureties, and the consignee immediately charged the owner with the amount of the duties, and afterwards failed before the bond became due. The owner paid the money due on the bond, and it was held he could recover contribution from the

<sup>30</sup> Gray v. McDonald, 19 Wis. 213. On this subject see, also, Ragland v. Milam, 10 Ala. 618.

<sup>31</sup> Jones v. Fitz, 5 N. H. 444. To

similar effect, see McPherson v. Talbott, 10 Gill & Johns. (Md.) 499.

<sup>32</sup> Bowser v. Rendell, 31 Ind. 128.

<sup>33</sup> Butler v. Birkey, 13 Ohio St. 514.



other surety in the bond. The court said that, on account of the nature of the transaction, the debt was that of the consignee, and the owner and the other surety were co-sureties.<sup>34</sup> Three parties contracted for the purchase of land, which was to be conveyed to them in three equal shares. They gave for the purchase money three joint notes for equal amounts, signed by them all. Held, each one was principal for one-third of each note, and co-surety of the others for two-thirds of each, and their rights and liabilities must be determined on that basis.<sup>35</sup>

**§ 293. Surety who pays debt for which principal or another surety is not liable cannot have contribution.**—As a general rule, one surety cannot recover contribution from another when the debt paid by the surety seeking contribution was either not binding on the principal or not binding on the other surety. Thus, a surety who, knowing all the facts, pays a note which is void for usury, cannot recover contribution from a co-surety on the note. A surety ordinarily has no greater rights against a co-surety than the creditor has against them both; and in such case the creditor has no lawful claim against any of them.<sup>36</sup> But if the surety paying a note tainted with usury had at the time of such payment no knowledge of the usury, he may recover contribution from a co-surety.<sup>37</sup> Where one surety on an official bond was sued at law, and a judg-

<sup>34</sup> Taylor v. Savage, 12 Mass. 98.

<sup>35</sup> Goodall v. Wentworth, 20 Me. 322.

<sup>36</sup> Russell v. Failor, 1 Ohio St. 327; Briggs v. Hinton, 14 B. J. Lea (Tenn.) 233. There must have been a legal obligation on the surety to pay, against whom judgment and execution could have been obtained. Stockmeyer v. Oertling, 35 La. Ann. 467; Skrainka v. Rohan, 18 Mo. App. 340. In Halsey v. Murray, 112 Ala. 185, 20 So. Rep. 575, a judgment having been recovered against a firm which could be enforced only against firm property, (p. 196), the individual partners, unnecessarily, obtained an injunction to prevent a levy on their individual property, and when the

injunction was dissolved one of the sureties on the injunction bond paid the judgment and filed his bill for contribution. It was held that the injunction bond did not render the parties thereto liable as individuals for the judgment against the firm. The injunction did not restrain the creditors from levying on firm assets—the only thing that he could levy on in any event. And when the surety paid the judgment he paid what he was under no obligation to pay, and therefore was not entitled to contribution, from his co-sureties. See § 275.

<sup>37</sup> Warner v. Morrison, 3 Allen, 566; Polhill v. Brown, 84 Ga. 339, 10 S. E. Rep. 921.

ment recovered against him for a demand for which he was not liable as surety, it was held he could not call on his co-surety for contribution. The court said that the surety who pays "takes the place of the original creditor, and may be resisted on the same principles, and in the same way."<sup>38</sup> Two co-sureties were sued jointly, and judgment was rendered in favor of them both. The creditor appealed to the supreme court from the judgment in favor of one of them, and such judgment was as to such surety reversed, and judgment in the supreme court was rendered against such surety for a large amount, which he paid. Held, he could not recover contribution from the other surety. The judgment which as to him remained in force in the court below established the fact that he was not liable to the creditor, and consequently not liable for contribution.<sup>39</sup> It has been held that a surety who pays a debt, after he might have defeated it by pleading the statute of limitations, can recover contribution from a co-surety on the ground that the surety who paid was under no obligation, legal or equitable, to defeat a just claim by such a plea.<sup>40</sup> A surety paid the debt of a deceased principal after the claim against his estate had been barred by the statute of non-claim, and it was held he was entitled to contribution from a co-surety. The debt, although barred as against the estate of the principal, was not barred as against the surety who paid it, and he was liable for it when he made the payment.<sup>41</sup> Where a surety pays a note which he could have defeated because of an alteration therein made without his consent, it is held that he may compel contribution from co-sureties who subsequently sign.<sup>42</sup> But where a surety pays a balance due upon a bond with knowledge of the existence of a covenant on the part of the obligee to a co-surety not to sue him, he will not be entitled to contribution.<sup>43</sup>

**§ 294. When one surety entitled to benefit of indemnity secured by another surety.**—If one of several sureties after all

<sup>38</sup> *Lowndes v. Pinckney*, 1 Rich. Eq. (S. C.) 155, per Dunkin, C. in *Cocke v. Hoffman*, 5 B. J. Lea (Tenn.) 105, and *Eberhardt v.*

<sup>39</sup> *Ledoux v. Durrive*, 10 La. Ann. 7. *Wood*, 6 B. J. Lea (Tenn.) 467.

<sup>41</sup> *Evans v. Evans*, 16 Ala. 465.

<sup>40</sup> *Jones v. Blanton*, 6 Ired. Eq. (N. C.) 115. And to same effect, <sup>42</sup> *Houck v. Graham*, 106 Ind. 195.

see *Bright v. Lennon*, 83 N. C. 183. <sup>43</sup> *Craven v. Freeman*, 82 N. C. 361. Compare *McChesney v. Bell*, 59 Ill. App. 84, note 31 to § 251. But see precisely the opposite, held

have signed, and before the debt has been paid, and without any agreement to that effect before he became liable,<sup>44</sup> obtains from the principal anything for his indemnity, such indemnity inures to the benefit of all the sureties, and the surety obtaining it immediately becomes the trustee of it for the benefit of all the sureties, even though he obtained it by his own exertions and it was intended for his sole benefit.<sup>45</sup> In such case, as all the sureties are alike liable for a common principal, it will be presumed that the surety taking the indemnity takes it for the benefit of all the sureties, or if he does not, then his taking from the effects of the common principal for his sole benefit is a fraud on the other sureties, and he will not be permitted to have the benefit of the indemnity alone, but must share it with the others. Where, after two sureties became bound, one received indemnity from the principal, with which

<sup>44</sup> In *Niece v. Rogers*, 14 Ohio Circuit Court, 646 at 651, Parker, J., quoting the text, said that it does not matter whether the surety's agreement for indemnity was made before or after he became liable as surety; the rule as to contribution is the same in either case, provided the indemnity is furnished out of the principal's property and is not consented to by the other sureties. Citing *Cannon v. Connoway*, 5 Del. Chan. 559.

<sup>45</sup> *Seibert v. Thompson*, 8 Kan. 65; *Steele v. Mealing*, 24 Ala. 285; *Miller v. Sawyer*, 30 Vt. 412; *McLewis v. Fergerson*, 5 The Reporter, 330; *McCune v. Belt*, 45 Mo. 174; *Hartwell v. Whitman*, 36 Ala. 712; *Smith v. Conrad*, 15 La. Ann. 579; *Hinsdill v. Murray*, 6 Vt. 136; *Leary v. Cheshire*, 3 Jones' Eq. (N. C.) 170; *Low v. Smart*, 5 N. H. 353; *Gregory v. Murrell*, 2 Ired. Eq. (N. C.) 233; *Hall v. Robinson*, 8 Ired. Law (N. C.) 56; *Fagan v. Jacocks*, 4 Dev. Law (N. C.) 263; *Steel v. Dixon*, Law Rep. (17 Ch. Div.) 825; *Reinhart v. Johnson*, 62 Iowa, 155; *Sanders v. Weelburg*, 107 Ind. 266; *McGhee v. Owen*, 61

Ala. 440; *Munden v. Bailey*, 70 Ala. 63; *Tolle, Ex'x, v. Boeckeler*, 12 Mo. App. 54; *Cannon v. Connoway*, 5 Del. Ch. 559; *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. Rep. 381. In *Meyers v. Campbell*, 59 N. J. Law, 378, 35 Atl. Rep. 788, the owner of land mortgaged it to secure an accommodation indorser of his notes. Held, that the mortgage inured to the benefit of the creditor and that therefore the owner of the land, for purposes of taxation, was entitled to have the amount of the indebtedness deducted from the assessed valuation of his property. To a contrary effect, see *Thompson v. Adams*, 1 Freeman's Ch. (Miss.) 225; *Cooper v. Martin*, 1 Dana (Ky.) 23; *Hall v. Cushman*, 16 N. H. 462. Sureties who become such after the liability of the original sureties is fixed, held not entitled to share in indemnity. *Hornsberger v. Yancy*, 33 Gratt. (Va.) 527. And it is held they are not entitled to share in such indemnity where they are liable on separate bonds for the same principal. *Somers v. Johnson*, 57 Vt. 274.

he paid more than one-half the debt, and the other surety paid the remainder, it was held the latter might recover from the former one-half the amount which he had paid.<sup>46</sup> It has also been held that the surety who has partial indemnity in his hands, and pays all the debt, can only recover from his co-surety one-half the sum which would remain after applying the amount of the indemnity on the sum paid.<sup>47</sup> A and B were co-sureties on a note for C, and B was indebted to C on a note of about the same amount. It was afterwards agreed between B and C that C should deliver to B his note, and that B should pay that amount of the note on which he and A were sureties, and B's note was delivered to him by C. Afterwards B and C made a different agreement with reference to the amount of B's note. B had to pay the note on which he and A were sureties, and sued A for contribution. Held, that when B received his own note from C, as above, he received it for the benefit of A as well as himself, and could not divert it from the purpose for which he received it, and he could only recover from A a pro rata share after deducting the amount of the note.<sup>48</sup> Where a surety, after he becomes bound and before he is damnified, takes a mortgage on property of the principal to indemnify himself, if there are several demands on which he is surety with different co-sureties, and the security is taken generally for his indemnity, it has been held that the indemnity shall be apportioned among all the demands pro rata.<sup>49</sup> Where a surety took from the principal a mortgage to secure a debt due from the principal to such surety and also to indemnify such surety against loss as such, and there was no provision in the mortgage as to which debt should be paid first, it was held that the proceeds of the mortgage should be applied

<sup>46</sup> *Agnew v. Bell*, 4 Watts (Pa.), 31.

<sup>47</sup> *Currier v. Fellows*, 27 N. H. 366.

<sup>48</sup> *Hall v. Robinson*, 8 Ired. Law (N. C.), 56. Holding that an indemnity placed in the hands of one surety for the benefit of all cannot be diverted from that purpose, *Hinsdill v. Murray*, 6 Vt. 136; *Hayes v. Davis*, 18 N. H. 600. Where money is deposited by the

principal with one of several sureties for the purpose of paying the principal's debt, the other sureties may maintain an action to compel their co-surety to so apply it, and if one surety has paid the principal's debt he may maintain his suit to compel the ratable division of such money among all the sureties: *Macdonald v. Whitfield*, 27 Can. Sup. Ct. 94 at 100.

<sup>49</sup> *Brown v. Ray*, 18 N. H. 102.

pro rata to the payment of the debt due from the principal to the surety, and to the payment of the debts for which the surety was liable as such with a co-surety.<sup>50</sup> But in a similar case it was held that the surety who took the indemnity might first pay from the proceeds the debt due him individually.<sup>51</sup> One of two sureties paid the debt and took an assignment of a mortgage given by the principal to secure the debt. He then foreclosed the mortgage (after first requesting his co-surety to pay one-half the debt and take an assignment of the mortgage jointly with him), and bid in the property for a nominal sum. In a suit by him against his co-surety for contribution, it was held that he was a trustee of the mortgaged premises for his co-surety and bound to account for their value at the time they were sold, and not at a subsequent time, and was entitled to commissions for his trouble.<sup>52</sup>

**§ 295. Instances of indemnity taken by one surety inuring to the benefit of all the sureties.**—To prevent circuitry of action and attain the ends of natural justice, equity will completely indemnify one of the sureties in a bond by means of a lien on the property of the principal existing in favor of another surety for the indemnity of such other surety, and for that purpose the court will compel the creditor (all the parties being before it) to resort to that property in the first place for the satisfaction of the debt.<sup>1</sup> Two sureties having become bound, the principal placed an indemnity in the hands of one of them, and he assumed to pay the debt, and, after having paid it in part, procured a third person to purchase the debt for his benefit. The assignee sued the debt in his own name and recovered a judgment against both sureties, and had an execution issued and levied on the property of the surety who had no indemnity. Held, equity would interfere and compel the payment of the debt by the indemnified surety, and restrain its collection from the other surety.<sup>2</sup> A principal gave a surety who was liable with a co-surety a mortgage for his indemnity, the mortgage stating the debts it was given to secure. The mortgagee afterwards had to pay as surety for his

<sup>50</sup> Moore v. Moberly, 7 B. Mon. (Ky.) 299.

<sup>1</sup> West v. Belches, 5 Munf. (Va.) 187.

<sup>51</sup> Brown v. Ray, 18 N. H. 102.

<sup>2</sup> Silvey v. Dowell, 53 Ill. 260.

<sup>52</sup> Livingston v. Van Rensselaer, 6 Wend. 63.

principal a certain sum for which he became liable after the making of the mortgage. . Held, the mortgagee must account to his co-surety for the mortgaged property, and could not retain anything from the proceeds thereof to indemnify himself from loss on account of the debt for which he subsequently became surety.<sup>3</sup> In order to indemnify his several sureties, a principal assigned to a trustee a claim to be collected for their benefit. Before this claim was collected the sureties were each compelled to pay an equal portion of the debt. One of the sureties (A) obtained judgment against the principal for the sum paid by him, on which the principal was arrested, and gave a prison bounds bond with sureties, which he forfeited, and the sureties thereon became liable. The assignee afterwards collected the claim for the benefit of the sureties. Held, that neither A nor the sureties in the prison bounds bond could come on the fund in the hands of the trustee till all the other sureties had been fully indemnified. A, having obtained another security, had two funds to look to, while the other sureties only had one; and he must first exhaust the one in which they were not interested. The sureties in the prison bounds bond were not in as good a position as A, because the effect of their act was to defeat the recovery of indemnity from the principal.<sup>4</sup> Complainants and defendants were bound as sureties for one S, to whom the defendant was indebted, and judgment was recovered against all the sureties, which they paid in equal proportions. S, as indemnity to the defendant for the sum paid by him, caused the notes which he held against the defendant to be surrendered to him. Held, the complainants were entitled to contribution from the defendant, and that the amount of the notes so surrendered to the defendant should be accounted for by him to his co-sureties.<sup>5</sup> Two co-sureties were offered security by their principal upon condition that they should execute a release to him, which offer was accepted by one and rejected by the other. The party accepting the security realized from it more than enough to pay half the common debt, and applied the proceeds to the payment thereof. The surety refusing to accept the security was forced to pay the portion of the debt still due, and sued

<sup>3</sup> Steele v. Mealing, 24 Ala. 285.      <sup>5</sup> Tyus v. De Jarnette, 26 Ala.

<sup>4</sup> Givens v. Nelson, 10 Leigh (Va.) 280.



his co-surety for contribution. Held, he was not entitled to recover. The court said contribution would not be enforced when it would be inequitable, and it would be inequitable to enforce it in this case.<sup>6</sup>

**§ 296. Same continued—Cases where indemnity to one surety does not inure to benefit of co-sureties.**—A mortgage executed to one or more of several sureties on an official bond is held to inure not only to the benefit of all who were sureties on such bond at the date of the mortgage, but to all who subsequently may become such; as, for example, under an order of court requiring additional sureties in pursuance of law.<sup>7</sup> It is held no defense to a surety when sued for his principal's debt that his co-surety had secured indemnity from his principal solely for himself, as such indemnity inures to the benefit of all, and the surety so holding it does so as trustee and for the joint benefit of his co-sureties.<sup>8</sup> In an action for contribution where the co-surety for his indemnity had received property which he turned into money and applied in part payment of the debt, it was held that the money so applied must be considered as a payment made by the principal, and the co-surety was liable for an aliquot portion of the balance.<sup>9</sup> Where accommodation indorsers of a promissory note each paid one-half the balance due the discounting bank on the same, and at the request of the maker his wife assigned part of a certain judgment which she held against him to one of the sureties for his individual indemnity, the maker joining in the assignment, it was held that the co-surety was entitled to share equally in the indemnity.<sup>10</sup> But where the principal's wife mortgaged her separate real estate for the exclusive use and benefit of one of her husband's sureties, it was held that such mortgage did not inure to the benefit of the co-sureties.<sup>11</sup> The

<sup>6</sup> White v. Banks, 21 Ala. 705.

<sup>7</sup> Farmers' Bank v. Teeters, 31 Ohio St. 36. Compare note 12, § 296.

<sup>8</sup> Glasscock v. Hamilton, 62 Tex. 143.

<sup>9</sup> Wolcott v. Hagerman, 50 N. J. Law, 289.

<sup>10</sup> Shaeffer v. Clendenin, 100 Pa. St. 565.

<sup>11</sup> Leggett v. McClelland, 39 Ohio St. 624; Taylor v. Farmers' Bank

of Kentucky, 87 Ky. 398, 9 S. W. Rep. 240; Osborn v. Noble, 46 Miss. 449, a well considered case; Ohio Life Ins. Co. v. Reeder, 18 Ohio 35, 46. Compare Magoffin v. Boyle Natl. Bank, Ky., Sept., 1902, 69 S. W. Rep. 702, per Hobson, J., in which case the wife's mortgage was to secure the debt as well as to indemnify the surety, and it was held that the creditor might have recourse to the mortgaged



court said that the rule entitling co-sureties to share in indemnity given to one surety from the principal did not apply where such indemnity was furnished by a stranger. And it is held, also, that such rule does not extend to the benefit of sureties upon another separate and distinct bond or obligation made by the principal. Thus, where a county treasurer executed two official bonds, one the general official bond, and the other to secure school funds, and he executed a mortgage to the sureties upon his general bond, it was held that such security did not inure to the benefit of the sureties upon the bond for the school funds.<sup>12</sup> Where the principal procures a third party to agree to indemnify one of several sureties against personal loss, the authorities differ as to whether or not the indemnified surety may be compelled to share such indemnity with the remaining sureties. The conflicting cases are cited in a note.<sup>13</sup> The better opinion would seem to be that the

property, although the surety having been discharged in bankruptcy, could suffer no loss. *Black v. Kaiser*, 91 Ky. 427, 16 S. W. Rep. 89. Compare note 13, § 296.

<sup>12</sup> *Lacy v. Rollins*, 74 Tex. 566.

<sup>13</sup> In *American Surety Co. v. Boyle* (1902), 65 Ohio St. 486, 63 N. E. Rep. 73, *McCurdy*, one of five sureties on a replevin bond, got the plaintiff in replevin to give him an indemnity bond with the plaintiff in replevin as principal and the American Surety Company as surety conditioned to save him harmless from loss or damage arising out of his having become one of the sureties on the replevin bond. Judgment having been rendered against the obligors on the replevin bond for about \$25,000, the surety company paid *McCurdy's* share, one-fifth, whereupon *Boyle*, another of the sureties, brought suit and recovered judgment against the surety company for one-fifth of the amount which the surety company had paid in behalf of *McCurdy*. Upon appeal this judgment was re-

versed. "The surety who receives indemnity from the property of the principal," said the court, "is treated as a trustee for his co-sureties either because of the presumption that he obtained it for the equal benefit of all, or because the diminution of the property of the principal, and the consequent diminution of his ability to discharge his primary obligation, would operate as a fraud upon the co-sureties if the special indemnity is obtained without their consent. On the other hand, the surety who obtains special indemnity from a stranger to the obligation is not charged as a trustee for his co-sureties because no injury is done them, the ability of the principal to discharge his primary obligation not being diminished. The right of a surety to procure indemnity for his sole benefit is, therefore, restricted only by the requirement that it must not be obtained to the prejudice of his co-sureties." Upon substantially the same facts a contrary ruling was made in *Gibson v.*

indemnified surety, under such circumstances, is not liable for contribution unless to the extent of the expenditure made by the principal in procuring such indemnity.<sup>14</sup> Where one of several co-sureties has paid only his own proportionate share of the principal's debt, leaving the rest wholly unpaid and unsettled, it seems needless to say that he has no right to call upon his co-sureties for contribution.<sup>15</sup> It is equally clear that

Sheehan (1895), 5 App. Cas. (D. C.) 391, 28 L. R. A. 400, in which case the American Surety Company, as surety in a like bond of indemnity to one of three sureties on an official bond, paid the whole of a judgment that had been obtained upon the official bond and took an assignment from the surety for whom it was indemnitor, of his right of contribution from his co-sureties, and it was held that it was not entitled to contribution. The Ohio Court, in the case cited, says of *Gibson v. Sheehan*, that "it applies a general rule to a case which is not comprehended by it, because not within its reason." In each case the premium for the indemnity bond was paid by the principal and in each case none of the other sureties was informed of the indemnity. The Ohio court intimated, but did not decide, that there might be contribution to the extent of the sum paid by the principal for premium. For applications of the principle announced in the Ohio case to other facts see *Michael v. Prussian Natl. Ins. Co.*, N. Y., 1902, 63 N. E. Rep. 810, affirming 71 N. Y. Supp. 918. and *Embler v. Hartford Steam Boiler Inspection and Insurance Co.*, 44 L. R. A. 512, 158 N. Y. 431, 53 N. E. Rep. 212. To the effect that there is not only no contribution, but also no subrogation of the creditor to the rights of the surety as against a

stranger to the debt who has agreed to indemnify him against individual loss by reason of his becoming such surety, see the interesting case of *Henderson-Achert Lithographic Co. v. John Shillito Co.* (Ohio), 60 N. E. Rep. 295 at 298, and cases there cited.

<sup>14</sup> *American Surety Co. v. Boyle*, 65 Ohio St. 486, 63 N. E. Rep. 73, *supra*.

<sup>15</sup> In *Pegram v. Riley*, 88 Ala. 399, 6 So. Rep. 753, *Riley*, Cottrill and two others in 1872 became sureties on the bond of Hall as administrator. In 1889, Hall having been decreed to be in default \$8,246.64 as administrator, suit was brought against the estate of Cottrill, which compromised by paying half that sum and assigning to the creditor all right of contribution against the estate of Riley, the other two sureties having died insolvent. Held, on bill filed by the creditor to enforce contribution from Riley's estate, that Cottrill's estate had paid only the share that it was bound to pay and that no right to enforce contribution arose. The court said: "If Cottrill's executors had discharged the entire liability to all the sureties, though by payment of one-half or less of the decree, they would have been entitled to contribution from Riley's estate—*Stallworth v. Preslar*, 34 Ala. 505. But by the composition, the estate of Cottrill obtained a release and discharge by payment of

he has no right to contribution though he has paid the whole of the principal's debt when he has made himself whole out of collateral.<sup>16</sup> The fact that one of several co-sureties holds indemnity for the benefit of all is no defence to a suit at law for reimbursement brought against the principal by the others after they have paid the principal's debt.<sup>17</sup>

**§ 297. If surety surrender lien for his indemnity on property of principal he discharges co-surety from contribution.**— If after several sureties become liable, and before the debt is paid, one of the sureties, not having stipulated for the same before he became bound, obtains a mortgage or other lien on property of the principal for his indemnity, such lien inures to the benefit of his co-sureties, and if it is afterwards lost by his positive act,<sup>18</sup> his co-sureties will be discharged from liability to contribute to him to the extent that they are injured; and a defense founded on such facts may be made both at law and in equity.<sup>19</sup> In a case in which it was held that a

only one-half of the decree, and stipulated that the same should be only a credit thereon, and that complainant might reserve the right to proceed against the other sureties. The other sureties being insolvent, one-half was Cottrill's equitable share. Not having paid more than the amount for which he was absolutely liable, his estate is not entitled to contribution, unless there are circumstances which take the case out of the general rule."

<sup>16</sup> One of two sureties who has settled the principal's debt cannot maintain an action against his co-surety if he has already realized enough from the proceeds of collateral placed in his hands by the principal to repay the amount expended by him in making such settlement: *Cornett v. Holcomb*, 23 Ky. Law Rep. 34, 62 S. W. Rep. 477.

<sup>17</sup> In *Conley v. Buck*, 100 Ga. 188, 28 S. E. Rep. 97, one of several sureties on a bond given by de-

fendant in a bail-trover suit took a mortgage from his principal to indemnify him and subsequently recovered the full amount that he had been compelled to pay as such surety. Held, that another surety was not thereby estopped from recovering from the principal money which he had been compelled to pay although the mortgage contained a stipulation that the mortgagee might under certain circumstances take possession of the mortgaged property "for the benefit and security of himself and co-sureties on said bond."

<sup>18</sup> That the surety may make a valid release of property put up by the principal for indemnity at any time before a bill is filed to subject it to the demand of the creditor or of a co-surety, see *Poole v. Rowe*, 24 Colo. 475, 52 Pac. Rep. 741, cited more fully in note 45 to § 278, *supra*.

<sup>19</sup> *Paulin v. Kaighn*, 5 Dutch. (N. J.) 480, overruling *Paulin v. Kaighn*, 3 Dutch. (N. J.) 503;

surety cannot recover contribution from a co-surety whose right to subrogation to a judgment against the principal he has rendered unavailable, the court said: "A co-surety has, of course, the same responsibility for keeping alive securities in favor of his co-surety, from whom he claims contribution, as a creditor has in behalf of sureties."<sup>20</sup> A and B were co-sureties on the bond of an administrator, and, being sued on the same by the next of kin, compromised the suit by each paying \$1,100 under the advice of counsel, from an honest belief that both were liable in a larger amount on account of a devastavit and the insolvency of the principal. It was afterwards discovered that B, who had administered on the estate of the principal, had, by a misapprehension of law, but honestly and under advice of counsel, given up assets of their principal for the payment of another claim, which, if they had been held by him, would have saved them both from loss on account of their suretyship. Held, A could not sustain a bill to throw the whole loss on B, it not appearing that B had concealed the fact of having parted with the assets, or had been guilty of any fraud or imposition.<sup>21</sup> A surety does not release his co-surety from contribution by the fact that after he has paid the debt he surrenders to the principal certain notes which the principal had deposited with him to secure another debt, and which it was expressly agreed should be delivered up as soon as the latter debt was paid. In such case no lien in which the co-surety is interested is lost.<sup>22</sup> After A and B became co-sureties, the principal put into A's hands, for his indemnity, certain notes of a third person. A inquired about the notes, and was informed that they would soon be paid, and they were soon after paid; but before that time A returned them to the principal upon the principal's giving him a satisfactory bond of indemnity. A, having paid the debt, sued B for contribution. Held, that A was the trustee of the notes for B as well as himself; but as there was no evidence that the bond

Ramsey v. Lewis, 30 Barb. (N. Y.) 403; Taylor v. Morrison, 26 Ala. 728. Holding that where the debt is paid by one surety he does not thereby obtain any right to a collateral security for the same debt put up by another surety, see Bowditch v. Green, 3 Met. (Mass.) 360.

<sup>20</sup> Fielding v. Waterhouse, 8 Jones & Spencer (N. Y.), 424, per Sedgwick, J.

<sup>21</sup> Brandon v. Medley, 1 Jones' Eq. (N. C.) 313.

<sup>22</sup> Higgins v. Morrison's Ex'r, 4 Dana (Ky.), 100.

was not as good as the notes, nor that A had failed to act with ordinary prudence, B could not complain, and was not discharged from contribution.<sup>23</sup> Where a surety failed to enforce an indemnity held by him, it was held that he could not call upon his co-surety for contribution.<sup>24</sup>

**§ 298. If surety negligently lose indemnity, co-surety released from contribution.**—The surety who holds a lien on property of the principal for the payment of the debt, concerning which lien he is chargeable as trustee for his co-sureties as well as himself, must be active in preserving the lien to the same extent that any other trustee under similar circumstances would be obliged to be diligent, and if through his negligence the lien is rendered unavailable for the payment of the debt, his co-sureties will be released from contribution to him, to the extent that they are injured thereby. Negligence under such circumstances is equivalent to a positive act producing the same result.<sup>25</sup> Thus, where a surety held a chattel mortgage for his indemnity on slaves of the principal, and, after the mortgage might have been foreclosed, he suffered some of the slaves to be sold by the sheriff for another debt of the principal, and lost as a security, it was held that he must account to his co-surety, who had paid the debt for the slaves so lost by his negligence.<sup>26</sup> So where property was conveyed by the principal for the indemnity of one of two sureties, and it was sold for that purpose, but through the negligence of the surety for whose indemnity it was conveyed, the purchase money was not collected and was lost, it was held he could not recover contribution from his co-surety.<sup>27</sup>

<sup>23</sup> *Carpenter v. Kelly*, 9 Ohio, 106. Holding that the surety who obtains a mortgage for the benefit of the other sureties will be allowed for his trouble and expenses, see *Comegys v. State Bank*, 6 Ind. 357. Holding that a surety may give to his co-sureties a mortgage to secure them against his liability for contribution, see *Steele v. Faber*, 37 Mo. 71. Holding that if money is deposited with a trustee by one surety for the indemnity of his co-sureties, if such co-sureties consent thereto, the money must be

returned to the owner, see *Skidmore v. Taylor*, 29 Cal. 619.

<sup>24</sup> *Frink v. Peabody*, 26 Ill. App. 390.

<sup>25</sup> *Schmidt v. Coulter*, 6 Minn. 492. As to the surety's right to release collateral without consent of the creditor or of his co-surety, see note 45 to § 278, supra. *Fertig v. Henne*, 197 Pa. St. 560, 47 Atl. Rep. 840.

<sup>26</sup> *Steele v. Mealing*, 24 Ala. 285.

<sup>27</sup> *Chilton v. Chapman*, 13 Mo. 470.

The surety who receives from his principal a chattel mortgage of slaves and other property must account to his co-surety for such of the property as is wasted in consequence of his laches and for the value of the hire of the slaves.<sup>28</sup> A surety is not, however, accountable to his co-surety for a loss arising by reason of his failure to record a chattel mortgage given by the principal for his indemnity, when he agreed with the principal at the time he took the mortgage that he would not record it. In such case he is bound by the agreement, and the co-surety has no greater rights than he has.<sup>29</sup>

**§ 299. Surety who obtains indemnity after all the sureties have paid an equal amount is not obliged to share it with the others.**—After the debt of the principal is paid by several sureties in equal proportions, the equities between them as co-sureties cease, and each becomes an independent creditor of the principal for the amount paid by him. In such case, if one afterwards receives indemnity from the principal, the others are entitled to no part thereof.<sup>30</sup> So where one of two sureties paid the entire debt, and the principal afterwards paid him for his sole benefit one-half the amount, it was held that he was afterwards entitled to recover from his co-surety the other half of the debt he had paid for the principal.<sup>31</sup> One of two sureties, with the consent of the other, gave up a security which he had taken for the benefit of both, on receiving a written promise of the principal that he would pay the debt or return the security. This promise was not performed, and the sureties paid the debt of \$1,080, by giving them joint and several notes therefor, payable on time. Before the note was paid or payable, the surety to whom the promise was made sued the principal for breach thereof, and in consequence received from him \$600. Held, he was liable for one-half of this amount to his co-surety.<sup>32</sup> In this case, although the money was received after the debt was paid, the promise was made before that time. A was collector of state revenue, and gave a bond, with B and C as sureties. He collected certain money of the state which he deposited in his own name in a private

<sup>28</sup> Goodloe v. Clay, 6 B. Mon. (Ky.) 236.

<sup>30</sup> Messer v. Swan, 4 N. H. 481; Harrison v. Phillips, 46 Mo. 520.

<sup>29</sup> White v. Carlton, 52 Ind. 371. To similar effect, see Pool v. Williams, 8 Ired. Law (N. C.) 286.

<sup>31</sup> Gould v. Fuller, 18 Me. 364.

<sup>32</sup> Doolittle v. Dwight, 2 Met. (Mass.) 561.



bank instead of in the state bank, where it should have been deposited. A became a defaulter for a much larger sum, and B and C each paid one-half of the defalcation. B then sued A for indemnity, and garnished the private bank, and by legal proceedings got the money there deposited. Held, C was entitled to one-half the money thus obtained by B, on the ground that the money belonged to the state and not to A, and each surety, when he paid, was entitled to subrogation to the claim of the state against A, and consequently each was entitled to one-half the money.<sup>33</sup>

**§ 300. When suit for contribution can be brought by surety holding indemnity.**—Although there is a conflict of authority on the subject, the weight of authority seems to be that the fact that the surety who pays the debt has in his hands an indemnity other than money, and more or less valuable, will not prevent him from suing a co-surety for contribution, and recovering such amount as he is then entitled to, irrespective of the sum that may afterwards be realized from the indemnity; but he will be accountable to the co-surety for a proper proportion of whatever sum he may afterwards realize from the indemnity.<sup>34</sup> A surety who had some indemnity in his

<sup>33</sup> *Harrison v. Phillips*, 46 Mo. 520.

<sup>34</sup> *Johnson's Adm'rs v. Vaughn*, 65 Ill. 425. In *Williams v. Riehl*, 127 Calif. 365, 59 Pac. Rep. 762, Riehl, one of five sureties on a guardian's bond, transferred to three of the sureties who paid the judgment, \$5,000 of real and personal property that had been placed in his hands as indemnity to the extent of its value. Held, that the three co-sureties, who paid, could maintain their action for contribution nevertheless. "The moment one co-surety or joint judgment debtor pays the debt of his principal," said the court (p. 370), "he has a right to recover from his co-surety or joint judgment debtor his proportionate share. The law gives him this right and also imposes upon his co-surety the duty

of paying his proportionate share. The obligation is as binding upon the co-surety as if created by promissory note or contract. It would be no defense for a defendant, when sued upon a promissory note or other written contract, to set up that the plaintiff held collateral securities or property for the purpose of indemnifying himself. Why should it be a defense in this kind of an action? Why should the plaintiff, in an action for contribution, after having paid out his money, be compelled to wait until he can realize upon some collateral indemnity which may require years, while his co-surety, who was as much bound in law and morals as himself by the bond, has paid nothing? The indemnity is for the benefit of one co-surety as much as for the other, no matter which holds



hands paid the debt and sued his co-surety for contribution. Held, the amount he had received from the indemnity should be deducted from the amount he had paid, and a judgment for one-half the remainder should be rendered against the co-surety. If the party holding the indemnity afterwards realizes anything from it, he must account to his co-surety for one-half of it, but the fact that he had the indemnity would not prevent him from recovering.<sup>35</sup> A principal gave his sureties a mortgage on slaves for their indemnity, and judgment was afterwards recovered against the principal and sureties, which one of the sureties paid. The sureties filed a bill to foreclose the mortgage which was pending. The surety who paid the debt brought suit against the principal to recover the amount paid by him and the suit was pending. The surety who paid the debt then sued a co-surety for contribution, and it was held that, notwithstanding the pendency of the other two suits, he was entitled to recover.<sup>36</sup> Where a surety held for his indemnity certain bonds of third persons, and judgment had been recovered against him, the principal, and a co-surety, of which he had obtained an equitable assignment, it was held that equity would not permit him to enforce the collection of one-half the judgment from the co-surety, unless he showed that he could not have collected the bonds by reasonable diligence.<sup>37</sup> It has been held that a surety who is fully indemnified cannot recover contribution from his co-surety.<sup>38</sup> It has also been

it. \* \* Either one could apply to the court for its sale, or to enjoin a wrongful disposition of it."

<sup>35</sup> *Bachelder v. Fiske*, 17 Mass. 464. See, also, *Titcomb v. McAllister*, 77 Me. 353.

<sup>36</sup> *Anthony v. Percifull*, 8 Ark. (3 Eng.) 494.

<sup>37</sup> *Kerns v. Chambers*, 3 Ired. Eq. (N. C.) 576. In *Manning v. Weyman*, 99 Ga. 57, 26 S. E. Rep. 58, judgment was entered on a forfeited criminal recognizance against Manning and Weyman as sureties, Weyman compromised the judgment with the solicitor general by payment of \$400, took an assignment of the judgment to himself and brought suit against Manning for

contribution. Manning pleaded that the principal had conveyed to Weyman more than enough property to pay the judgment by way of indemnity. Held, that that plea did not state a defense. Weyman being presumably solvent, Manning must pay him \$200 and would then be entitled to look to the property for reimbursement. If Weyman were insolvent, Manning could fully protect himself by resorting to a court of equity. See *Gibson v. Sheehan*, 5 App. Cas. (D. C.) 391, 28 L. R. A. 400; *American Surety Co. v. Boyle*, 65 Ohio St. 486, 63 N. E. Rep. 73.

<sup>38</sup> *Morrison v. Taylor*, 21 Ala. 779. Compare notes 37, 39, § 300.

held that the surety who has partial indemnity in his hands, in the shape of property of the principal, can only recover from a co-surety one-half the amount paid by him after deducting therefrom the value of the property.<sup>39</sup>

§ 301. **Surety may, before paying debt, file bill to compel co-surety to contribute and to restrain him from transferring his property.**—The remedy between co-sureties is usually sought after the debt has been paid by some of them, but a surety may, before he has paid the debt, file a bill against his co-surety to compel him to contribute to its payment.<sup>40</sup> So where judgment was recovered against a principal and two sureties, and the principal was insolvent, and one of the sureties, having some real estate in his wife's name, was about to sell it to an innocent purchaser, it was held that the other surety, before paying the debt, might by suit in chancery restrain him from selling the property till the debt for which they were liable as sureties was paid. The court said: "While at law the surety has no remedy until he has paid the debt, equity, with a view of placing the performance of the duty where it primarily belongs, will interpose at the instance of the surety, as soon as the debt becomes due, to compel its payment by the principal. \* \* A court of equity, to prevent a multiplicity of suits, in order to do right and distribute justice, will, in the first instance, impose the discharge of the duty or performance of the obligation upon the party primarily and ultimately bound. Instead, therefore, of requiring the surety to pay, and then reimbursing him by decree against the principal, it permits the surety at once to resort to the court to compel the principal to discharge his obligation. Although the question is new and without precedent in the books so far as we have been able to see, this equity is quite as strong in favor of a surety (where the principal is insolvent) against his co-surety. It is well supported by authority, and thoroughly approved, for the reason that, if the principal has made or is about to make secret or fraudulent dispositions of

<sup>39</sup> *Currier v. Fellows*, 27 N. H. 366. But if the surety has in his

hands sufficient money or property of the principal to indemnify him, and he fails to discharge the indebtedness, he cannot recover con-

tribution. *Neely v. Bee*, 32 W. Va. 519.

<sup>40</sup> *McKenna v. George*, 2 Rich. Eq. (S. C.) 15. And, in principle, see, to like effect, *Hayden v. Thrasher*, 18 Fla. 795.

his property, so as to throw the debt upon his surety, the latter may have ample remedy. If the principal is insolvent, and therefore the debt rests as a common and equal burden upon the sureties, do not the same considerations appeal with equal force to the chancellor that he may see to it that one of them shall not, by secret or fraudulent contrivances or conveyances of property, fasten the whole of it upon the other? We think that the principle may well have this extended application."<sup>41</sup> After a judgment creditor had filed a creditor's bill against the principal and others, to subject money or assets fraudulently assigned by the principal to such others, a surety for the debt paid it, upon the express condition that he should have the right to prosecute the creditor's bill. Held, that paying the judgment did not, under the circumstances, extinguish it, and the surety had a right to prosecute the creditor's bill.<sup>42</sup> The statutory proceeding to enforce contribution has been held cumulative; courts of equity retain their former jurisdiction concurrent with that of courts of law.<sup>43</sup>

**§ 302. Discharge of surety in bankruptcy does not release him from contribution to co-surety, who pays subsequently.—**

The discharge of a surety in bankruptcy does not usually release him from a claim to contribution by a co-surety who afterwards pays the debt. In a case in which this was held the court said: "There was here no debt capable of estimation in order to its being proved, because two contingencies were to be taken into consideration; first, whether the original debtor would not himself pay the debt, and secondly, whether this defendant would ever be called upon to pay it. I do not see how it is possible to say that any such debt existed between these parties as could have been proved under the commission."<sup>44</sup> If a surety, after his discharge in bankruptcy,

<sup>41</sup> *Bowen v. Hoskins*, 45 Miss. 183, per Simrall, J. See, also, *Washington v. Norwood*, 128 Ala. 383, note 7 to § 279.

<sup>42</sup> *Harris v. Carlisle*, 12 Ohio, 169.

<sup>43</sup> *Dysart v. Crow*, Mo. Sup., Nov., 1902, 70 S. W. Rep. 689, citing to this point: *Washington Savings Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 17 S. W. Rep. 644, 28 Am. St. Rep. 405, 1 Story Eq. Jur., 13 ed., p. 89.

<sup>44</sup> *Clements v. Langley*, 2 Nev. & Man. 269, per Denman, C. J.; *Goss v. Gibson*, 8 Humph. (Tenn.) 197; *Eberhardt v. Wood*, 2 Tenn. Ch. (Cooper), 488; *Dunn v. Sparks*, 1 Ind. 397; *Swain v. Barber*, 29 Vt. 292; *Keer v. Clark*, 11 Humph. (Tenn.) 77; *Smith v. Hodson*, 50 Wis. 279; *Liddell v. Wiswell*, 59 Vt. 365; *Byers v. Alcorn*, 6 Bradw. (Ill. App.) 39; *Paddleford v. State*, 57 Miss. 118. To contrary

voluntarily pays a balance due upon a bond on which he is surety, he is held entitled to contribution from a co-surety.<sup>45</sup>

**§ 303. When surety who is discharged from liability to creditor liable to contribute to co-surety, who subsequently pays.**—It has been held that the release of one surety, without the consent of his co-surety, from liability to the creditor, will not discharge him from liability to contribute to the co-surety, who is subsequently compelled to pay the debt.<sup>46</sup> But where suit was brought against one of two sureties, and judgment recovered, which such surety paid, and before the judgment was rendered the other surety, who was not sued, became released by the statute of limitations, it was held that the latter was thereby released from liability to contribution. In this case the surety who was sued had a statutory right to have compelled a suit to be brought against the other surety.<sup>47</sup>

**§ 304. Rights of bail, who pays the debt, against the principal and sureties for the debt.**—If one of two sureties in a bail bond in a civil action voluntarily pays the judgment against the principal before the bail are fixed, he cannot recover contribution from his co-surety in the bond. The latter had a right to relieve himself from liability by surrendering the body of the principal, and he could not be deprived of this right by a voluntary payment by the other surety.<sup>1</sup> An attachment of B's property was dissolved upon a bond being given by him with C and D as sureties. The creditor, A, recovered a judgment in the attachment suit against B, which was not paid, and then brought suit on the bond and recovered a judgment therein against B, C and D, and arrested B on the execution issued on this judgment. B applied to take the oath for the relief of poor debtors, and entered into the

effect, see *Tobias v. Rogers*, 13 N. (Ky.) 314, followed and approved Y. 59, distinguished in *Johnson v. in Cochran v. Walker's Ex'rs*, 82 Harvey, 84 N. Y. 363; *Miller v. Ky. 220*. A surety to an undertaking upon appeal is not discharged on this subject, *Hays v. Ford*, 55 because of action against his co-surety, who is a non-resident, is Ind. 52. barred by the statute of limitations, and he in consequence thereof lost

<sup>45</sup> *Craven v. Freeman*, 82 N. C. 361.

<sup>46</sup> *Hill v. Morse*, 61 Me. 541; *Clapp v. Rice*, 15 Gray 557.

<sup>47</sup> *Shelton v. Farmer*, 9 Bush

his right to contribution. *Staples v. Gokey*, 34 Hun 289.

<sup>1</sup> *Skillin v. Merrill*, 16 Mass. 40.

statutory recognizance with E as surety to deliver himself up for examination. \* \* After a breach of the condition of the recognizance, C and D paid the amount of the judgment to which they were parties to A, and brought suit in his name for their benefit on the recognizance against E. Held, they could not recover. Payment of the judgment by them discharged it and released E. There was no privity between C and D and E. They were sureties for A under different contracts. They were all principals as to E; nor did the doctrine of subrogation apply.<sup>2</sup> Principal and surety executed a bond, but the fact of suretyship did not appear from it. Suit was commenced on the bond, and the principal was arrested and gave bail, who at that time had no knowledge of the suretyship. The surety was not served, and no judgment was rendered against him. The bail was obliged to pay the debt, and sued the surety for indemnity. Held, he was not entitled to recover.<sup>3</sup> A and B owed a note upon which suit was commenced, and A was arrested and C became his bail. Judgment was recovered against A and B, which C, as the bail of A, was obliged to pay. Held, that C was not entitled to recover indemnity from B, as there was no privity between them. It was the case of a person paying the debt of another without any request, express or implied.<sup>4</sup>

**§ 305. When surety who pays judgment may have execution thereon against co-surety.**—Judgment was recovered against A, B, C and D, who were co-sureties. A, B and C paid the judgment and had execution issued thereon and placed in the sheriff's hands, with directions to make one-fourth of it from the property of D. No property of D was found, and A, B and C filed a creditor's bill against him to reach his effects. Held, the sureties who paid were entitled to subrogation to the creditor's rights in the judgment, so as to proceed against their co-surety D, and that a court of equity would prevent the extinction of a judgment so as to afford a surety a remedy against a co-surety.<sup>5</sup> Although this is the approved doctrine, it has been held that a surety who pays a judgment thereby ex-

<sup>2</sup> Holmes v. Day, 108 Mass. 653.

<sup>3</sup> Smith v. Bing, 3 Ohio 33.

<sup>4</sup> Osborn v. Cunningham, 4 Dev.

& Bat. Law (N. C.) 423.

<sup>5</sup> Cuyler v. Ensworth, 6 Paige's Ch. 32.

tinguishes it, and that he cannot afterwards have an execution thereon against his co-surety.<sup>6</sup> In some states this matter is regulated by statute.<sup>7</sup>

**§ 306. How liability to contribution affected by giving of time to one of several co-sureties.**—If one of two co-sureties consents to the giving of time to the principal, and the other does not, and the one who so consents afterwards has the debt to pay, he cannot recover contribution from the surety who did not consent to the extension. The latter was discharged from his obligation to the creditor, and likewise from contribution, by the extension. There is no stronger obligation between co-sureties that they shall contribute than there is that they shall pay the creditor, and a giving of time releases them from the creditor, and will, under the foregoing circumstances, release them from each other.<sup>8</sup> A was creditor, B principal, and C, D and E sureties on a bond, which became due, and C gave his obligation to A, payable by instalment, in payment of the debt. Subsequently, and after the payment of the first instalment, C took from B his bond for an extended time to secure the same debt. Held that, by the payment of the original debt as above, C became subrogated to the place of A, the creditor, and that by giving time to B the same results followed as if C had been the original creditor. C could not, therefore, recover contribution from D.<sup>9</sup> After judgment against a principal and two sureties the creditor gave time to one of the sureties. Held, he thereby discharged the other surety from liability to him for the portion of the debt which the surety to whom the time was given was

<sup>6</sup> *McDaniel v. Lee*, 37 Mo. 204; *Hull v. Sherwood*, 59 Mo. 172.

<sup>7</sup> For instance, in *Knight v. Weeks*, 115 Fed. Rep. 970, 53 C. C. A. 366, judgment having been recovered against a principal and four sureties, two of the sureties paid it and took an assignment of the execution and, in accordance with the provisions of a statute, (Sec. 983 and 1177, Rev. Stat. Fla.), levied upon the property of another surety to enforce contribution. Held, on petition of that surety, that the court had no power to go behind the judgment and in-

vestigate the equities of the parties prior thereto. That a surety who has paid a part only of the principal's debt, without obtaining an assignment of the debt, may maintain contribution against co-sureties under Georgia code, and have summary judgment, see *Cooper v. Chamblee*, 114 Ga. 116.

<sup>8</sup> *Brown v. McDonald*, 8 Yerg. (Tenn.) 158; *Beckham v. Pride*, 6 Rich. Eq. (S. C.) 78; *Boughton v. Bank of Orleans*, 2 Barb. Ch. 458. Compare note 12 to § 306.

<sup>9</sup> *Cameron v. Boulton*, 9 Up. Can. (C. P.) 537.



liable to contribute.<sup>10</sup> Two sureties entered into an indemnity bond, and one of them, being pressed for payment, gave a warrant of attorney to confess judgment for the debt, due at a future time, and afterwards paid the debt. Held, that the giving of time to him by the creditor did not discharge his co-surety from liability to contribute.<sup>11</sup> Held, in England, that an agreement by a surety to give time to the principal does not discharge his co-surety from liability to contribution.<sup>12</sup>

§ 307. Contribution as affected by release of principal or of co-surety—Failure of consideration—Set-off, etc.—If a surety releases the principal from liability to indemnify him, he thereby releases his co-surety from contribution.<sup>13</sup> If there are three sureties, and one of them pays the debt and releases one of the others upon payment of less than his share, he may recover from the third surety one-third of the debt which he has paid.<sup>14</sup> The right to contribution between co-sureties is not destroyed by the fact that they agree among themselves to pay and do pay the debt due a bank, in the notes of the bank.<sup>15</sup> Where a surety is released by the creditor, with the consent of his co-sureties, he thereupon ceases to be co-surety with them, and is not afterwards liable to them for contribution.<sup>16</sup> If

<sup>10</sup> *Ide v. Churchill*, 14 Ohio St. 372.

<sup>11</sup> *Dunn v. Slee*, 1 Moore 2.

<sup>12</sup> *Greenwood v. Francis*, 1 L. R. Q. B. 312 (1899), was a suit for contribution. One surety contended that the other had released him by giving time to the principal. Held that this was no defense. Smith, L. J., said, p. 320: "I have never before heard of defences which would be defences by a surety against a principal creditor being attempted to be set up in a case of sureties suing a co-surety for contribution, and no authority has been cited to show that this can be done. What principles of equity are there to intervene to prevent one surety suing his co-surety at law to indemnify him from that part of the loss which the latter was bound to participate in and

which the former has been compelled to pay? What defences a surety has against his co-surety when sued for contribution are no more and no less than the defences one principal may have against another principal, and this alone would, I think, suffice to determine this case against Captain Francis [the defendant] \* \* ." Note 8, § 306.

<sup>13</sup> *Draughan v. Bunting*, 9 Ired. Law (N. C.) 10; *Fletcher v. Jackson*, 23 Vt. 581.

<sup>14</sup> *Currier v. Baker*, 51 N. H. 613.

<sup>15</sup> *Derossett v. Bradley*, 63 N. C. 17.

<sup>16</sup> *Moore v. Isley*, 2 Dev. & Batt. Eq. (N. C.) 372. See *Lusby v. Carr, Ex'r*, 60 Md. 192, which was an abandonment by agreement of the right to contribution that otherwise existed.



one of several co-sureties agrees to pay the entire note on which they are liable, but the consideration for the agreement fails, and he afterwards pays the note, he will not be prevented by the agreement from recovering contribution from his co-sureties. The action for contribution being an equitable one, equitable principles should prevail.<sup>17</sup> It has been held that in an action by a surety against his co-surety for contribution, the latter cannot defend by setting up by way of counter-claim, recoupment or set-off a cause of action existing in favor of the principal against the plaintiff.<sup>18</sup> A, being principal, and B, C and D sureties, they all became insolvent except D, who paid the debt. Before such payment, but after C and D became sureties, D executed his bond to C for a sum less than half the amount of the debt for which they were liable as A's sureties, and C assigned this bond to a trustee for the benefit of his creditors. Held, the trustee stood in no better position than C, and D might by bill in equity set off C's liability to him as co-surety against his liability on the bond.<sup>19</sup> A and B were the payees and accommodation indorsers of a note made for the accommodation of C, and signed by him. Having been obliged to pay the note, A sued C for indemnity, after his remedy against C on the note was barred by the statute of limitations, but within apt time after he paid the money. Held, he was not entitled to recover. The court said that his only remedy against C was on the note, and that was barred by the statute. Until the time of Lord Mansfield, the surety had no remedy at law against his principal on an implied promise. His remedy for reimbursement was in equity, unless he took a bond to secure indemnity. Implied promises will not be raised where there is no necessity for it. "If the party choose to take a security, there is no occasion for the law to raise a promise. Promises in law only exist where there is no express stipulation between the parties."<sup>20</sup>

**§ 308. How far judgment against one surety evidence against co-surety in suit for contribution—Failure of consideration.—**

<sup>17</sup> Prindle v. Page, 21 Vt. 94.

<sup>18</sup> O'Brien v. Karing, 57 N. Y. 649. And see Davis v. Toulmin, 77 N. Y. 280.

<sup>19</sup> Wayland v. Tucker, 4 Gratt. (Va.) 267.

<sup>20</sup> Kennedy v. Carpenter, 2 Whar-

ton (Pa.), 344. One surety on a sheriff's bond cannot recover at law on the bond against his co-sureties, before paying the debt: Mitchell v. Turner, 37 Ala. 660. Note 19, § 317.

Where a judgment was recovered against a principal and one surety, which was paid by the latter, it was held in a suit by such surety against a co-surety, for contribution, that the co-surety could not show as a defense that the consideration of the note on which they were both sureties had failed. The court said: "No question of consideration is involved in the contest between co-sureties, for they enter into the undertaking without reference, as between themselves, to the consideration paid their principal. If his contract was entirely without consideration, the relative rights of these parties would be precisely the same, and on payment by one, the right to contribution is called into existence. Each has impliedly agreed with the other to protect him to the extent of the joint undertaking against the consequences arising out of the failure of the principal."<sup>21</sup> It has been held that a joint judgment against co-sureties is, in a suit between them for contribution, conclusive evidence that a cause of action existed against them.<sup>22</sup> Where a judgment is recovered against part of the sureties, in a bond which is satisfied by them, it has been held in a suit by them against their co-sureties, for contribution, that such judgment is competent evidence to show the amount of the payment made by the plaintiffs, and the circumstances under which it was made, but not for the purpose of proving the liability.<sup>23</sup>

**§ 309. When surety can recover contribution for costs paid by him.**—Whether a surety can recover from his co-surety contribution for the costs of a suit against him, for the collection of the debt, depends upon the circumstances of each case. Where a joint judgment is recovered against the principal and two sureties, or against two sureties alone, and one of them pays it, he can recover one-half of the costs of the suit from his co-surety. In holding this principle it has been said: "The failure to pay which occasioned the costs was imputable to the

<sup>21</sup> *Cave v. Burns*, 6 Ala. 780, per Goldthwaite, J.; *Babcock v. Carter*, 117 Ala. 575, 23 So. Rep. 487, was a bill in equity by one of two co-sureties on a supersedeas bond to compel the other to contribute. It was held that the record of the judgment against the surety, which

he had paid, was clearly admissible to prove its rendition and by way of inducement to the evidence that the surety had paid it.

<sup>22</sup> *Waller v. Campbell*, 25 Ala. 544.

<sup>23</sup> *Fletcher v. Jackson*, 23 Vt. 581.

defendant as much as to the plaintiff. The plaintiff paid the execution, including the costs. \* \* The costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one applies equally to the other."<sup>24</sup> So a surety may recover contribution from his co-surety for the costs and expenses of defending a suit against him for the debt, if the defense was made under such circumstances as to be regarded prudent.<sup>25</sup> Where the only surviving surety on a joint bond (he alone being subject to an action at law) is sued, and defends the action bona fide, and thereby reduces the amount of the creditor's demand, the representatives of the deceased co-surety are liable to contribute towards payment of the costs and other expenses incurred in defending the action at law.<sup>26</sup> Where two co-sureties executed a warrant of attorney on which judgment was entered up, it was held that the surety who paid the judgment and costs, could recover one-half the costs from his co-surety.<sup>27</sup> It has, however, been held that a surety cannot recover from his co-surety any part of the costs of defending himself in a suit against him by the creditor, unless the co-surety authorized him to defend the action.<sup>28</sup> Attorney's fees incurred by a surety in making a prudent defense are held recoverable in an action for contribution.<sup>29</sup> "There can be no doubt but that a surety, or one standing in such a position, will be justified in employing counsel and incurring costs and expenses, to which his co-sureties must afterwards contribute, in defending

<sup>24</sup> Davis v. Emerson, 17 Me. 64, per Weston, C. J. See, also, Briggs v. Boyd, 37 Vt. 534; Gross v. Davis' Adm'r, 87 Tenn. (3 Pickle) 226; Van Winkle v. Johnson, 11 Oreg. 469.

<sup>25</sup> Fletcher v. Jackson, 23 Vt. 581. See, also, Breckenridge v. Taylor, 5 Dana (Ky.) 110; Bright v. Lennon, 83 N. C. 183; Wagenseller v. Prettyman, 7 Bradw. (Ill. App.) 192.

<sup>26</sup> McKenna v. George, 2 Rich. Eq. (S. C.) 15.

<sup>27</sup> Kemp v. Fiuden, 12 Mees. & Wels. 421.

<sup>28</sup> John v. Jones, 16 Ala. 454;

Knight v. Hughes, Moody & Mal. 247.

<sup>29</sup> Gross v. Davis' Adm'r, 87 Tenn. (3 Pickle) 226. See, however, Acers v. Curtis, 68 Tex. 423. Boutin v. Etsell, 110 Wis. 276, 85 N. W. Rep. 964, overruling Shepard v. Pebbles, 38 Wis. 374, in so far as it denies the right of contribution for costs and attorneys' fees reasonably and prudently incurred, and citing Backus v. Coyne, 45 Mich. 584, 8 N. W. Rep. 694; Marsh v. Harrington, 18 Vt. 150; Fletcher v. Jackson, 23 Vt. 581; Gross v. Davis, 87 Tenn. 226, 11 S. W. Rep. 92.

against illegal demands. Nor will the right of the surety to recover in such cases be made dependent upon his success, as that would compel him to act at his peril. It is sufficient if he acted as a prudent man would, in the light of facts and circumstances showing a probability of success in whole or in part sufficient to justify the expense likely to be incurred.”<sup>30</sup>

**§ 310. Estate of deceased co-surety liable for contribution.—** If two co-sureties become bound in a joint, or joint and several obligation, and one of them dies, and the other, before or after such death, pays the debt, he can recover contribution from the estate of such deceased co-surety, either at law or in equity, to the same extent as if such co-surety was alive. As between co-sureties there is an implied agreement for contribution at the time they sign, and this implied agreement is not joint, but several. It is like any other promise to pay money for which the personal representative of the deceased promisor is liable; and it makes no difference whether the default was committed before or after the death of the promisor.<sup>31</sup> The death of one of the co-sureties under a joint and several continuing guaranty does not of itself determine the future liability of the surviving co-surety.<sup>32</sup>

**§ 311. Surety who pays by his note may recover contribution from co-surety.—** If two co-sureties are bound for a debt, and one of them pays it by giving his own note for it, which is accepted by the creditor as payment, the surety thus paying may at once, and before paying the note so given as payment, sue

<sup>30</sup> Marston, C. J., in *Backus v. Coyne*, 45 Mich. 584, 586.

<sup>31</sup> *Bradley v. Burwell*, 3 Denio 61, followed in *Cornes v. Wilkin*, 14 Hun 428; *Supplee v. Sayre*, 51 Hun 30; *Ramskill v. Edwards*, Law Rep. (31 Ch. Div.) 100; *Aikin v. Peay*, 5 Strob. Law (S. C.) 15; *Conover v. Hill*, 76 Ill. 342; *Bachelder v. Fiske*, 17 Mass. 464; *Stothoff v. Dunham's Ex'rs*, 4 Har. (N. J.) 181; *McKenna v. George*, 2 Rich. Eq. (S. C.) 15; *Stephens v. Meek*, 6 B. J. Lea (Tenn.) 226; *In re Beumen & Co.*, 13 Fed Rep. 623. Contra, *Waters v. Riley* 2

*Harris & Gil*, (Md.) 305. See this case disapproved in *Johnson v. Harvey*, 84 N. Y. 363. As to when the estate of a deceased surety, which has been distributed to his heirs, is liable to contribute to a co-surety who has paid the debt, see *Williams v. Ewing*, 31 Ark. 229; *Stevens v. Tucker*, 73 Ind. 73. An action for contribution against the estate of a deceased co-surety is held to be triable by jury: *Sanders v. Wellburg*, 107 Ind. 266.

<sup>32</sup> *Beckett v. Addyman*, Law Rep. 9 Q. B. Div. 783. See note 38, § 321, post.

his co-surety for contribution, the same as if he had paid the debt in money. In holding this, it has been said: "Where one person is obligated to pay money for the use of another, a payment made in any mode, either property or negotiable paper or securities, if such payment is received as full satisfaction of the demand, it is equivalent to, and will be treated as, a payment in cash. \* \* Where the payment is received as a complete satisfaction, and the debt or obligation is extinguished, it is a matter of no moment to the person to whose use the payment is made whether it is made in money, property or obligations. The benefit to him is the same, and the obligation to refund should be the same." <sup>33</sup>

**§ 312. What contribution surety who pays in land entitled to recover.**—Where a surety paid the debt of the principal in lands, it was held, in a suit for contribution by him against a co-surety, that the price at which the lands were taken as payment by the creditor would ordinarily be the amount on which the damages should be founded; but if the lands were taken at a very high price, as a compromise of a doubtful claim, the actual value of the lands might, perhaps, be the basis of the damages, and in such case the actual value of the lands should be allowed, no matter what they cost the surety.<sup>34</sup> Where a principal was insolvent, and one of two co-sureties paid the debt in real estate, which was taken by the creditor at about twice its value, on account of the failing condition of the parties, it was held that the surety thus paying was entitled to recover from his co-surety, as contribution, one-half of what the real estate was worth, and no more.<sup>35</sup>

**§ 313. When surety who has paid less than his share of the debt cannot recover contribution.**—A surety who has paid a portion of the debt, leaving the remainder unpaid, cannot usually recover contribution from his co-surety, unless the amount so paid by him is more than his share of the common

<sup>33</sup> *Ralston v. Wood*, 15 Ill. 159, Tex. 133. Contra, *Brisendine v. per Caton, J.*; *Pinkston v. Taliaferro*, 9 Ala. 547; *Anthony v. Percifull*, 8 Ark. (3 Eng.) 494; *Hutchins v. McCauley*, 2 Dev. & Bat. Eq. (N. C.) 399; *White v. Carlton*, 52 Ind. 371; *Robertson v. Maxcey*, 6 Dana (Ky.) 101; *Bell v. Boyd*, 76

*Martin*, 1 Ired. Law (N. C.) 286; *Nowland v. Martin*, 1 Ired. Law (N. C.) 307. Compare note 12 to § 143, note 23 to § 232.

<sup>34</sup> *Jones v. Bradford*, 25 Ind. 305.

<sup>35</sup> *Hickman v. McCurdy*, 7 J. J. Mar. (Ky.) 555.

debt. The co-surety may, in such case, pay the remainder to the creditor. In holding this, it has been said that: "The right to contribution is founded, not on contract, but on the principle that equality of burden, as to a common right, is equity. \* \* Where joint promisors or co-sureties have received equal benefits, or been relieved from common burthens, neither shall recover over against another, unless for the excess paid by him beyond his due proportion or equal share."<sup>36</sup> If, however, a surety discharges the entire debt by payment of less than his share, he may recover contribution from his co-surety.<sup>37</sup> Where one of two co-sureties of an insolvent administrator purchased, at a discount, legacies for which the sureties were bound, it was held he could only charge his co-surety for one-half of what he paid for the legacies and one-half the expense of purchasing them.<sup>38</sup>

**§ 314. In what proportions co-sureties are liable to contribute.**—If one of several co-sureties who are equally bound for the debt pays it, he has a right in equity to recover, as contribution from his solvent co-sureties, a pro rata amount of the sum paid by him, based upon the number of solvent co-sureties, and excluding the insolvent ones.<sup>1</sup> The fact that one of sev-

<sup>36</sup> *Fletcher v. Grover*, 11 N. H. 368, per Woods, J. For a case identical in principle and strictly analogous to *Fletcher v. Grover*, see *Apperson v. Wilbourn*, 58 Miss. 439. See, also, *Smith v. State*, 46 Md. 617; *Ex parte Snowden*, Law Rep. (17 Ch. Div.) 44; *Gross v. Davis*, 87 Tenn. (3 Pick.) 226; *Davies v. Humphreys*, 6 Mees. & Wels. 153; *Lytle's Exr's v. Pope's Adm'r*, 11 B. Mon. (Ky.) 297; *Taylor v. Means*, 73 Ala. 468. Of course if the surety pays more than his share of the common debt he is entitled to contribution from his co-sureties such as will meet the equity of the case. *Bryan v. McDowell*, 15 B. J. Lea (Tenn.) 581.

<sup>37</sup> *Stallworth v. Preslar*, 34 Ala. 505.

<sup>38</sup> *Tarr v. Ravenscroft*, 12 Gratt. (Va.) 642.

<sup>1</sup> *Powell v. Matthis*, 4 Ired. Law (N. C.) 83; *Newton v. Pence*, 10 Ind. App. 672, 38 N. E. Rep. 484; *Michael v. Albright*, 126 Ind. 172, 25 N. E. Rep. 902; *Judah v. Mieure*, 5 Blackf. (Ind.) 171; *Young v. Lyons*, 8 Gill (Md.) 162; *Samuel v. Zachery*, 4 Ired. Law (N. C.) 377; *Klein v. Mather*, 2 Gilman (Ill.), 317; *Burroughs v. Lott*, 19 Cal. 125; *Young v. Clark*, 2 Ala. 264; *Breckenridge v. Taylor*, 5 Dana (Ky.) 110; *Magruder v. Admire*, 4 Mo. App. 133. In *Moore v. Bruner*, 31 Ill. App. 400, it is held to be the rule at law that where one of several sureties pays a judgment in full he may recover from each of his co-sureties, without regard to their solvency, a pro rata share of the sum so paid, with interest from date of payment. That a surety is entitled to judgment of



eral co-sureties has left the state has in this regard been considered equivalent to his insolvency.<sup>2</sup> As a general rule the surety who has paid the debt can at law only recover from his solvent co-sureties an aliquot part of the debt, based on the whole number of co-sureties, solvent and insolvent.<sup>3</sup> But in a state where there were no courts of equity, it was held that the surety who paid the debt might at law recover contribution based on the number of solvent co-sureties, and excluding the insolvent ones.<sup>4</sup> On a question of contribution, partners who sign in the partnership name are to be regarded as but one surety.<sup>5</sup> Whatever the number of the principals may be, it cuts no figure with reference to the amount of contribution which will be enforced between co-sureties.<sup>6</sup> If three co-sureties agree among themselves when they sign, that if the principal fails to pay they will each pay one-third, the surety who pays the whole debt can only recover from a solvent co-surety one-third of the amount so paid, even though the other co-surety is insolvent.<sup>7</sup> Where three persons give a note for their joint debt, each is to be considered with respect to the other as a surety with regard to two-thirds, and as a principal with regard to one-third of the debt; and if one be insolvent and another pays the whole debt, the third shall contribute one-half to the one who pays.<sup>8</sup> Where co-sureties are

contribution against all his co-sureties only pro rata, without regard to the insolvency of any one of them, see *Riley v. Rhea*, 5 B. J. Lea (Tenn.) 115; *Gross v. Davis*, 87 Tenn. (3 Pickle) 226. In *Re MacDonaghs, Irish* (10 Eq.), 269, it is held co-sureties contribute in proportion to the amounts for which they were originally respectively bound.

<sup>2</sup> *McKenna v. George*, 2 Rich. Eq. (S. C.) 15; *Liddell v. Wiswell*, 59 Vt. 365.

<sup>3</sup> *Stothoff v. Dunham's Ex'rs*, 4 Harr. (N. J.) 181; *Morrison v. Poyntz*, 7 Dana (Ky.) 307; *Cowell v. Edwards*, 2 Bos. & Pul. 268; *Acers v. Curtis*, 68 Tex. 423.

<sup>4</sup> *Henderson v. Duffee*, 5 N. H. 38; *Michael v. Albright*, 126 Ind. 38.

172, 25 N. E. Rep. 902, in which case it is held to be a question of fact for the jury whether or not one of several sureties is insolvent. See, also, *Mills v. Hyde*, 19 Vt. 59. In *Cummings v. May*, 91 Ala. 233, 8 So. Rep. 790, it was held that where two or more co-sureties pay the share of another co-surety who is insolvent, they may compel other co-sureties who are solvent to pay not only their own shares of the debt, but also their proportionate part of the share so paid for such insolvent surety.

<sup>5</sup> *Chaffee v. Jones*, 19 Pick. 260.

<sup>6</sup> *Kemp v. Frinden*, 12 Mees. & Wels. 421.

<sup>7</sup> *Swain v. Wall*, 1 Rep. Ch. 149.

<sup>8</sup> *Henderson v. Duffee*, 5 N. H. 38.



bound for the same thing, but in different amounts, they are liable to contribute in the proportion of the amounts of the obligations signed by them respectively. Thus, A became bound for a deputy sheriff in a bond of \$2,000. B became liable for the same deputy on a similar bond for \$18,000. A was obliged to pay the \$2,000. Held, he was entitled to recover from B eight-ninths of the amount so paid by him.<sup>9</sup> In another case A was a guardian, and B became his surety in a bond for \$10,000. C subsequently became A's surety in a bond of \$5,000; both sureties being liable for the same thing but in these amounts. Held, that B might recover from C one-third of the amount which he had paid for the default of the common principal.<sup>10</sup> But where several stockholders of a corporation, each owning different amounts of stock, signed a note as surety for the corporation, and one of them paid such note, it was held he was entitled to recover contribution from his co-sureties, based on their number, and not on the amount of stock held by them respectively.<sup>11</sup> The law of contribution among sureties operates only where the sureties have not made an express agreement themselves governing the subject. If they have made any such agreement it is enforced.<sup>12</sup>

**§ 315. Surety may recover contribution either at law or in equity.**—One of several co-sureties who has paid the debt may recover contribution from the others in a suit at law for money paid for their use, or he may bring his suit for contribution in chancery. Originally the only remedy was in chancery, but

<sup>9</sup> *Armitage v. Pulver*, 37 N. Y. 494. In *re Macdonaghs*, Irish, 10 Eq. 269. In *Williams v. Riehl*, 127 Calif. 365, 59 Pac. Rep. 762, one of seven co-sureties on a guardian's bond bound himself in the sum of \$25,000, and six others in the sum of \$5,000 each. Held, that each of the latter must pay one-eleventh of the loss and the first, five-elevenths. In *Springs v. Brown* (C. C., S. C.), 97 Fed. Rep. 405, A furnished counter security to a surety company to the amount of \$15,000, and B to the amount of \$10,000. The loss having been made good to the surety company wholly out of A's security, it was held that B

must stand forty per cent of it (p. 408).

<sup>10</sup> *Bell v. Jasper*, 2 Ired. Eq. (N. C.) 597. To same effect, see *Jones v. Blanton*, 6 Ired. Eq. (N. C.) 115.

<sup>11</sup> *Coburn v. Wheelock*, 34 N. Y. 440.

<sup>12</sup> For an instance of such an express agreement see *Crane v. Bayley*, 126 Mich. 323, 85 N. W. Rep. 874, where seven directors of a B. & L. association procured two of their number to become accommodation makers of a note for the benefit of the association upon an agreement that each director should be responsible for one-seventh of the note. Agreement enforced; as-

courts of law afterwards assumed jurisdiction. The fact, however, that courts of law have assumed jurisdiction in this matter, or that it has been conferred upon them by statute, does not oust equity of its original jurisdiction. With reference to this it has been said: "The right to sue in chancery for contribution was an established head of chancery jurisdiction in the time of Queen Elizabeth on the plain principles of natural justice. \* \* Ultimately courts of law entertained actions between sureties, but the court of chancery did not on that account renounce its jurisdiction. This tribunal still exercises a concurrent jurisdiction in all cases for contribution between sureties."<sup>13</sup> When the surety on a note pays it, it is held that he cannot maintain his suit as owner of the note, but must set up his true relation to it.<sup>14</sup>

**§ 316. Whether surety must show insolvency of the principal in order to recover contribution.**—In an action at law by a surety against his co-surety for contribution, the weight of authority seems to be that the insolvency of the principal need not be averred or proved.<sup>15</sup> It has, however, been repeatedly

sumpsit by one maker against one director.

<sup>13</sup> Couch v. Terry, 12 Ala. 225, per Collier, C. J.; Kemp v. Finden, 12 Mees. & Wels. 421; Mansfield v. Edwards, 136 Mass. 15; Bachelder v. Fiske, 17 Mass. 464; Sloo v. Pool, 15 Ill. 47; Foster v. Johnson, 5 Vt. 60; Crowder v. Denny, 3 Head (Tenn.), 359. Contra, Carrington v. Carson, Conf. Rep. (N. C.) 216. See, on this subject, Cholan v. Temple, 39 Ark. 238; Broughton v. Wimberly, 65 Ala. 549. Bill by one surety who paid to enforce contribution by co-sureties and set aside fraudulent conveyances. Hayden v. Thrasher, 28 Fla. 162, 9 So. Rep. 855. See note to § 279; Babcock v. Carter, 117 Ala. 575, 23 So. Rep. 487.

<sup>14</sup> In King v. McGhee, 99 Ga. 621, 25 S. E. Rep. 849, two accommodation indorsers on a note having been obliged to pay it, brought

suit on the note as owners and holders thereof. Held, that they might amend by stating the facts. Compare note 19, § 316.

<sup>15</sup> Judah v. Miere, 5 Blackf. (Ind.) 171; Caldwell v. Roberts, 1 Dana (Ky.) 355; Buckner's Adm'r v. Stewart, 34 Ala. 529; Rankin v. Collins, 50 Ind. 158; Roberts v. Adams, 6 Port. (Ala.) 361; Boutin v. Etsell, 110 Wis. 276, 85 N. W. Rep. 964; Smith v. Mason, 44 Neb. 610, 63 N. W. Rep. 41; Goodall v. Wentworth, 20 Me. 322; Rankin v. Collins, 50 Ind. 158; Sloo v. Pool, 15 Ill. 47; Cowell v. Edwards, 2 Bos. & Pull. 268. Contra, Morrison v. Poyntz, 7 Dana (Ky.), 307. To the effect that the surety seeking contribution may show the principal's general reputation for insolvency, such as unsatisfied executions against him, see Leak v. Covington, 99 N. C. 559.

held that, in a suit in equity by one surety against another for contribution, no recovery can be had unless the principal is shown to be insolvent, on the ground that the right to contribution does not rest on contract, but on natural justice, and this element is wanting when the principal is solvent.<sup>16</sup> As the right to contribution is grounded upon the same reasons, both at law and in equity, it seems that the rule should be the same in both jurisdictions.

**§ 317. When suit for contribution should be joint and when several.**—Where two or more co-sureties jointly pay the debt, they may join in a suit either at law or in equity against a co-surety for contribution,<sup>17</sup> but when each pays separately they cannot usually join in such a suit.<sup>18</sup> If one of several co-sureties pays the debt, he cannot usually maintain a joint action for contribution against his co-sureties.<sup>19</sup> A surety who has

<sup>16</sup> *Daniel v. Ballard*, 3 Dana (Ky.) 296; *Rainey v. Yarborough*, 2 Ired. Eq. (N. C.) 249; *Bolling v. Donegby*, 1 Duvall (Ky.) 220; *Allen v. Wood*, 3 Ired. Eq. (N. C.) 386; *Lawson v. Wright*, 1 Cox, 275; *McCormack's Adm'r v. Obannon's Ex'r*, 3 Munf. (Va.) 484. To substantially similar effect, see *Glasscock v. Hamilton*, 62 Tex. 143; *Jackson v. Murray*, 77 Tex. 644.

<sup>17</sup> *Dussol v. Brugniere*, 50 Cal. 456; *Fletcher v. Jackson*, 23 Vt. 581. In *Weeks v. Parsons*, 176 Mass. 570, 58 N. E. Rep. 157, the directors of a corporation indorsed its notes upon an understanding among themselves that the indorsements were to a joint and not several. Held, that the rest of them, including the executor of one who had died, might maintain a joint suit against one of their number who failed to pay his share of the note for contribution.

<sup>18</sup> *Lombard v. Cobb*, 14 Me. 222; *Prescott v. Newell*, 39 Vt. 82.

<sup>19</sup> *Powell v. Matthis*, 4 Ired. Law (N. C.) 83. The case of *Hull v. Meyers*, 90 Ga. 674, 683, 16 S. E.

Rep. 653, is worth careful reading in this connection. Four of the five indorsers of a corporation's note, out of their own funds in February, 1887, paid the note upon its dishonor by their principal. One of the four, in June, 1891, brought suit against the non-paying indorser praying judgment for the money contributed by him toward payment of his share. Four years barred an action on an implied contract, while six years was necessary to bar an action on a note. The court held that inasmuch as the declaration was drawn on the theory that recovery was sought on an implied contract, the action was barred, but said that if the plaintiff had declared on the note, and not on the implied contract and had joined the other paying sureties as parties plaintiff he would have been clearly entitled to recover. "As soon as the debt is paid," said Bleckley, J., "the surety paying it is subrogated to the creditor's rights and to any and all remedies for the enforcement thereof and for his own reimbursement. He is substituted in

paid the debt cannot sue his principal and a co-surety jointly for reimbursement.<sup>20</sup> If two co-sureties pay the debt by their

place of the creditor to all securities held by the latter for the payment of the debt. 'All securities' will include the identical security, the judgment, promissory note, bill, bond or other contractual instrument, upon which the surety and his co-sureties are bound with and for the principal debtor. Though there is a conflict on the question, the better opinion is that the primary and original security, as well as all others, was embraced in the equitable right of subrogation as it existed prior to the code, irrespective of any statute \* \* By legal subrogation [under the code] the paper 'becomes his property, and the creditor has no right to withhold it from his possession. It is equally certain that he could maintain an action upon it against his principal for reimbursement, or against his co-sureties for contribution, at any time before an action upon it by the creditor would have been barred had the creditor not been satisfied by full payment. Not to allow the surety as much time to sue as the creditor himself would have had on the face of the paper, would be only partial, not complete subrogation to the creditor's rights. \* \* There is no legal reason why such an action as the present might not be founded directly on the indorsed notes, and a recovery be had upon the contracts of indorsement commensurate with the rightful claim to contribution.'" But such an action on the note could be maintained only by, or in the names of, all the sureties by whom it had been paid. "The creditor remained the legal owner until the last dollar was paid; there was no substitution as to

either note until it was fully discharged, and the substitution which then actually took place was not the substitution of any one of the paying sureties in place of the creditor, but a substitution of them all jointly as owners in common. From thenceforth the notes stood, with reference to the legal title, just as they would if they were payable on their face to these four persons only, or had been assigned to them by the creditor to whom the payment was made. The law made the assignment, and it was of each note as a whole. There was no carving of them up into fractional parts, and assigning to each new owner his proper fraction of the contracts of indorsement according to the amount contributed by him to the fund which was used to pay them off. Each owner became a part owner of a whole note, not the whole owner of part of the note. This being so, only one action would lie for contribution against the defendant upon his indorsement of either note, and that would be a joint action by all the owners, not an action brought severally by one of them in his own name alone. Most certainly any one of them would have a right to bring the action with or without the consent of the others; if they did not wish to join, he could force them to do so in order that he might collect enough to cover his proportion of what would be recoverable if all desired to make claim and prosecute the action. He might have to indemnify them against costs, but this would be all they could insist upon.'" Compare note 14, § 315.

<sup>20</sup> Burnham v. Choat, 5 Up. Can. K. B. (O. S.) 736.

joint note, they may join in a suit for contribution against another co-surety, even though the latter became surety for them on the note with which they paid the debt.<sup>21</sup> Where three of four co-sureties paid part off the debt in money, each paying an equal amount, and for the remainder gave their note, which was accepted as payment, it was held that each might maintain a separate suit for contribution against the fourth surety.<sup>22</sup> Four parties were liable as co-sureties, and two of them each gave one-third the amount of the debt to a third surety, who put the remaining third necessary to pay the debt with the money thus given him, and therewith paid the debt. Held, the three sureties thus paying might join in a suit against the fourth for contribution. This was put upon the ground that each of the three sureties had paid the one-fourth which he ought to pay, and then each had contributed an equal sum to pay the amount for which the other surety was liable, and had paid it in one payment. The court said: "We are of opinion that when three persons, each of whom is responsible for an entire sum due from another, join in making the payment of that sum by a contribution agreed on among themselves for that purpose, they may join in one action to recover it from the person for whose benefit the payment has been made."<sup>23</sup> Ten parties became sureties in a bond, and the principal and four of the sureties became insolvent. Five of the solvent sureties paid the debt, each paying an equal amount, and brought a joint bill in equity for contribution against the remaining solvent surety. Held, the bill could be maintained, although it was admitted that if the action had been at law several suits would have been necessary.<sup>24</sup> A, B and C being co-sureties, judgment was recovered against them, and execution was levied on separate property belonging to each. A and B paid the judgment and filed a joint bill against C and others, to be subrogated to the lien of the levy on the land of C, and to set aside certain conveyances thereof by C, which were alleged to

<sup>21</sup> Prescott v. Newell, 39 Vt. 82. equivalent to a payment in money

<sup>22</sup> Atkinson v. Stewart, 2 B. Mon. under the statute. Stubbins v. (Ky.) 348. Upon the strength of Mitchell, 82 Ky. 535.  
this decision it was subsequently <sup>23</sup> Clapp v. Rice, 15 Gray (Mass.) 557, per Hoar, J.  
decided by the court that, as be- <sup>24</sup> Young v. Lyons, 8 Gill (Md.) 162.  
tween sureties, a discharge of their  
obligation by the creditor's accept-  
ance of a note of one of them was

be fraudulent. Held, the bill might be maintained. The court said that the object sought by the suit was the benefit of the levy. The levy is an entire thing in the sense of giving a lien capable of being enforced by sale for complainant's benefit; and their rights and interests, however separate in regard to their payments to the creditor, and in regard to their claim against the pocket of their co-surety, come together and join in the pursuit and subjection of the lien.<sup>25</sup>

**§ 318. Who not necessary parties to a bill for contribution, etc.**—To a suit in equity by a surety who has paid the debt against a co-surety for contribution, neither an insolvent principal nor insolvent co-sureties on the personal representatives of insolvent deceased co-sureties are necessary parties.<sup>26</sup> It has also been held that a solvent co-surety who lives out of the state is not a necessary party to a suit in equity for contribution between the other sureties.<sup>27</sup> Where one of two partners is insolvent, and has absconded, and the other is dead, leaving a solvent estate, a surety for the firm, who has paid the debt, may proceed in equity against the estate of the deceased partner, without prosecuting a suit against the survivor.<sup>28</sup>

**§ 319. Surety may without compulsion pay debt when due, and immediately sue co-surety for contribution without demand or notice.**—As soon as the debt becomes due, any one of several co-sureties may, without suit or compulsion on him of any kind, at once pay the debt and recover contribution from his co-sureties. All the co-sureties are equally liable for the whole debt, and a payment of the debt by one of them after it is due and without compulsion is in no sense a voluntary payment.<sup>29</sup> And in such case the surety who pays the debt may immediately and without any demand on his co-surety, or

<sup>25</sup> Smith v. Rumsey, 33 Mich, 183, per Graves, J.

<sup>26</sup> Byers v. McClanahan, 6 Gill & John. (Md.) 250; Johnson's Adm'rs v. Vaughn, 65 Ill. 425; Young v. Lyons, 8 Gill (Md.) 162; Bruce v. Bickerton, 18 W. Va. 342. Neither is the person to whom payment was made a necessary party. Rosenthal v. Sutton, 31 Ohio St. 406. But as to when the principal

is a necessary party in a suit for contribution, see Chrisman v. Jones, 34 Ark. 73.

<sup>27</sup> Jones v. Blanton, 6 Ired. Eq. (N. C.) 115.

<sup>28</sup> Horsey v. Heath, 5 Ohio, 353.

<sup>29</sup> Judah v. Mieure, 5 Blackf. (Ind.) 171; Nixon v. Beard, 111 Ind. 137; Bradley v. Burwell, 3 Denio 61, followed in Supple v. Sayre, 51 Hun 30; Stallworth v.



notice to him, sue him for contribution. In holding this it has been said that, upon payment by the surety, "the law immediately raised an obligation from the defendant to the plaintiff to pay an aliquot part of this sum, according to the number of the sureties. It was a present debt. It was a payment for the use of the defendant upon his request, implied by law; no special demand and notice were therefore necessary." <sup>80</sup>

**§ 320. When liability to contribution attaches.**—The liability of one surety to another for contribution, and of the principal to a surety for indemnity, attaches or springs up at the time the obligation which they have signed is delivered, and whenever payment may be made by the surety, he is considered as a creditor of his principal or co-surety from the time the obligation was made and delivered. This principle is applicable to a case where, after the obligation is delivered, and before it is paid, the principal or co-surety makes a conveyance of his property which the surety who pays seeks to set aside as fraudulent.<sup>31</sup> One of two co-sureties, after he became surety, habitually turned his entire income over to his wife. The jury found that the effect of so doing was to hinder and delay his creditors. Held, that in contemplation of law, the surety became a debtor to his co-surety as soon as the bond was executed, and that as against the co-surety's claim for contribution, such transfer was void. But land that had come to the surety charged with a parol trust in favor of the surety's wife, could

Preslar, 34 Ala. 505; Pitt v. Pursord, 8 Mees. & Wels. 538; Lucas v. Guy, 2 Bailey, Law (S. C.) 403; Linn v. McClelland, 4 Dev. & Batt. Law (N. C.) 458; Machardo v. Fernandez, 74 Cal. 362. But see Curtis v. Parks, 55 Cal. 106. See compulsory payment defined by Royce, C. J., in Aldrich v. Aldrich, 56 Vt. 324. The fact that a surety paid under an execution which could have been quashed on motion is held not to affect his right to contribution. Jenkins v. Lockard's Adm'r, 66 Ala. 377.

<sup>80</sup> Chaffee v. Jones, 19 Pick. 260, per Shaw, C. J.; Cage v. Foster, 5 Yerg. (Tenn.) 261; Wood v.

Perry, 9 Iowa 479; Parham v. Green, 64 N. C. 436; Mason v. Pieron, 69 Wis. 585. Contra, Carpenter v. Kelly, 9 Ohio, 106.

<sup>31</sup> Sargent v. Salmond, 27 Me. 539; Wayland v. Tucker, 4 Gratt. (Va.) 267. The liability to contribution as between co-sureties arises when the common obligation is assumed. Jenkins v. Lockard's Adm'r, 66 Ala. 377. Surety's mere passiveness in asserting his rights does not prejudice his right to contribution, where such delay has worked no injustice to his co-sureties. McGehee v. Owen, 61 Ala. 440.



not be taken to satisfy the co-surety's demand for contribution.<sup>32</sup>

§ 321. **When claim for contribution barred by the statute of limitations.**—The statute of limitations begins to run between co-sureties at the time the debt is paid, irrespective of the time when the obligation was entered into or became due.<sup>33</sup> The surety who has paid more than his share of the debt may, for every separate payment he makes, sue his co-surety for contribution, and the statute of limitations runs against each payment from the time it is made.<sup>34</sup> Where suit is commenced against one of two co-sureties before the debt is barred by the statute of limitations, and judgment is recovered against him, and the debt paid by him after the time when the statute would have been a bar if no suit had been previously brought, and after the debt is barred by the statute against the co-surety, the statute begins to run between the sureties from the time of payment, and the surety who pays may recover contribution from

<sup>32</sup> *Whitehouse v. Bolster*, Me., (Aug., 1901), 50 Atl. Rep. 240. See, also, note 11, § 296.

<sup>33</sup> *Wood v. Leland*, 1 Met. (Mass.) 387; *Singleton v. Townsend*, 45 Mo. 379; *Broughton v. Robinson*, 11 Ala. 922; *Knotts v. Butler*, 10 Rich. Eq. (S. C.) 143; *Camp v. Bostwick*, 20 Ohio St. 337; *Preslar v. Stallworth*, 37 Ala. 402; *Sherrod v. Woodard*, 4 Dev. Law (N. C.) 360; *Stallworth v. Preslar*, 34 Ala. 505; *May v. Vann*, 15 Fla. 553; *Becket v. Tarrant*, 61 Tex. 402; *Martin v. Frantz*, 127 Pa. St. 389; *Leak v. Covington*, 99 N. C. 559. In *Washington Adm'r v. Norwood*, 128 Ala. 383, it was held that the right of action for contribution by one surety against another does not accrue at law or in equity, until one surety pays more than his share of the common liability and the statute of limitations does not begin to run against a claim for contribution until such payment is made. In that case it was held that one surety,

who had been forced to make good a shortage of his principal in 1898, might maintain a bill in 1899 against his co-surety and fraudulent grantees of his co-surety's real estate to set aside a fraudulent conveyance which had been made in 1887 by the co-surety, although the statute of limitations of that state barred an action to set aside fraudulent conveyances of real estate in ten years. See note to § 279. In *Hooper v. Hooper*, 81 Md. 155, 31 Atl. Rep. 508, three guarantors bound themselves to pay the debt of their principal upon thirty days' notice. On demand of the creditor two of them notified the third of their intention to pay, and afterwards paid the entire indebtedness. Held, that the statute of limitations did not begin to run against their suit against the third guarantor for contribution until thirty days after their notice to him.

<sup>34</sup> *Davies v. Humphreys*, 6 Mees. & Wels. 153.

his co-surety at any time after such payment and within the statutory limitation.<sup>35</sup> Where a surety on a joint note, whose liability thereon is barred by the statute, waives his privilege and pays the note, it is held he may sue the co-surety who has not been discharged.<sup>36</sup> A surety suing for contribution must do so within the statutory period or he will be barred.<sup>37</sup> It has been held that failure to present the bond as a claim against the estate of a deceased surety within the statutory time limit for presentation of claims does not affect the liability of his estate upon his contract of suretyship unless such liability has become absolute.<sup>38</sup> The period in which a suit for contribution is barred seems to depend on whether suit is brought on the implied promise of contribution or upon the written instrument, treated as being assigned by law to the surety who paid it.<sup>39</sup>

**§ 322. Rights of sureties as against each other governed by what law—Residence of co-surety in suit for contribution.—**

The legal right of sureties as against each other is not governed by the *lex loci contractus*; neither is there any implied obligation that they shall reside or remain in any particular locality. Thus where a surety on a note made in Vermont, after the bar of the statute of limitations there, voluntarily and without the knowledge of his co-surety, but with no fraudulent intent, removed to New Hampshire, and was there sued by the payee and judgment rendered against him, which he paid, held, in a suit for contribution, that the payment was compulsory and not voluntary, and that his co-surety was liable.<sup>40</sup> A surety on a

<sup>35</sup> Crosby v. Wyatt, 10 N. H. 318; Crosby v. Wyatt, 23 Me. 156. For case holding surety discharged from contribution by long delay under peculiar circumstances, see Williamson's Adm'r v. Rees' Adm'r, 15 Ohio, 572.

<sup>36</sup> McClatchie v. Durham, 44 Mich. 435.

<sup>37</sup> Preston v. Gould, 64 Iowa, 44.

<sup>38</sup> County of Los Angeles v. Lankersheim, 100 Calif. 525, at 534, 35 Pac. Rep. 153, 556. See, also, note 57 to § 150. Also note to South Milwaukee Co. v. Murphy, 58 L. R. A. 82. Div. VI. to X, as to when a claim against the estate of

a deceased surety becomes absolute so that the statutory limitation for the presentation of claims against such estate begins to run.

<sup>39</sup> See Hull v. Meyers, 90 Ga. 674, sec. 4, of opinion at 681, 16 S. E. Rep. 653, cited in note 19 to § 317. Following Sublett v. McKinney, 19 Tex. 438, in which case it was held that an accommodation acceptor who has paid the draft and sues his principal sues on a written instrument and is not limited to the two years within which an action on an unwritten contract must be begun.

<sup>40</sup> Aldrich v. Aldrich, 56 Vt. 324.

joint and several administrator's bond may sue his co-sureties thereon for contribution in any county in which either of them resided.<sup>41</sup>

**§ 323. Pleading—Former adjudication—Co-surety as witness—Evidence.**—A bill by a surety against a co-surety to compel contribution and set aside certain conveyances and subject them to liability is not a creditor's bill, and a court of equity may, upon suitable averments, grant the proper relief, without requiring the surety to first exhaust his remedy at law by judgment and execution.<sup>42</sup> In a suit for contribution against a co-surety, where the principal was also made a defendant, it was sought to obtain not only a judgment against the co-surety for the amount which he ought to contribute, but also to subject to the payment of such judgment, or to the lien of the original judgment, land which the co-surety had conveyed to the principal and which conveyance was alleged to be fraudulent. Held, that the bill to state a cause of action against the principal must show that the surety was insolvent or some necessity existed for resorting to such land in the event of judgment against the co-surety, but that it was not necessary as against the principal that an execution against the co-surety should have been returned unsatisfied.<sup>43</sup> In a suit against sureties on a promissory note, an answer by one that he is liable only as surety, and judgment accordingly, and that the property of the others be first exhausted, is not an adjudication which binds the other surety so as to bar a suit by him against his co-surety for contribution.<sup>44</sup> In a suit by the administrator of a surety against his principal and co-surety for reimbursement, the co-surety is an incompetent witness, and a letter from him and certain extracts from private books are inadmissible.<sup>45</sup>

<sup>41</sup> Rush v. Bishop, 60 Tex. 177.

<sup>43</sup> Mason v. Pierron, 63 Wis. 239.

<sup>42</sup> Moore v. Baker (Cir. Ct. E. D. Wis.) 34 Fed. Rep. 1. See note to § 279.

<sup>44</sup> Leaman v. Sample, 91 Ind. 236.

<sup>45</sup> Harper v. McVeigh, 82 Va.

## CHAPTER XII.

### OF SUBROGATION.

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§ 324. Subrogation—What it is—How connected with the law of suretyship—Conventional subrogation.—Intimately connected with the relation of principal and surety is the doctrine of subrogation. By subrogation, in this connection, is meant the equitable principle upon which one who pays the debt,

or satisfies the obligation of another under such circumstances that the other ought, as a man of honor and conscience, to repay his benefactor, is, for the purpose of giving him a chance to make himself whole, put in the place of the creditor or obligee to whom he has made payment, and given all securities and all rights<sup>1</sup> and remedies against any person whatever that the creditor or obligee has to secure performance of the obligation,—so far as that can be done without violating the rights of innocent third parties.<sup>2</sup> It is “bottomed and fixed on general principles of justice and does not spring from contract though contract may qualify it.”<sup>3</sup> This is a doctrine of the court of chancery and cannot usually be enforced at law as fully and completely as in equity.<sup>4</sup> In cases where the person

<sup>1</sup> It has been held that the surety paying the principal's debt becomes subrogated to the creditor's rights and remedies as they exist at the time of payment. In *The Evangel* (D. C., Wash), 94 Fed. Rep. 680, a steamer having been attached for wages, the United States Fidelity & Guaranty Co. became surety on a release bond upon which the release of the vessel was procured. The vessel was subsequently attached and sold for other claims and thereafter the Fidelity Company paid the first mentioned claim and claimed to be subrogated to the right of the holders of that claim to the balance of the fund in court remaining after payment of such subsequent claims. It was held that by its voluntary act in becoming surety, it did not become subrogated to the rights of the creditor whose claim it had paid, that if it did become so subrogated, it was subrogated only to the creditor's rights as they were at the time of payment and after their lien had been cut off by the sale of the vessel under other liens, and that therefore, as against a prior mortgage of the vessel, the company had no right to the undistributed balance of the fund in court.

Compare note 21, § 325. In *re Stout* (D. C., Mo.) 109 Fed. Rep. 794, in bankruptcy, holding that the surety's payment of the note of his principal relates back to the time of its execution. *Prairie State National Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412, 17 Sup. Ct. Rep. 142. Note 45 to § 278; note 38 to § 326.

<sup>2</sup> Post § 336. This definition is offered by Mr. Lemuel M. Ackley, editor of this edition. Note 19, § 317.

<sup>3</sup> For the nature and origin of subrogation and the varied applications of the doctrine see *Deering v. Earl of Winchelsea*, 1 White & Tudor, L. Cas. Eq. 78 and notes; *S. C.*, 1 Cox. 318, 2 B. & P. 270; *Matthews v. Fidelity Title & Trust Co.* (U. S. C. C., W. Dist. Pa.) 52 Fed. Rep. 687, per Acheson, J., *infra*, note 17 to § 325; *Smith v. Harrison*, 33 Ala. 706; *Felton v. Bissel*, 25 Minn. 15; *Knighton v. Curry*, 62 Ala. 404; *Watts v. Eufaula Nat. Bank*, 76 Ala. 474. In *re Hoge's Estate*, 188 Pa. St. 527, 41 Atl. Rep. 621.

<sup>4</sup> Holding that subrogation cannot be applied in courts of law except in those states in which equitable remedies are administered

paying the debt or performing the obligation of another stands in the relation of surety or guarantor to the person whose debt or obligation has been performed, equity substitutes him in the place of the creditor or obligee as a matter of course, without any special agreement to that effect and without requiring any further showing to be made of circumstances entitling him to subrogation.<sup>5</sup> It has been said that "the surety, upon performance by him of his contract, is entitled to the original evidences of debt held by the creditor, and to any judgment in which the debt has been merged, as well as to all collateral securities held by the creditor. The right of the surety is not only that of subrogation, pure and simple, but a right to an assignment by the creditor.

\* \* By performing the contract of suretyship, the principal obligation is discharged against the creditor and is kept alive between the creditor, the debtor and the surety, for the purpose of enforcing the rights of the last."<sup>6</sup> It has also been said that subrogation is a mode which equity adopts to compel the ultimate discharge of a debt by him who in good conscience ought to pay it, and to relieve him whom none but the creditor could ask to pay.<sup>7</sup> Where a party became bound by bond, which the importer and owner of certain goods did not sign, for duties due the United States, and afterwards paid such duties, it was held he was entitled to be subrogated to all the rights and preferences of the United States for the payment of the duties. The court said that the importer remained liable for the duties, notwithstanding the giving of the bond, and the signer of the bond, although bound by a separate instrument, still occupied the position of a surety, and was entitled to subrogation as such.<sup>8</sup> A surety who becomes such at the request

through the forms of law, see *Moore v. Watson*, 20 R. I. 495, 40 Atl. Rep. 345.

<sup>5</sup> *Miller v. Stout*, 5 Del. Ch. 259; *Bray v. First Ave. Coal Mining Co.*, 148 Ind. 599, 47 N. E. Rep. 1073; *Frank v. Traylor*, 128 Ind. 455, 29 N. E. Rep. 486; *Murrell v. Henry*, Ark., Feb., 1902, 66 S. W. Rep. 647; *Gunn v. Orndorff*, Ky., Mch., 1902, no official report, 67 S. W. Rep. 372, 23 Ky. Law Rep. 2369.

<sup>6</sup> *Fielding v. Waterhouse*, 8 Jones

& *Spencer* (N. Y.) 424, per *Sedgewick, J.* To same effect, see *Berthold, Adm'r, v. Berthold*, 46 Mo. 557; *Miller v. Stout*, 5 Del. Ch. 259; *Dunphy v. Gorman*, 29 Ill. App. 132.

<sup>7</sup> *McCormick's Adm'r v. Irwin*, 35 Pa. St. 111, per *Strong, J.* See, also, *Heart v. Bryan*, 2 Dev. Eq. (N. C.) 147; *Rooker v. Benson*, 83 Ind. 250; note 17 to § 325.

<sup>8</sup> *Enders v. Brune*, 4 Rand. (Va.)

438. See, further, to this point,



of the creditor, and without any request from the principal, is, if he pay the debt, entitled to subrogation. "The right of the surety to demand of the creditor whose debt he has paid, the securities he holds against the principal debtor, and to stand in his shoes, does not depend at all upon any request or contract on the part of the debtor with the surety, but grows rather out of the relations existing between the surety and the creditor, and is founded not upon any contract, express or implied, but springs from the most obvious principles of natural justice."<sup>9</sup> Where the parties have contracted that the party paying the debt shall be subrogated to some particular right or remedy of the creditor, their contract is enforced, and the party paying the debt is not subrogated to any other right or remedy of the creditor.<sup>10</sup> In some states subrogation is regulated by statute.<sup>11</sup> The right to subrogation is assignable.<sup>12</sup>

*Harnsberger v. Yancey*, 33 Gratt. (Va.) 527.

<sup>9</sup> *Matthews v. Aiken*, 1 N. Y. 595, per Johnson, J. See, also, on this subject, *McArthur v. Martin*, 23 Minn. 74; *Eaton v. Hasty*, 6 Neb. 419; *Talbot v. Wilkins*, 31 Ark. 411.

<sup>10</sup> This is finely illustrated by *Huntington v. The Advance*, 72 Fed. Rep. 793, 19 C. C. A. 194, affirming 63 Fed. Rep. 726, in which case the insolvent owner of a vessel procured, at New York, credit upon which money was obtained in Brazil to pay off claims against it in Brazilian ports by pledging to the New York creditors the freights as security. Held, that the New York creditors, having contracted expressly for a specified security were not subrogated to the rights of the lienors in Brazil. Shipman, J., said that "in this case there can be no implied assignments by operation of law, no succession to the position of the Brazilian lienors, and no subrogation to their rights, because the contract of lien under which the guaranties were given was expressly limited to the freights. A court of admiralty is compelled,

therefore, to look at the contract; and, if it does, the right of subrogation disappears, for nothing in the negotiations supports the idea of subrogated liens. Inasmuch as the contract for lien, between the owner and the guarantor, was an express one, the lien which it created upon one thing cannot be supplemented by a lien, arising by operation of law, upon a different thing." In *Patterson v. Clark*, 96 Ga. 494, 23 S. E. Rep. 496, Patterson borrowed money on his note with which he paid certain judgments against him. Clark became surety on the note under an agreement with Patterson that the judgments should not be extinguished by the payment but should remain open for the surety's benefit until Patterson's note was paid. Held, that payment of the judgment under such circumstances with money so raised did not extinguish or satisfy them. "In the absence of any agreement or understanding upon the subject," said the court, "it would doubtless be true that when Patterson paid his judgment creditors the amounts respectively

due them, their executions would become satisfied; but if Patterson made an express contract with Clark, in order to induce him to become surety, that the executions should not become satisfied but should be held by Clark for his protection, what good reason in law or in morals can be suggested why this contract should not, inter partes, be enforced for the benefit of the surety?" See, also, *Henderson-Achert Lithographic Co. v. John Shillito Co.*, 64 Ohio St. 236, 60 N. E. Rep. 295. In *Allen v. Caylor*, 120 Ala. 251, 24 So. Rep. 512, it was held that a demurrer was properly overruled to a bill filed by a woman stating that her husband bought certain land for \$280 and paid \$180 of the purchase money and that she paid \$100, the balance, under an agreement with her husband that she should have "a claim or lien on the land for the same" and praying that the land be sold to satisfy such lien. The court rested its decision upon conventional subrogation. "Under that doctrine," it said (p. 254), "a stranger, paying off a vendor's lien at the instance of the debtor, and upon agreement that he shall have a lien for reimbursement, stands in the shoes of the vendor, in respect of the lien. This subrogation is purely conventional; it results directly from the agreement; it is in effect, though not in form, an equitable assignment of the lien for the security of the advance, as in *McMillan v. Gordon*, 4 Ala. 716, where a stranger paying off part of a mortgage debt at the instance of the mortgagor and upon the latter's agreement that a lien should be given him on the mortgaged premises, and that he should be repaid out of the proceeds of the sale, it was held that the payment did

not extinguish the mortgage debt, and that the party paying was entitled in equity to a pro tanto assignment of the mortgage; and this notwithstanding the agreement was not in writing." Compare *Chapman v. Abraham*, 61 Ala. 108. In *Gore v. Brian*, N. J. Eq., Oct., 1896, no official report, 35 Atl. Rep. 897, A loaned to B \$5,000 upon the understanding that the loan should be secured by first mortgage on B's land. The money was actually used in paying off two \$2,500 first mortgages, leaving unsatisfied an \$1,100 second mortgage of which A had no personal knowledge when the loan was made. Held, that, although, if there had been no agreement that A was to be secured by first mortgage, she would be a mere volunteer and not entitled to subrogation, yet, by reason of that agreement, she was entitled to be subrogated to the rights of the holders of the second \$2,500 mortgage as against the holder of the \$1,100 mortgage. The Court, Vice Chancellor Reed, cited as to the distinction between legal and conventional subrogation, *Seeley v. Bacon*, N. J. Eq., Mch., 1896, no official report, 34 Atl. Rep. 139. Compare *Kocher v. Kocher*, 56 N. J. Eq. 547, 39 Atl. Rep. 536. In *Elliott v. Tainter*, Minn., Jan., 1903, 93 N. W. Rep. 124, plaintiff loaned money upon the understanding that it was to be a first lien on certain land and should be used in paying off certain existing mortgages. By mistake one existing mortgage was overlooked and by such payment advanced to be a first lien. Held, that plaintiff was subrogated to the lien of the earlier mortgages paid with her money. *Home Bk. v. Bierstadt*, 168 Ill. 618.

<sup>11</sup> Since the statutory enlargement of the doctrine of subrogation,

**§ 325. No subrogation in favor of the mere volunteer—What is a volunteer?**—There is no subrogation in favor of the mere volunteer.<sup>13</sup> The term volunteer in this connection is not used in its popular sense. It has a special limited meaning. It means a gratuitous intermeddler who voluntarily pays the debt or performs the obligation of another without either having or believing that he has<sup>14</sup> any interest of his own to be pro-

courts are liberal in their application of it in favor of the surety. *Watts v. Eufaula Nat. Bank*, 76 Ala. 474. A Georgia statute provides that any surety "who shall have paid off or discharged the judgment" "shall have the control of the execution, and the judgment upon which it is founded, to the same extent as if he was the original plaintiff therein, and be subrogated to all the rights of such plaintiff, for the purpose of reimbursing himself from his principal." In *Ezzard v. Bell*, 100 Ga. 150, 28 S. E. Rep. 28, it was held that the statute applies to a case where the judgment is satisfied by levy and sale of the surety's property and not merely to voluntary payment of the judgment by the surety.

<sup>13</sup>In *Peirce v. Garrett*, 65 Ill. App. 682, 687, Boyer mortgaged his land to secure the Home Nursery Co.'s note for \$8,400 on which he, Porter and others, were sureties. Porter paid a judgment for \$9,110 on the note and assigned his right of subrogation to Pierce who filed a bill to foreclose the mortgage. Held, that Pierce was entitled to foreclosure to the extent of his right to compel Boyer to contribute. Citing: *Munford v. Frith*, 68 Ind. 83; *Frank v. Traylor*, 130 Ind. 145, 29 N. E. Rep. 486. A statutory right of subrogation is assignable. In *Fuller v. Dowdell*, 85 Ga. 463, 11 S. E. Rep. 773, the sureties of a defaulting tax collec-

tor made good his shortage with money furnished by Mrs. Boss. Held, that the execution that the state had sued out against the collector and his sureties was properly assigned to Mrs. Boss, who was not a surety, and was enforceable by her.

<sup>13</sup>*Griffin v. Orman*, 9 Fla. 22; *Winder v. Diffenderfer*, 2 Bland's Ch. (Md.) 166; *Richmond v. Marston*, 15 Ind. 134; *Coe v. New Jersey Midland R. R. Co.*, 27 N. J. Eq. 110; *Hough v. Aetna Life Ins. Co.*, 57 Ill. 318; *Wilson v. Brown*, 2 Beasley (N. J.) 277; *Shinn v. Budd*, 1 McC. (N. J.) 234; *Burton v. Mill*, 78 Va. 468; *Beaver v. Slauker*, Adm'r, 94 Ill. 175.

<sup>14</sup>*Kapena v. Kaleleonolani*, 6 Hawaii, 579, in which case a statute directed the minister of finance to pay such mortgages on the crown lands as might remain unsatisfied after the administrators of the late king's estate had exhausted the estate belonging to the king in his private capacity. By mistake the minister, acting under this statute, paid a mortgage of \$27,000 on the late king's private property, supposing it to be crown land. Held, that he became thereby subrogated to the rights of the mortgagee to the extent of \$8,000 which was the value of the land in question at the time of such payment. *S. C., Hawaiian Government v. Cartwright*, 8 Hawaii, 697. See, also, *St. John v. Connell*, 61 Neb. 267, 85 N. W.

tected thereby, without having any agreement, express or implied,<sup>15</sup> with either the debtor or the creditor,<sup>16</sup> to be subrogated to the creditor's rights, without request by the

Rep. 82, note 9 to § 353, post; Western Mortgage & Investment Co. v. Ganzer, 63 Fed. Rep. 647, 11 C. C. A. 371, 375; Redington v. Cornwell, 90 Calif. 49, 27 Pac. Rep. 40; Ferris v. Van Ingen, 110 Ga. 102, 35 S. E. Rep. 347; Taylor v. Girard Life &c. Ins. Co., 1 App. Cas. D. C. 209; Nord Deutscher Lloyd v. President Ins. Co. of N. A., 110 Fed. Rep. 420; Clark v. Marlow, 149 Ind. 41, 48 N. E. Rep. 359; Backer v. Pyne, 130 Ind. 288, 30 N. E. Rep. 21 and cases cited; First Natl. Bank of Seattle v. City Trust Safe Deposit & Surety Co., 114 Fed. Rep. 529; Chicago & Alton R. R. Co. v. Glenney, 175 Ill. 238, 51 N. E. Rep. 896, affirming 70 Ill. App. 510; Straman v. Rehtine, 58 Ohio St. 443, 51 N. E. Rep. 44. In Albrow Co. v. Fountain, 162 N. Y. 498, 57 N. E. Rep. 72, a bank paid out the money of one of its depositors on her check after it had been served as defendant in a creditor's bill by which it was sought to appropriate her deposit to payment of her husband's debt. Held, that by such payment the bank became subrogated to the rights of the depositor and could make any defence that she might have made. In Pease v. Egan, 131 N. Y. 262, 30 N. E. Rep. 102, a daughter having a contingent interest in real estate left by her deceased father, which interest by the terms of his will, would terminate upon her death without issue during the life of her mother, assisted in paying a mortgage of \$18,000 to which the real estate was subject and thereafter died during the life of her mother without issue. The supreme court, 15 N. Y. Supp.

200, held that in making such payment she was a mere volunteer and that her executor was not subrogated to the right of the mortgagee. This decision was reversed by the Court of Appeals. Peckham, J., said that the daughter having a contingent interest in the real estate to protect, was not to be regarded as a volunteer when she paid the mortgage. "Whether she had any interest in its payment was based upon whether she was a devisee of the realty, and that was based upon a contingency which had not yet occurred; and when she paid the mortgage, or some part thereof, she took the chance of paying a debt for which she was not responsible in order to preserve an estate, her interest in which was contingent. When the contingency subsequently occurred which proved that she had no interest in the property which she had aided in preserving, justice demanded that her estate, which had thus suffered, should be treated as if it had paid the debt of another." See, also, Lidderdale's Ex'rs v. Robinson's Adm'r, 2 Brock 159-168, Marshall, C. J.; Cole v. Malcolm, 66 N. Y. 363; John v. Connell, 61 Neb. 267, 85 N. W. Rep. 82, cited note 9 to § 353.

<sup>15</sup> In Wilkins v. Gibson, 113 Ga. 31, 38 S. E. Rep. 374, Steiner, having a farm subject to \$6,000 first mortgage in favor of Richardson and to second mortgage in favor of Wilkins, borrowed \$6,000 from Gibson upon the agreement that Gibson should have a first lien. Held, that such agreement by the lender with either Steiner, the creditor, or

debtor,<sup>17</sup> and without having any equity in his own favor by virtue of which a court of conscience feels bound, as a matter of justice and right, to give him the remedies of the creditor

Richardson, the first mortgagee, would entitle Gibson to be subrogated to the rights of Richardson to the extent that his money had been used to pay Richardson's mortgage, but that it was incumbent on Gibson to aver in his pleadings and establish by the proofs that such an agreement existed or to show facts from which it could be inferred. A judgment in his favor, finding him subrogated to the rights of Richardson, was set aside because the trial court had instructed the jury that "if the plaintiff advanced the money to pay off the debt due Richardson, by request of Mrs. Steiner, and the money was used for that purpose, this, without more, would make a case for the application of the doctrine of conventional subrogation." "In order to recover on this theory," said the court (p. 49), "the plaintiff must show a state of facts from which either an express agreement or one arising by necessary implication will appear to have been made between him and Mrs. Steiner, or Richardson, or their respective agents under authority from their principals, that the plaintiff was, so far as the dignity of his lien was concerned, to stand in the place of Richardson." Citing many cases. In *McWilliams v. Bones*, 84 Ga. 203, 10 S. E. Rep. 724, it was held that one who advanced money which by his agreement with the mortgagor was to be used in paying off a purchase money mortgage on the mortgagor's homestead and another mortgage which antedated the mortgagor's homestead, was entitled to be subrogated to the rights of the mort-

gagees whose claims were paid with his money, and therefore had priority to the mortgagor's homestead. See, also, *Henderson Achert Lithographic Co. v. John Shillito Co.*, 64 Ohio St. 236, 60 N. E. Rep. 295. Compare *Martin v. Martin*, 164 Ill. 640, 45 N. E. Rep. 1007, in which case it was held that where an employer advanced money on account of salary to his employee to enable the employee to pay a mortgage on his home without any agreement for security, and the money advanced was so used, the employer did not become thereby subrogated to the rights of the mortgagee whose mortgage was paid with his money. And see *Falmouth Natl. Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550, 44 N. E. Rep. 617, holding that one who furnishes money to a sub-contractor, which goes into the work, does not thereby, without agreement therefor, become subrogated to the principal contractor's right to a fund that he had deposited as security for performance of his contract.

<sup>16</sup> *Wilkerson v. Tichenor* (Ky.), 62 S. W. Rep. 870; *Woodbury v. Butler*, 67 N. H. 545, 38 Atl. Rep. 379.

<sup>17</sup> There is strong authority for the proposition that if A pays B's debt at B's request he thereby, without more, becomes subrogated, in a court of equity, to the rights, remedies and securities held by B's creditor for the payment of the debt. *Clark v. Marlow*, 149 Ind. 41, 48 N. E. Rep. 359, in which case A's support was charged on certain land. B, at A's request, supported A. Held, that he became subro-

gated to A's lien against the land. *Warford v. Hankins*, 150 Ind. 489, 50 N. E. Rep. 468, cited in note 57 to § 326. *Straman v. Rectine*, 58 Ohio St. 443, 51 N. E. Rep. 44. In *Matthews v. Fidelity Title & Trust Co.* (U. S. C. C., W. Dist., Pa.) 52 Fed. Rep. 687, the Lawrence Bank being in financial difficulty, Matthews, a stranger, with no interest of his own to protect, gave it a mortgage for \$50,000 executed by the Moorehead-McCleane Co. to use in sustaining its credit. It pledged the mortgage and a lot of commercial paper with the Union National Bank of Pittsburgh to secure overdrafts and afterwards made a general assignment for the benefit of its creditors. The mortgage and paper brought a sum \$21,000 in excess of the overdraft. Held, that Matthews was entitled to this fund by subrogation. "It is well settled," said the court, Acheson, J., "that subrogation is not founded on contract, nor does it depend on strict suretyship, but it results from the natural justice of placing the burden where it ought to rest. It is a mode which equity adopts to compel the ultimate discharge of a debt by him who, in good conscience, ought to pay it, and relieve him whom none but the creditor could ask to pay. 2 White and T. Lead. cases, 282; *McCormick v. Irwin*, 35 Pa. St. 111. The facts above narrated, we think, clearly bring this case within the operation of the rule, for, as between the Lawrence bank and the plaintiff, the former was bound to pay the indebtedness to the Union bank, and, as the plaintiff's mortgage, pledged by the Lawrence bank for its debt, has been applied to the discharge thereof, the plaintiff has, as against the Lawrence bank, an equitable right to the sur-

plus in the hands of the creditor arising from the other securities owned and pledged by the Lawrence bank for the same debt \* \* The cases cited by the defendant's counsel to show that one who, without compulsion, obligation or duty, pays the debt of another, is not entitled to subrogation, have no application here, for the plaintiff was not a volunteer in the sense of those authorities. He was no more a volunteer than is any surety who, of his own free will, binds himself for the acts or debt of another." To the same effect, in principle, see *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. Ed. 825, 8 Sup. Ct. Rep. 1004. In that case the Cairo & St. Louis Railroad, being, in 1873, in default on its bonds secured by first mortgage on all its real and personal property, was threatened with seizure of its rolling stock under execution on a judgment which one Holbrook had obtained against it. It filed a bill and obtained an injunction restraining further proceedings under the execution and Morrison, a stranger, became surety on its injunction bond. The injunction was dissolved and judgment was obtained in 1880 against Morrison, as surety, for about \$14,000. In 1877 the mortgage securing the railroad's bonds was foreclosed and all the railroad's property was sold in July, 1881, to a new corporation formed by its bondholders for the purpose of buying it, subject, however, to the claim of Morrison, who had intervened in the foreclosure suit, provided that his claim for reimbursement should be finally found to be entitled to precedence to the mortgage. It was held that since Morrison's execution of the injunction bond had saved the road from complete paralysis and preserved



whose debt he has paid.<sup>18</sup> The debtor has a right to leave his debt unpaid.<sup>19</sup> It may be to his interest that it remain unpaid. The creditor has a right to refuse to accept payment from a person other than the debtor or his agent.<sup>20</sup> It may be to his interest that it remain unpaid. The volunteer is the man who, without any real or supposed interest of his own to protect, without

the rolling stock for the benefit of the mortgagee and had kept in the hands of the railroad money which was afterwards used in the purchase of new rolling stock of which the mortgagees eventually got the benefit, his claim to repayment constituted a lien on the property of the company paramount to the lien of the earlier mortgage. See, also, *Rome & Decatur R. R. Co. v. Sibert*, 97 Ala. 393, 12 So. Rep. 69, note 43 to § 278, supra. In *MacGreal v. Taylor*, 167 U. S. 688, 42 L. Ed. 326, 17 Sup. Ct. Rep. 961, an infant having a vacant lot subject to two mortgages and tax claims borrowed \$8,000, part of which was at her request expended by the mortgagee, who did not know of her infancy, in paying them and the balance in building a house upon the lot. Upon becoming of age the infant repudiated the contract. Held, modifying 1 App. D. C. 359, that the mortgagee was subrogated to the rights of the claimants whose claims had been paid by the mortgagee, and that since the infant still had the property, the mortgagee was entitled to be repaid to the extent that her money had added to its value. The true significance, or insignificance of the term volunteer as used in the law of subrogation seems to have been grasped also by Magruder, J., in *St. Louis and Sandoval Coal and Mining Co. v. Sandoval Coal and Mining Co.*, 116 Ill. 170. See also *Voltz v. Nat'l Bank of Illinois*, 158 Ill. 532, 42 N. E. Rep.

69, note 45 to § 326; *Home Bank v. Bierstadt*, 168 Ill. 618, at 626, 48 N. E. Rep. 161. The text on this subject has been rewritten by Mr. L. M. Ackley, editor of this edition.

<sup>18</sup> *Matthews v. Fidelity Title & Trust Co.*, 52 Fed. Rep. 687, supra; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. Ed. 825, 8 Sup. Ct. Rep. 1004, supra; *Kalschener v. Upton*, 6 Dak. Terr. 449, in which case Kalschener sold certain land to Keller subject to mortgages held by Smith and Miller, respectively. Keller, before the deed was delivered to her, mortgaged the land to Upton to secure a loan of \$2,000 and used part of the proceeds in paying the mortgages of Smith and Miller which were duly released. Afterwards, upon receiving Kalschener's deed conveying the land to her she executed to him a purchase money mortgage. Held, that Upton was entitled to be subrogated to the rights of Smith and Miller as prior mortgagees to the extent that his money had been used in paying those mortgages. In *Hackfeld v. Ing Choi*, 5 Hawaii 136, A paid B's debt in consideration of a transfer of property from B to A which was afterwards adjudged void in fraud of creditors. Held, that A was subrogated to the rights of B's creditors whose claims he had paid.

<sup>19</sup> See numerous cases cited in N. 1 22 Am. & Eng. Enc. Law, 2d Ed., 520.

<sup>20</sup> Ibid.



the debtor's request, without any agreement with either debtor or creditor that he shall be put in possession of the creditor's rights, and without any equity in his own favor, intermeddles and pays the debt. The courts have no time for him. The term volunteer is a very unfortunate one. Confusing its meaning in common language with its technical meaning, courts have often denied subrogation where the unfortunate applicant, as a matter of justice and right, was clearly entitled to it.<sup>21</sup> It follows from the very meaning of the word that a surety who is by law compelled to make good the default of his principal is never a volunteer. A study of the cases is the best means of determining the position of the courts in this regard.

**§ 326. Instances where one whose money paid the debt of another was held not to be a volunteer but entitled to subrogation.**—In the following instances the party paying was held to be not a volunteer but entitled to be subrogated to the rights of the creditor: The insurer who pays the loss of the insured.<sup>22</sup> Even when he might have made a successful defense.<sup>23</sup> An ad-

<sup>21</sup> For instance, the mistake of the Supreme Court that was corrected in *Pease v. Egan*, 131 N. Y. 262, 30 N. E. Rep. 102, note 14, § 325; *The Evangel*, 94 Fed. Rep. 680, note 1, § 324, *supra*.

<sup>22</sup> *Chicago & Alton R. R. v. Glenney*, 175 Ill. 238, 51 N. E. Rep. 869, affirming 70 Ill. App. 510; *The Clintonia* (D. C., N. Y.) 104 Fed. Rep. 92; *The Livingston* (D. C., N. Y.) 104 Fed. Rep. 918; *Phoenix Ins. Co. v. Pennsylvania Co.*, 134 Ind. 215, 33 N. E. Rep. 970; *Kennedy v. Iowa State Insurance Co.*, Iowa, Oct., 1902, 91 N. W. Rep. 831. In *Lake Erie R. R. Co. v. Falk*, 61 Ohio St. 312, 56 N. E. Rep. 1020, an insurance company which paid a fire loss growing out of the burning of a grain elevator was held subrogated to the rights of the insured under a statute which provided that whenever property was destroyed by fire caused by a passing locomotive, the loser might recover its value from the railroad

without proof of the railroad's negligence. *Railway Co. v. Fire Assn.*, 55 Ark. 165, 18 S. W. Rep. 43; *Leavitt v. Canadian Pac. R. R. Co.*, 90 Me. 153, 37 Atl. Rep. 886; *Savannah Fire Ins. Co. v. Pelzer Mfg. Co. (C. C. So. Car.)*, 60 Fed. Rep. 39.

<sup>23</sup> In *Nord Deutscher Lloyd v. President, etc., Ins. Co. of North America*, 110 Fed. Rep. 420 C. C. A., an insurance company paid a loss caused by the capsizing of a lighter which was caused by defective caulking, when it had not yet received the premium and had not yet issued any policy and might have successfully resisted payment. Held, that it was subrogated to the right of the insured to recover from the owner of the lighter. The court held that it made no difference to the negligent carrier whether it paid the penalty for its negligence to the insured or the insurer. Citing to this point: *Sun Mutual Ins. Co. v. Mississippi Val-*

ministrator who redeems real estate of his decedent, by order of court, from foreclosure sale.<sup>24</sup> One who loans money upon an agreement with the borrower that it is to be used in paying off a purchase money mortgage.<sup>25</sup> One innocently loaning money to a supposed owner of land who uses it in paying off prior liens.<sup>26</sup> One advancing money to pay off vendor's liens.<sup>27</sup> One who loans money on a defective or void mortgage which is used in pursuance of agreement to pay off an existing mortgage.<sup>28</sup> Mortgagee paying prior mortgage.<sup>29</sup> Mortgagee pay-

ley Transportation Co. (C. C.) 17 Fed. Rep. 919, and Insurance Co. v. The C. D. Jr., 1 Woods 72, Federal Cases No. 7051.

<sup>24</sup> An administrator, by order of the court, redeemed from foreclosure sales of real estate of his decedent, taking assignments of the certificates of sale. Held, that he thereby became subrogated to the rights of the mortgagees and took precedence of subsequent incumbrancers who had no other notice of his rights than the fact that the mortgage redeemed from remained unsatisfied of record. *Green v. Brown* (Ind.), 38 N. E. Rep. 519 (no official report) same case, on rehearing, 146 Ind. 1, 44 N. E. Rep. 805. In *Salinger v. Black*, 68 Ark. 449, 60 S. W. Rep. 229, personal property of an insolvent estate (\$31,859.72 cash), was used to pay mortgages on the decedent's land, part of which was afterwards assigned to the widow as dower. Held, that the administrators were subrogated to the rights of the mortgagees and that the widow must repay her proportionate part of the money.

<sup>25</sup> *McWilliams v. Bones*, 84 Ga. 203, 10 S. E. Rep. 724.

<sup>26</sup> *Kalschener v. Upton*, 6 Dak. Terr. 449.

<sup>27</sup> It is held in Texas that generally where one advances money to pay a vendor's lien on the home-

stead of another and the money is so applied, the creditor becomes subrogated to the vendor's lien so discharged. *Hicks v. Morris*, 57 Tex. 658; *Pridgen v. Warn*, 79 Tex. 588, 15 S. W. Rep. 559. See, also, *Western Mortgage & Investment Co. v. Ganzer* (Tex.) 63 Fed. Rep. 647, 11 C. C. A. 371, and note at 375, in which case the right to such subrogation was expressly given to the mortgagee advancing the money to pay off purchase money mortgages. Contra, holding that there can be no subrogation to a vendor's lien for unpaid purchase money, see *Martin v. Martin*, 164 Ill. 640, 45 N. E. Rep. 1007, reversing 62 Ill. App. 378.

<sup>28</sup> *Straman v. Rechline*, 58 Ohio St. 443, 51 N. E. Rep. 44, in which case the mortgage was not acknowledged. *State National Bank v. Vicroy*, Ky., Nov., 1902, 7 S. W. Rep. 183; *Amick v. Woodworth*, 58 Ohio St. 86, 50 N. E. Rep. 437, In *Equitable Mortgage Co. v. Lowry* (C. C. Tex.) 55 Fed. Rep. 165, foreclosure, plaintiff loaned defendant money on a mortgage which was absolutely void because the property mortgaged was defendant's homestead. Part of the money was used by plaintiff at defendant's request in paying an earlier mortgage on defendant's homestead which was made by a third party to whom defendants had made a

ing prior mortgage which was void as to the mortgagee therein.<sup>30</sup> Mortgagee who pays off mechanics' lien claims which had not yet been adjudged to be liens against the mortgaged property.<sup>31</sup> Mortgagee paying taxes.<sup>32</sup> Mortgagee paying ground rent that the mortgagor had covenanted to pay.<sup>33</sup> Junior judgment creditor who redeems from a sale under an earlier judgment.<sup>34</sup> Stockholder of a corporation who pays its debt.<sup>35</sup> Surety who pays principal's debt voluntarily or by compulsion.<sup>36</sup> Surety on a tax collector's official bond who makes good his principal's default.<sup>37</sup> Surety for a building contractor who performs the contract after his principal has abandoned it.<sup>38</sup> Surety on a stay bond who is compelled to

colorable transfer of their homestead for the purpose of procuring the loan. It was held that plaintiff became subrogated to the rights of the earlier mortgagee and that the defence of homestead could not be made against him in the absence of evidence that he had notice of the devices to which defendants had resorted in mortgaging their homestead. See, also, *Ivory v. Kennedy* (C. C., Tex.) 57 Fed. Rep. 340, 6 C. C. A. 365.

<sup>29</sup> *Pleasants v. Fay*, 13 App. Cas. D. C. 237; *Wyman v. Johnson*, 68 Ark. 369, 375, 59 S. W. Rep. 250; *Tillman v. Stewart*, 104 Ga. 689, 30 S. E. Rep. 949.

<sup>30</sup> *Equitable Mortgage Co. v. Lowry* (C. C. Tex.) 55 Fed. Rep. 165; *Ivory v. Kennedy* (Tex.), 57 Fed. Rep. 340, 6 C. C. A. 365.

<sup>31</sup> *Fletcher v. Stallings*, 5 Colo., App. 106, holding him subrogated upon establishing their validity.

<sup>32</sup> *Ferris v. Van Ingen*, 110 Ga. 102, 35 S. E. Rep. 347, holding him subrogated to the rights and remedies of the taxing power. In *Rohrbaugh v. Johnson*, 107 Calif. 144, 40 Pac. Rep. 37, it was held that a mortgagee who pays the lien of a warehouseman to protect his mortgage, is subrogated to the right

of the warehouseman to hold the mortgaged property as against attaching creditors until his lien is satisfied.

<sup>33</sup> *Barron v. Whiteside*, 89 Md. 448, 43 Atl. Rep. 825.

<sup>34</sup> *Backer v. Pyne*, 130 Ind. 288, 30 N. E. Rep. 21 and cases cited.

<sup>35</sup> *Redington v. Cornwell*, 90 Calif. 49, 27 Pac. Rep. 40.

<sup>36</sup> In *re Stout* (D. C., Mo.) 109 Fed. Rep. 794; *Ezzard v. Bell*, 100 Ga. 150, 28 S. E. Rep. 28; *Bray v. First Ave. Coal Mining Co.*, 148 Ind. 599, 47 N. E. Rep. 1073; *Park v. Robinson*, S. D., Apl., 1902, 91 N. W. Rep. 344; *Shirey v. Bicknell*, 87 Ill. App. 429. In *Mendel v. Boyd*, Neb., Oct., 1902, 91 N. W. Rep. 860, the sureties on the bond of a bank cashier who had made good his defalcation were held subrogated to the rights of the bank to recover its loss from the broker who had joined the cashier in gambling transactions in grain in which the bank's money was used and lost.

<sup>37</sup> *Fuller v. Dowdall*, 85 Ga. 463, 11 S. E. Rep. 773.

<sup>38</sup> Held subrogated to the contractor's right to recover the contract price, without regard to his subsequent assignment thereof: In

pay the judgment.<sup>39</sup> Devisee who pays the debts of his decedent.<sup>40</sup> Purchaser at void judicial sale.<sup>41</sup> Purchaser at void

*First National Bank of Seattle v. City Trust Safe Deposit & Surety Co. of Phila.*, 114 Fed. Rep. 529, 52 C. C. A. 313, *McCauley and Delaney* having obtained a paving contract from the city of Seattle, procured the City Trust Company to act as surety on their bond, and in order to obtain funds, pledged certain instalments that should be come due them for the work under the terms of their contract, without the surety's consent to the First National Bank which in consideration thereof, advanced the necessary money to do the work. The contractors abandoned the paving before it was finished and the City Trust Company, as surety, finished it, and filed its bill to compel the city to issue to it the full amount of the contract price then remaining unpaid including the portion thereof that had been assigned to the bank. It was held (Mr. Justice McKenna dissenting), that the right of the surety to the fund was superior to that of the contractors and therefore also superior to the right of the bank, their assignee. The court cited and followed *Prairie State National Bank v. United States*, 164 U. S. 227, 17 Sup. Ct. Rep. 142, 41 L. Ed., 412, and disapproved the decision of the state court in *Dowling v. City of Seattle*, 22 Wash. 592, 61 Pac. Rep. 709, in which case it was held that the rights of the contractors' assignee were superior to the rights of the surety who took up and finished the work that the contractor had failed to complete it. In *Prairie State Natl. Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412, 17 Sup. Ct. Rep. 142, the surety of a government building contractor upon the default

of his principal finished the principal's contract and, after May, 1890, expended \$15,000 in doing so. Held, that he thereby became subrogated to the rights of the contractor to a fund equal to 10 per cent of the contract price of the work which the government had reserved to insure completion of the work and that his rights as subrogee related back to the date of the contract, May 10, 1888, and took precedence of the equitable lien of plaintiff bank which had advanced money to the contractor to be used in the work, upon his assigning to the bank, Feb. 3, 1890, the reserved fund in question. The surety, said the court, discharged an obligation due by the principal, for the performance of which the surety was bound under the obligation of his suretyship. The bank, on the contrary, was a mere volunteer, who lent money to the principal on the faith of a presumed agreement and of supposed rights acquired thereunder. The contractor's assignment was ineffective as to the government under sec. 3477, U. S. Rev. Stat., making such assignments void when made before claim allowed and warrant issued, but the decision was not grounded on the statute. The court held that the principal could not assign any greater rights than he possessed and his rights to the reserved fund were "subordinate to those of the United States and the sureties." (p. 240.)

<sup>39</sup> *Davis v. Schlemmer*, 150 Ind. 472, 50 N. E. Rep. 373, holding the surety subrogated to the rights of the judgment creditor.

<sup>40</sup> *Suydam v. Voorhees*, 58 N. J. Eq. 157, 43 Atl. Rep. 4; *Pease v.*

judicial sale paying taxes in advance of a proceeding to have the sale declared void.<sup>42</sup> One who pays the debt of another in consideration of the debtor's conveyance to him of property, which conveyance is void as made in fraud of creditors.<sup>43</sup> One who at the request of the beneficiary performs a duty, the performance of which is charged upon land, in this case support.<sup>44</sup> A bank that guarantees payment of a draft without request of the maker.<sup>45</sup> A widow who furnishes money to pay claims against her husband's estate.<sup>46</sup> Surviving partner paying

Egan, 131 N. Y. 262, 30 N. E. Rep. 102, in which case the devise was contingent on an event that never happened. Cited in note 14 to § 325.

<sup>41</sup> Milburn v. Phillips, 143 Ind. 93, 42 N. E. Rep. 461; Bruschke v. Wright, 166 Ill. 183; Randall v. Duff, 107 Calif. 33, 40 Pac. Rep. 20.

<sup>42</sup> Taylor v. Girard Life Insurance Co., 1 App. Cas. D. C. 209.

<sup>43</sup> Hackfeld v. Ing Choi, 5 Hawaii, 136.

<sup>44</sup> In Clark v. Marlow, 149 Ind. 41, 48 N. E. Rep. 359, the support of A was charged on certain land. Held, that B, who supported A, at A's request, became subrogated to the lien on the land. Citing and following Huffmond v. Bence, 128 Ind. 131, 27 N. E. Rep. 347. In Bourne v. Bourne, 69 Vt. 251, 37 Atl. Rep. 1049, a father and mother conveyed land to their son upon his agreement to support them. The father died. The son sold the land and used the proceeds in paying off a mortgage on other property and failed to support his mother. Held, after the son's death, that the mother was subrogated to the rights of the mortgagee.

<sup>45</sup> In Voltz v. National Bank of Illinois, 158 Ill. 532, 42 N. E. Rep. 69, affirming 57 Ill. App. 360, the National Bank of Illinois was the representative of Schaffner & Co.,

private bankers in the Chicago Clearing House, and had entered into an agreement with the First National Bank of Chicago to guaranty all checks against Schaffner & Co., which the First National received "in payment of collections or discounted items." On June 2, 1893, the First National took Voltz's certified check on Schaffner & Co. in payment of a draft on Voltz, and before it could be cashed, Schaffner & Co. failed. The National Bank of Illinois thereupon paid the check and sued the maker who insisted that in making such payment it was a volunteer and not entitled to be subrogated. Held, Baker, J., that The National Bank of Illinois "being legally liable, or, at the very least, under moral obligation for the payment of the certified check to the First National Bank, it cannot be said that it was a mere volunteer when it paid the money and took up the check. A person who, though not obliged to do an act, yet has an interest in doing it, is not to be regarded as necessarily and simply a volunteer," citing Wright v. London & N. W. R. W. Co., L. R. 1 Q. B. Div. 252, and Holmes v. N. E. Railway Co., L. R. 4 Ex. 254, 6 Ex. 123.

<sup>46</sup> In Pease v. Christman (Ind.), 64 N. E. Rep. 90, a widow, before

debts of the firm.<sup>47</sup> One who loans money to a county on bonds that are afterwards decreed to be void, which is used to pay the county's indebtedness.<sup>48</sup> Joint owner of land paying a

an administrator was appointed, erected a tombstone over her husband's grave. Held, that she became subrogated to the right of the administrator to repayment out of the estate. The same ruling was made in *Brown v. Forst*, 95 Ind. 248, as to claims against the estate of her husband paid by the widow. See, also, *Neptune v. Tyler*, 15 Ind. App. 132, 41 N. E. Rep. 965, where the widow advanced money to pay claims.

<sup>47</sup> Held, subrogated to the rights of the creditors against the estate of his deceased co-partner: *Harter v. Sanger*, 138 Ind. 161, 38 N. E. Rep. 595. In *Robinson v. Roos*, 138 Ill. 550, 28 N. E. Rep. 821, three of four surviving partners paid off the firm debt to the estate of a deceased partner. Held, that they might compel the fourth surviving partner to contribute and might follow certain real estate in which he had invested partnership money in his wife's name.

<sup>48</sup> In *Coffin v. Board of Commissioners*, 114 Fed. Rep. 518, Kearney county, Kansas, issued bonds and with the proceeds took up and cancelled warrants which evidenced its outstanding indebtedness. The bonds were afterwards declared void because the county had no authority to issue them. Held, that a purchaser of the bonds was subrogated to the rights of the holders of the original indebtedness. "By issuing the bonds," said the court, Philips, J., "the county put it in the power of the taker of the bonds to transfer them by delivery, and obtain the amount of his debt against the county. The purchasers of the

bonds have no recourse on the person from whom they purchased, as he transferred them simply for what they appeared on their face to be—commercial paper—without any guaranty. \* \* The warrant holders, having realized their money by the sale of the bonds, have no occasion to go on the county for pay of the warrants. Therefore if the defendant's contention is to prevail, that the complainants are not entitled to be subrogated, the situation presents this anomaly: The county, by the trick or scheme of issuing the bonds, and having the warrants surrendered for cancellation, and then repudiating the bonds, is to be forever discharged from its debts represented by the warrants, aggregating about \$35,000 and interest. The complainants, whose money the warrant holders were thus, by the act of the county, enabled to obtain, have no standing in court to compel the original warrant holder to pursue the county for their use and benefit. So the county is to go free. It is difficult for the human mind to conceive of a situation more rank with injustice, and, if the courts cannot afford relief to these complainants, it must be said that justice no longer in American jurisprudence, has a 'forum of conscience'. \* \* In the face of such a contingency as this case presents, the very instinct of justice should compel a chancellor to make a precedent. The motto of the device of the pickaxe on the dial, 'Find a way or make one,' should be applied at times by the courts." See note 2 to next section. Contra, in



mortgage thereon.<sup>49</sup> A purchaser of land who takes a husband's deed not knowing that he has a wife and pays off mortgages.<sup>50</sup> One who buys at a void administrator's sale of real estate to pay debts.<sup>51</sup> Purchaser at void tax sale.<sup>52</sup> Purchaser

*O'Brien v. Wheelock* (C. C., S. D. Ill.), 78 Fed. Rep. 673, a buyer in the open market of bonds issued to provide funds for the construction of a levee, by a commission created by a statute which was afterwards declared void, sought to be subrogated to the rights of the contractors, to whom the proceeds of the bonds had been paid, to enforce payment out of the lands benefited. Held, that complainant had waited too long—thirteen years—that the statute providing for payment of the bonds by taxation having been declared void, a court of equity could not create new tax-collecting machinery, and that, besides, plaintiff, buying bonds in the open market, was a volunteer and not entitled to subrogation. In *Lyon Co. v. Ashuelot Natl. Bank* (Iowa), 87 Fed. Rep. 137, 30 C. C. A. 582, a county having exceeded its constitutional limit of indebtedness issued and sold \$100,000 of bonds and used the proceed in paying other void bonds which had been theretofore issued by it. Held, that conceding that the holders of the latter bonds had any equities, the purchasers of the last issue of bonds were not subrogated thereto.

<sup>49</sup> *Fort Jefferson Improvement Co. v. Dupoyster*, Ky., Dec., 1901, no official report, 66 S. W. Rep. 1048, 23 Ky. Law Rep. 1501. The purchaser of a lot who is compelled, in order to protect his title, to pay a blanket mortgage on that and other property, which mortgage he had not assumed, is subrogated to all the rights of the

mortgagee. *Hazle v. Bondy*, 173 Ill. 302, 50 N. E. Rep. 671, S. C. 70 Ill. App. 185; *Kinnah v. Kinnah*, 184 Ill. 284, 56 N. E. Rep. 376.

<sup>50</sup> Held subrogated to the rights of the mortgagees: *Fowler v. Maus*, 141 Ind. 47, 40 N. E. Rep. 56.

<sup>51</sup> In *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. Rep. 525, a probate court ordered the sale of the homestead of the deceased. The order was an absolute nullity, the court being without power to sell a homestead during the minority of the children of the deceased. Held, that the purchaser at such sale should be subrogated to the rights of the creditors of the estate whose debts his money was used to pay. That the creditors are necessary parties to such a proceeding, see *Harris v. Watson*, 56 Ark. 574, 20 S. W. Rep. 529. Compare *Borders v. Hodges*, 154 Ill. 498, 39 N. E. Rep. 597. In *Miller v. Stark*, 61 Ohio St. 413, 56 N. E. Rep. 11, an administrator without authority sold mortgage notes owned by the deceased at his death. Held, that the purchaser was not subrogated to the rights of the mortgagee as against the administrator, because the administrator had power to collect only, and not to sell, but that he was subrogated to the rights of the mortgagee as against a subsequent mortgagee who had notice of the prior mortgage.

<sup>52</sup> In *Gregory v. Bartlett*, 55 Ark. 30, 17 S. W. Rep. 344, the purchaser at a tax sale which was void by reason of there being no previous



at a voidable railroad foreclosure sale.<sup>53</sup> One who loans money to an infant to improve the infant's real estate and discharge liens.<sup>54</sup> Devisee paying debts of his devisor.<sup>55</sup> Purchaser at sale by trustee in trust deed paying out money for taxes pending a proceeding that resulted in the sale being decreed to be void.<sup>56</sup> One who advances money to pay the debt of another at the debtor's request.<sup>57</sup> As against the holder of a third

order of record authorizing it, was held to be "subrogated to the rights of the liens he has discharged" because "the amounts paid by him, whether upon his purchase or for subsequent taxes, as far as they have relieved the land of a burden, have inured to its benefit." In *Reed v. Kalfsbeck*, 147 Ind. 148, 45 N. E. Rep. 476, suit to remove cloud from title, it was held that the purchaser at a void tax sale is subrogated to the lien of the state to the extent of the tax payment made by him. Compare *Mumme v. McCloskey*, Tex. Civ. App., Jany., 1902, 66 S. W. Rep. 853.

<sup>53</sup> In *Stewart v. Wheeling & Lake Erie R. R. Co.*, 53 Ohio St. 151, 41 N. E. Rep. 247, the purchaser of a railroad at a foreclosure sale under decree of a U. S. court took subject to a right of resale by a judgment creditor in a state court who had not been made a party to the foreclosure suit. Held, that the purchaser became subrogated as against the judgment creditor, to the prior lien of the mortgage under which the foreclosure sale was made.

<sup>54</sup> *MacGreal v. Taylor*, 167 U. S. 688, 42 L. Ed. 326, 17 Sup. Ct. Rep. 961, modifying 1 App. (D. C.) 359.

<sup>55</sup> *Snydam v. Voorhees*, 58 N. J. Eq. 157, 43 Atl. Rep. 4.

<sup>56</sup> *Taylor v. Girard Life Insurance Co.*, 1 App. Cas. (D. C.) 209.

<sup>57</sup> In *Warford v. Hankins*, 150

Ind. 489, 50 N. E. Rep. 468, at the request of one of two partners, a woman advanced \$1,000 to take up a firm note which was secured by a vendor's lien on real estate upon an agreement that she should hold the note uncanceled as security. Held, that she became subrogated to the vendor's lien and took precedence of subsequent encumbrancers who had record notice thereof. The court said that one who pays a debt or advances money for the purpose at the request of the debtor is not a mere volunteer. Citing III Pomeroy Eq. Jur. § 1212; Harris on Sub. § 792; *Shattuck v. Cox*, 128 Ind. 293, 27 N. E. Rep. 609. In *Rudy v. Austin*, 56 Ark. 73, 19 S. W. Rep. 111, an insolvent debtor, in 1870, bought certain lots and took title in the name of his minor son. In 1879, still being insolvent, he conveyed them, by means of a guardian's sale, on account of certain new debts subsequently incurred, for money that was used in paying off the old ones. Then he filed the present bill to set aside that conveyance and for an accounting. Held, that the new creditors, from the fact that their money was used to pay off old debts existing at the time of the purchase of said land by the insolvent, became subrogated to the rights of the old creditors to have the land applied in payment of their debts, and that, having obtained the land by means of the

mortgage a purchaser of land whose money has paid the first and second mortgages and part of the third.<sup>58</sup> An attorney-at-law rendering services to an administrator through which the estate profits.<sup>59</sup> To the rights of the mortgagee, where the surety on right-of-way bonds of a railroad under foreclosure has to make good the default of his principal.<sup>60</sup>

**§ 327. Cases in which subrogation was denied because the party paying was considered a volunteer.**—In the following instances the party paying the debt of another was held, either in terms or in effect, to be a volunteer, and not subrogated to the rights of the party paid: Where a mortgage broker pays interest on a mortgage sent to him for collection to conceal from the mortgagee the mortgagor's delinquency.<sup>1</sup> Where,

guardian's sale, they should be permitted to keep it. In *Dillon v. Dillon*, Ky., Oct., 1902, no official report, 69 S. W. Rep. 1099, 24 Ky. Law Rep. 781, it was held that where A advanced money to B in discharge of liens against B's land and afterwards married B, thereby extinguishing the debt, he became subrogated to the liens that had been discharged with his money. In *Cotton v. Dacy* (C. C. Kans.), 61 Fed. Rep. 481, Phipps obtained money from plaintiff to invest in Wichita land and used it in paying off a mortgage on land belonging to an investment company in which he was interested. Held, that plaintiff was not a volunteer and was subrogated to the rights of the mortgagee and that his equity as subrogee took precedence of a judgment obtained in a suit which was begun after plaintiff had filed his bill in this case.

<sup>58</sup> In *Joyce v. Dauntz*, 55 Ohio St. 538, 45 N. E. Rep. 900.

<sup>59</sup> Held (in effect), to be subrogated to the right of the administrator to recover the value of such services from the estate after himself paying for them: In *Pike v. Thomas*, 65 Ark. 437, 47 S. W. Rep.

110, the court of claims paid \$1,338 to an administrator as the result of a suit which Pike, as attorney, had prosecuted on a contingent fee of one-half by agreement with the administrator. The administrator was insolvent. He refused to pay. The attorney's administrator filed a bill to be subrogated to the administrator's right to recover from the estate the amount due for the prosecution of the claim. Held, that, without regard to the solvency or insolvency of the administrator, and without regard to the terms of the contract, which gave the attorney a lien on the fund recovered, the estate, having received the entire fruits of the litigation, was, in equity, bound to pay the attorney his demand as a reasonable fee.

<sup>60</sup> Because such payment by the surety, though it was not even made at the request of the mortgagee, insured to the benefit of the mortgagee: *Rome & Decatur R. R. Co. v. Sibert*, 97 Ala. 393, 12 So. Rep. 69; *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. Ed. 825, 8 Sup. Ct. Rep. 1004, note 17, § 325.

<sup>1</sup> In *Bennett v. Chandler*, 199 Ill. 97, Green endorsed for collection and sent to Chandler, a mortgage

without any agreement on the part of A for subrogation, money of A that happens to get into the hands of B is used by B to pay B's debt to C.<sup>2</sup> Where one pays a disputed tax without

banker at Chicago, several mortgage interest coupons. Instead of collecting them Chandler, in accordance with a custom prevailing among mortgage brokers, sent his check for the amount to Green, and, besides, advanced moneys for taxes and insurance on the mortgaged property. Held, that in making such payments and advances he was a mere volunteer and was not subrogated to the rights of Green as mortgagee. "In one aspect," said Magruder, J., "it may seem inequitable that these plaintiffs in error should receive the benefit of a payment which they themselves did not make, but the result cannot be avoided unless the established rules of law are to be set aside and ignored." Reversing *Chandler v. Green*, 101 Ill. App. 409. To the same effect, see *Suppiger v. Garrels*, 20 Ill. App. 625.

<sup>2</sup> *Wilkins v. Gibson*, 113 Ga. 31, 38 S. E. Rep. 374; *Green v. Western Natl. Bank*, 86 Md. 279, 38 Atl. Rep. 131; *Pollock v. Wright*, 15 S. D. 134, 87 N. W. Rep. 584, same controversy: *Parrish v. Mahany*, 10 S. D. 276, 73 N. W. Rep. 97, 66 Am. St. Rep. 733, and, on rehearing, 12 S. D. 278, 81 N. W. Rep. 295, 76 Am. St. Rep. 604. In *Kocher v. Kocher*, 56 N. J. Eq. 547, 39 Atl. Rep. 536, a son loaned his father money with which to pay liens. Held, that he was not subrogated to the liens that were paid off with his money. In *Gore v. Brien*, N. J. Eq., Oct., 1896, 35 Atl. Rep. 897, no official report, where A loaned money to B upon an agreement that he should have a first lien on B's land, he was held

subrogated to the rights of the mortgagees who were paid with his money. In *Cumberland B. & L. Assn. v. Sparks* (C. C. Ark.), 106 Fed. Rep. 101, plaintiff's assignor loaned to defendant Sparks a sum of money on second mortgage, part of which was used by Sparks to pay off a first mortgage. The second mortgage, because of defective acknowledgment, constituted no lien on the property. Held, that the mere fact that the money was used by the borrower to pay the first mortgage did not entitle the lender to subrogation to the rights of the holder of the first mortgage. Citing *Cohn v. Hoffmann*, 50 Ark. 108, 6 S. W. Rep. 511; *Campbell v. Foster Home Assn.*, 163 Pa. 609, 30 Atl. Rep. 222, 1 Am. & Eng. Dec. Eq. 472 and note as to what constitutes a volunteer. In *Campbell v. Foster Home Assn.*, the case last referred to, an attorney-in-fact with a mere naked power to sell land, mortgaged it and applied the proceeds in payment of an earlier mortgage. On the owner's bill to remove the mortgage as a cloud on the title, it was held that the second mortgage was void and the party loaning money upon it was not subrogated to the rights of the holder of the first mortgage. In *Springs v. Brown* (C. C. So. Car.), 97 Fed. Rep. 405, at 408, A borrowed a bond from B and used it to pay off a mortgage on land of A's wife, afterwards informing B of the use he had made of it; held, that B was not subrogated to the rights of the mortgagee. In *McCowan v. Brooks*, 113 Ga. 532, 39 S. E. Rep. 115, McCowan borrowed

money from Brooks to discharge a purchase money mortgage on his land upon the agreement that Brooks was to be given "a deed to the land," and was "to hold the land for collateral security." It was held that Brooks was not subrogated to the rights of the mortgagee. The court said: "One who, having no interest to protect, voluntarily pays off an incumbrance on the land of another, is not subrogated to the rights of the holder of such incumbrance, unless there is an agreement, either express or implied, between the person discharging the incumbrance, and either the debtor or the creditor, that he shall be subrogated to the rights of the incumbrancer. \* \* The evidence does not show an express agreement to this effect, and is not of such a nature that an undertaking of the character required can be necessarily implied. To have a deed to land, and to hold the same as collateral is not necessarily inconsistent with a prior incumbrance." In *Brown v. Rouse*, 125 Calif. 645, 58 Pac. Rep. 267, a husband, acting under a power of attorney that gave him no power to mortgage his wife's land, executed a mortgage thereof and, out of the proceeds of that mortgage, a prior mortgage was paid by the lender. The power of attorney was on record and was examined by the lender's agent and his loan was made in good faith. Held, that he was not entitled to subrogation. "There was no mistake of fact," said the court (p. 651), "for he had knowledge of the authority under which Rouse (the husband) was acting; his mistake was one of law. No question of fraud, accident or mistake of fact arises," and, quoting from *Webster's Appeal*, 86 Pa. St. 409, the court continued: "While subrogation is founded upon

principles of equity and benevolence, and may be decreed where no contract exists, yet it will not be decreed in favor of a mere volunteer who, without any duty, moral or otherwise, pays the debt of another. It will not arise in favor of a stranger, but only in favor of a party who, on some sort of compulsion, discharges a demand against a common debtor." In *Meeker v. Larson*, Neb., June, 1902, 90 N. W. Rep. 958, a widow having only a life estate in the homestead left by her deceased husband, borrowed \$1,300 from her brother to use in payment of an existing mortgage thereon, and gave to her brother her mortgage purporting to mortgage the entire property to him. The money was used in paying the first mortgage. Held, that her brother was a mere volunteer and did not, as against the children of the deceased, become subrogated to the rights of the mortgagee. In *Gilbert v. Seatco Mfg. Co.* (C. C. Wash.) 98, Fed. Rep. 208, plaintiff advanced money with which his grandson paid for stock in defendant corporation to a former holder thereof who used the money in payment of the corporation's debts. Held, that plaintiff was not thereby subrogated to the rights of the creditors whose debts had been so paid. For an ineffectual attempt of a party loaning \$350 to another with which to buy a homestead to have the homestead set aside and the land applied to payment of his judgment, see, *Campan v. Molle*, 124 Calif. 415, 57 Pac. Rep. 208. Compare *Zuellig v. Hemerlie*, 60 Ohio St. 27, 53 N. E. Rep. 447, in which case a surety furnished the principal money with which the principal paid the debt for which the surety was liable. Held, that the principal was to be regarded as the

protest.<sup>3</sup> Where an executor pays a mortgage on land of the testator without expectation of repayment.<sup>4</sup> Where one furnishes material to a building contractor without agreement for subrogation.<sup>5</sup> Where one accepts a deed that is void for uncertainty at an administrator's sale of real estate to pay debts.<sup>6</sup>

surety's agent and that the surety was entitled to subrogation. It is suggested by Mr. Ackley, editor of this edition, that in many of these cases, the judges, in attempting to follow precedents, do not give enough weight to the strong equity in A's favor arising from the fact that B's creditor to whose rights A seeks to be subrogated, has accepted A's money without giving A any equivalent, and is enjoying the benefit of it. In this respect compare the line of cases of which *Matthews v. Fidelity Title & Trust Co.*, 52 Fed. Rep. 687, note 17 to § 325, *supra*, is an example, in which the strong equity in favor of A was the controlling element that determined the decision. See, also, *Coffin v. Board Commissioners of Kearney Co.*, 114 Fed. Rep. 518, notes 48 and 59, § 326.

<sup>3</sup> In *Montgomery v. City Council of Charleston (S. C.)*, 99 Fed. Rep. 825, 40 C. C. A. 108, a cotton mill at Charleston, S. C., having been struck off to petitioner at judicial sale, he being a non-resident, without any inquiry, paid about \$3,000 city tax, which was in dispute, and claim for which was pending against the receiver in the cause in which the sale was made. It was held, that he was a mere volunteer not entitled to subrogation to the city's rights, nor to have the amount paid for so much of said tax as was disputed deducted from his bid. Citing *Little v. Bowers*, 134 U. S. 548, 10 Sup. Ct. Rep. 620, 33 L. Ed. 1016; *Robinson v. City Council of Charleston*, 2 Rich. Law (S. C.)

319; *Peebles v. City of Pittsburgh*, 101 Pa. St. 304.

<sup>4</sup> In *Farlee v. Field*, N. J. Eq., Mch., 1897, 36 Atl. Rep. 945, it was held that the right of an executor to be subrogated to the rights of the mortgagee of the testator's land, after payment of the mortgage, being an equitable right, depends upon the intention with which the executor advanced the money, and where it was advanced without expectation of repayment, as in that case, there is no subrogation.

<sup>5</sup> In *Riggin v. Hilliard*, 56 Ark. 476, 20 S. W. Rep. 402, it was held that in the absence of agreement to that effect between a material man and a contractor, the material man cannot be subrogated to the right of the contractor against the owner. Unless more was shown than the mere furnishing of materials at the contractor's request the relation of debtor and creditor only was established. Held, however, the builder in this case being the county and the amount being due the contractor, and the contractor being insolvent, and it being possible (by statute), to institute proceedings for equitable garnishment without first obtaining judgment, that the county must pay the material man.

<sup>6</sup> In *Borders v. Hodges*, 154 Ill. 498, 39 N. E. Rep. 597, a purchaser at administrator's sale of land to pay debts took a deed in which the description was so vague that the deed was held void for uncertainty. It was claimed that the purchaser, whose purchase money went to pay the debts of the estate,

Where the holder of a valid mortgage redeemed the land therein described from tax sale.<sup>7</sup> Where a tax collector accepts anything else than money in payment of public dues.<sup>8</sup>

should be subrogated to the rights of creditors of the estate. The court held and said (p. 507), that "One who purchases real estate at a judicial sale made by an administrator, and who pays money for land sold, which is applied on simple debts of the ancestor, cannot be subrogated to the rights of creditors whose debts are so paid. Such case does not come within any of the cases to which the doctrine is limited and confined." Citing and following *Bishop v. O'Connor*, 69 Ill. 421, where the reason assigned is that simple contract debts are not liens on the land of the deceased, the administrator having only a power within a limited time to resort to the real estate in case of deficiency of personal property. Contra, *Bond v. Montgomery*, 56 Ark. 563, 20 S. W. Rep. 525; *Harris v. Watson*, 56 Ark. 574, 20 S. W. Rep. 529.

<sup>7</sup> In *Koehler v. Hughes*, 148 N. Y. 507, 42 N. E. Rep. 1051, plaintiff, claiming to be mortgagee of an undivided one-eighth of a lot in New York City, redeemed the lot from tax sale. Held, that he was not entitled to be subrogated to the rights of the holder of the certificates of tax sale because his proof failed to show that his mortgagor had any title to the interest he had mortgaged and that plaintiff must be treated as a volunteer.

<sup>8</sup> In *Mercantile Trust Co. v. Hart*, 76 Fed. Rep. 673, 22 C. C. A. 473, 40 U. S. App. 559, on foreclosure of a mortgage securing \$250,000 bonds of the Colorado Mining Stock Exchange, the county treasurer intervened and stated that in

October, 1892, he had accepted checks in payment of the taxes on its mortgaged real estate amounting to \$2,238.13, and had paid that amount to the state of Colorado, the city of Denver and the board of education, and that the checks had been dishonored, and asked to be subrogated to the rights of the state, the city and the board and to be given priority to the lien of the bondholders. The Court, Thayer, J., held that he was not entitled to subrogation. By issuing his receipt for taxes on the strength of the check and so concealing the fact that the Stock Exchange had defaulted in payment of taxes, he had induced the bondholders to delay foreclosure until 1895, and the property had sold for less than the mortgage debt. Besides the treasurer was a volunteer. And "it would certainly be contrary to sound public policy to concede that a collector may accept payment of taxes in a mode not authorized by law, and, thereafter, when confronted with a possible loss, be allowed the right of subrogation." Citing to the last proposition: In *re Wallace's Estate*, 59 Pa. St. 401, in which case a tax collector paid the taxes of a property owner who gave the collector a judgment note for the amount upon which the collector confessed judgment, and it was held that, as against a subsequent judgment creditor, the collector was not entitled to subrogation to the rights of the state as respects a lien for taxes; *Wilkinson v. Babbitt*, 4 Dill 207, Fed. Cas. No. 17668, in which case a collector of internal revenue who had repaid to the government



**§ 328. No subrogation to contingent rights—Nor where there is nothing to be subrogated to—Nor to creditor's rights that are wholly disconnected with the debt.**—Subrogation is a species of assignment by operation of law. By it the law assigns to the party paying the debt of another the creditor's rights and remedies for the collection of his debt. By such an assignment the assignee acquires no greater rights than the creditor has and acquires only rights that are assignable. It has been held that where at the time of payment of the principal's debt the creditor had only a contingent right of action against a third party and the contingency had not yet happened there was nothing for the assignment by operation of law to act upon, therefore no assignment, no subrogation.<sup>9</sup>

public moneys that had been deposited by one of his deputies in a bank and had been lost by the bank's failure, was held not to be subrogated to the right of the government to claim a preference against the assets of the bank; *Griffin v. Pintard*, 25 Miss. 173; *Hinchman v. Morris*, 29 W. Va. 673, 2 S. E. Rep. 863; *Aetna Life Insurance Co. v. Middleport*, 124 U. S. 534 at 547, 8 Sup. Ct. Rep. 625, in which case a purchaser of void municipal bonds was held not entitled to be subrogated to the rights of a railroad for the benefit of which the bonds were issued. The court said that plaintiff was a mere volunteer and that the railroad had no rights to which it could be subrogated in any event.

<sup>9</sup> In *Henderson-Achert Lithographic Co. v. John Shillito Co.*, 64 Ohio St. 236, 60 N. E. Rep. 295, the Book Supply Co. replevined a stock of books which had been attached as the property of Belford, Clark & Co. at Cincinnati under a writ sued out by the Henderson-Achert Co., and by letter authorized the Shillito Co. to hold enough of them to "guarantee" the sureties on the replevin bond "against any loss by

being a party to the bond." Judgments were rendered in favor of the Henderson-Achert Co. against defendant in the attachment suit for \$3,129.02, and against The Book Supply Co., as plaintiff in the replevin suit, for \$4,365.56, and the Henderson-Achert Co. sought to have the proceeds of the sale of the stock of books, which the Shillito Co. had agreed to hold for the protection of the sureties on the replevin bond "against any loss," applied in payment of its judgment. One of the sureties on the replevin bond had died and left no estate, and the other was insolvent, so that neither of them had sustained "any loss by being a party to the bond," and without the consent of such sureties the Shillito Co. had turned over the goods pledged for their security to the Book Supply Co. It was held that though the sureties on the replevin bond, in the event of their suffering any loss, might have a right of action against the Shillito Co. for diverting property pledged for their security, the Henderson-Achert Co. was not subrogated to that right because the creditor's right of subrogation was controlled by the writ-



There are scores of cases where the applicant for subrogation has been turned away because the proofs failed to show that the creditor or obligee had anything in the nature of rights or remedies to which the party paying could be subrogated. Subrogation was denied because there was nothing to be subrogated to.<sup>10</sup> One paying the debt of another is subrogated only

ten agreement expressed in the letter and under that agreement the liability of the Shillito Co. was purely contingent and might never happen.

<sup>10</sup> *The Livingstone* (D. C., N. Y.), 104 Fed. Rep. 918; *Latham v. Foley*, 153 Ill. 19, 38 N. E. Rep. 557; *Electric Appliance Co. v. United States Fidelity & Guaranty Co.*, 110 Wis. 434, 85 N. W. Rep. 648; *Savannah Fire Ins. Co. v. Pelzer Mfg. Co.* (C. C. So. Car.), 60 Fed. Rep. 39. In *German Savings and Loan Society v. De Lashmutt* (U. S. C. C., O. R.), 67 Fed. Rep. 399, foreclosure, plaintiff bank loaned \$25,000 to a mortgagor whose claim to the land mortgaged rested solely on the deed of a woman who was non compos mentis at the time of its execution. He had bought it in good faith and \$10,000 which he had paid as purchase money was used by the insane grantor for her support and maintenance. It was held that the deed was void and that the mortgagor acquired no title to the land. The mortgagee sought to be subrogated to the extent of the \$10,000 purchase money paid by the mortgagor on the ground that it had loaned the money in absolute good faith and without notice of the woman's insanity. The court held that the mortgagors, by paying the lunatic \$10,000, had not acquired any lien on her land and therefore there was nothing to which the mortgage could become subrogated except in so far as the mortgagee's money had been used

to pay taxes on the land. The court distinguished the case from *Edwards v. Davenport*, 20 Fed. Rep. 756, where the mortgagee's money was used in paying prior liens upon a lunatic borrower's property, and where it was held that he was subrogated to such liens. In *Grand Council Royal Arcanum v. Cornelius*, 198 Pa. St. 46, 47 Atl. Rep. 1124, the trustee of plaintiff society pledged its property as security to a loan to himself individually. His executrix paid the loan. Held, that she did not become entitled to the collateral by subrogation. In *Mumme v. McCloskey*, Tex. Civ. App., Jany., 1902, 66 S. W. Rep. 853, the land of A was sold under a decree for taxes obtained by the state against B. Held, that the purchaser at the tax sale did not become subrogated to any lien against the land as against the rightful owner; the state never had any lien for the payment of the taxes in question and there was nothing to be subrogated to. In *Aetna Life Ins. Co. v. Middleport*, 124 U. S. 534, 8 Sup. Ct. Rep. 625, the plaintiff as purchaser of void municipal bonds issued in aid of a railroad, sought to be subrogated to the rights of the railway as against the town issuing the bonds to enforce payment of them. Held, in effect, that the railroad had no rights in that respect to which anybody could be subrogated. In *Lawrence v. United States* (C. C., So. Car.), 71 Fed. Rep. 228, a bank furnished money to the contractor for a post-

to those rights and remedies of which the creditor might have availed himself for the collection of that debt and is not subrogated to rights of the creditor that are wholly disconnected therewith.<sup>11</sup> Thus, where a public building contractor gave a

office which the contractor used in paying for labor and materials. The government, as it might do under a stipulation in its contract, held back part of the contractor's pay until all labor and material claims were paid. And the bank sought to have this fund applied in repayment of the money it had loaned to the contractor, on the ground that it was subrogated to the rights of the material men and laborers who had been paid with the money it had borrowed. Held, that since the government had reserved merely the right to withhold the contractor's money until the material and labor claims were paid, and had not reserved the right to pay them, the material and labor men had no lien on the reserved fund, and therefore there was nothing to which the bank could be subrogated. If the bank sought to work out its claim by being subrogated to the rights of the contractor because its money was used to pay the contractor's debts, the answer was that the bank could not have any greater rights than the contractor himself and "the contractor could make a similar claim for all money he had expended for the same purposes—a proposition which refutes itself." The court ordered the labor and material claims paid and apparently made no order as to the bank. *March v. Barnett*, 121 Calif. 419, 53 Pac. Rep. 933.

<sup>11</sup> In *Bain v. Atkins* (Mass.), 63 N. E. Rep. 414, Bain recovered a judgment for \$7,000 against Atkins, who was insured against such liability by the Union Casualty and

Surety Co. Nine days before the judgment was recovered the casualty company paid Atkins \$3,000 in full settlement of all claims under its policy. Thereafter Atkins was discharged in bankruptcy and no part of the judgment was paid. Bain filed his bill to compel the casualty company to pay his judgment. In dismissing it the court said that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in other property belonging absolutely to Atkins. Citing *Embler v. Hartford Steam Boiler Inspection and Insurance Co.*, 44 L. R. A. 512, 158 N. Y. 431, 53 N. E. Rep. 212. Upon the same principle, in *Michael v. Prussian Nat'l Ins. Co.* (N. Y.), 63 N. E. Rep. 810, affirming 71 N. Y. Supp. 918, it was held that an insurance company which was liable for a loss caused by the destruction of a grain elevator by fire, was not subrogated to the rights of the insured under a pooling arrangement between that and other elevators, the effect of which was that the insured continued to receive his share of the earnings of the pool, notwithstanding the destruction of his elevator by fire. "The theory of the right of subrogation," said the court, Gray, J., "rests upon the fact that the assured has a claim against a third party for the loss which has been sustained in the destruction of the property insured. That is not the case with the plaintiff, who did not receive his payment from the

bond conditioned for the performance of his contract, and not conditioned for the payment for labor and materials, it was held that there could be no subrogation of a material man to the rights of the obligee under the bond.<sup>12</sup> It is held that stockholders of a corporation who as sureties have paid its note cannot maintain an action in equity against other stockholders to compel them to contribute but under the California Code may sue the other stockholders in assumpsit.<sup>13</sup>

**§ 329. No subrogation in favor of one whose conduct is tainted with fraud or is against public policy—No subrogation to one remaining passive.**—Subrogation will not be enforced by a court of equity in favor of one whose conduct is tainted with fraud. Like other equitable relief it will be denied to him who does not come into court with clean hands. In a case cited in a note, B took a conveyance of land from A for the purpose of defrauding A's creditors and then paid off liens against

pooling fund because or in consideration of the loss, but under an arrangement which had secured to members of the association certain percentages, under all conditions, as a consideration of entering into it." An accident insurance company, upon paying a claim for injuries, does not become subrogated to the right of the insured to recover for the tort that caused the injury: *Aetna Life Ins. Co. v. J. B. Parker & Co.*, Tex. Sup., Feb., 1903, 72 S. W. Rep. 168. Citing *Insurance Co. v. Brame*, 95 U. S. 754, 24 L. Ed. 580; *Connecticut Mutual Life Insurance Co. v. New York & New Haven Railroad Co.*, 25 Conn. 265, 65 Am. Dec. 571, and note.

<sup>12</sup> *Townsend v. Cleveland Fire Proofing Co.*, 18 Ind. App. 568, 47 N. E. Rep. 707. But if there has been an agreement between the parties that the plaintiff should receive pay for his materials from the county out of the fund due the contractor or if such an agreement could be implied from the

conduct of the parties, the laborer or material man would be entitled to subrogation. *Cockrell, J.*, in *Riggins v. Hilliard*, 56 Ark. 476, 20 S. W. Rep. 402. See also *Kansas City Sewer Pipe Co. v. Thompson*, 120 Mo. 218, 25 S. W. Rep. 522; *Breen v. Kelly*, 45 Minn. 352, 47 N. W. Rep. 1067. The last two cases hold that where the officials representing the public have no power by statute to make an indemnity contract for the benefit of laborers or material men, provisions to that effect inserted in a bond for the benefit of laborers or material men cannot be enforced. Upon the principle stated in the text, one furnishing money to a sub-contractor is not subrogated to the principal contractor's right to a fund that he has deposited as security for the performance of the contract. See *Falmouth Nat'l Bank v. Cape Cod Ship Canal Co.*, 166 Mass. 550, 44 N. E. Rep. 617.

<sup>13</sup> *Myers v. Sierra Valley &c. Ass'n*, 122 Calif. 669, 55 Pac. Rep. 689.

it of \$600 and \$14,000 respectively. The conveyance was afterwards decreed to be void and it was held that B was not subrogated to the rights of the lien claimants even though he had taken formal assignments of their claims. "He must take the usual portion of the person dealing in fraud," said Pope, C. J.<sup>14</sup> Where a mortgage that a corporation had given to one of its directors to indemnify him against loss by reason of his having become surety for it was decreed to be void as being a fraudulent preference of the director as a creditor, it was held that he was not subrogate to the rights of the creditor.<sup>15</sup> Bank officials became sureties on the official bond of a state treasurer upon an agreement that he should deposit public funds in their banks and have for himself 2½ per cent interest thereon. They were afterwards obliged to make good a large deficiency in the accounts of their principal. It was held that the transaction being fraudulent and against public policy they were not subrogated to the rights and remedies of the state whose claim they had paid.<sup>16</sup> In a note to a preceding section it is shown that subrogation to the rights of the public is denied to a collector of taxes who accepts anything else than money in payment of taxes or revenue.<sup>17</sup> Subrogation has been denied to those who having been brought into court as parties remain passive and do not actively seek it.<sup>18</sup> Query whether a party forfeits his right to subrogation by relying

<sup>14</sup> Greig & Jones v. Rice, So. Car., May, 1903, 44 S. E. Rep. 729, at 736, 730.

<sup>15</sup> Lowry Banking Co. v. Empire Lumber Co., 91 Ga. 624, 17 S. E. Rep. 968.

<sup>16</sup> Estate of Ramsay v. Whitbeck, 183 Ill. 550, reversing 81 Ill. App. 214, and 74 Ill. App. 524, cited in note 59 to § 20.

<sup>17</sup> Note 8, § 327; Mercantile Trust Co. v. Hart, 76 Fed. Rep. 673, 22 C. C. A. 473, 40 U. S. App. 559.

<sup>18</sup> In Boone County Bank v. Byrum, 68 Ark. 71, 56 S. W. Rep. 532, twenty-one of twenty-three sureties on a tax collector's bond made good his shortage and eleven of them filed a bill against the collector, a bank which had applied

some of the public money to the collector's individual debt, and the other contributing sureties for subrogation. It was held that the amount obtained must be divided pro rata among the contributing sureties, who by bill or answer asked relief and that it was error to give part of the fund to those contributing sureties who allowed the bill to be taken as confessed and did not answer. In Stokes v. Little, 65 Ill. App. 254, a county treasurer used public funds in his partnership business with the knowledge of his partner. The sureties were compelled to make good his default. Held, that they were entitled to a first lien on the partnership assets, but could not

on an abstract of title of real estate without examining the records and so remaining in ignorance of liens not shown by the abstract.<sup>19</sup>

**§ 330. Laches in asserting right to subrogation.**—The right to subrogation is one of equity merely, and due diligence must be exercised in asserting it. Laches in taking advantage of the right will forfeit it as against one who is injured by such laches. Thus a joint-judgment debtor was forced under execution to pay the whole debt. It was afterwards shown that he was only a surety. He neglected to have the judgment marked to his use until more than a year after its payment. Meanwhile the property of the principal debtor was sold and the surety claimed that he was entitled to be subrogated to the rights of the creditors under the judgment as against subsequent judgment creditors. Held, that he had not exercised due diligence in having the judgment marked to his use and therefore his claim could not be allowed.<sup>20</sup> A holder of railway receiver's certificates delayed more than three years in urging their payment. During that time the receivership was wound up. Held, that by reason of his laches he was barred from all right to subrogation.<sup>21</sup> Where two parties are equally entitled to subrogation it is held that the one moving more promptly than the other retains any advantage he has gained thereby.<sup>22</sup>

avail themselves of it because, in a suit to wind up the partnership, they had filed no cross bill.

<sup>19</sup> *Peters v. Huff*, Neb., Dec., 1901, 88 N. W. Rep. 179; S. C., 60 Neb. 625, 83 N. W. Rep. 920.

<sup>20</sup> *Gring's Appeal*, 89 Pa. St. 336. See also *Nelson v. Munch*, 28 Minn. 314; *Pickering v. Leiberman* (D. C., Del.), 41 Fed. Rep. 376.

<sup>21</sup> *Mercantile Trust Co. v. Kanawha &c. Ry. Co.*, 58 Fed. Rep. 6, 7 C. C. A. 3, 16 U. S. App. 37, reversing the circuit court.

<sup>22</sup> In *Tillman v. Stewart*, 104 Ga. 687, at 689, 30 S. E. Rep. 949, it was held that a junior mortgagee is "equitably entitled when necessary to his protection, to make a

tender to a prior mortgagee who is proceeding to foreclose his mortgage of the principal, interest and all costs due thereon and demand a transfer thereof," but to be entitled to such transfer facts must be presented showing that it is necessary for his protection. In this case there were two junior encumbrancers and one of them, having secured a transfer of a prior mortgage which stood in the way of both, it was held that "a court of equity would not be justified in depriving him of the advantage thus honestly gained in order that this very advantage might be conferred upon the other junior mortgage."

**§ 331. Upon what right subrogation depends—Surety must show what to be entitled to subrogation.**—To perfect the surety's right of subrogation it is held unnecessary that at the time of paying the debt he should do any act signifying his election and acceptance of the right. The fact of suretyship, payment of the debt, and a lien or security held by the creditor for the payment of the debt, generally creates the right, and it continues until lost by laches or until the surety does some act which amounts to a waiver.<sup>23</sup> Sureties seeking to be subrogated to the statutory rights and lien of the state and other creditors must allege and prove the particular facts which show their right of subrogation and the extent of it. Thus, where two official bonds were executed, one before and one after the enactment of a statute declaring a lien, and the sureties on both bonds unite in claiming subrogation, not discriminating between defaults committed before and those committed after the enactment of the statute, nor stating the facts from which their respective liabilities and rights can be ascertained, it was held their claim to relief was not established.<sup>24</sup>

**§ 332. Surety not entitled to subrogation till he pays the debt—May waive right to subrogation—Discharged if right rendered unavailing by creditor.**—Generally a surety or guarantor does not become entitled to subrogation until he has actually paid the principal's debt for which he is liable.<sup>25</sup> But it makes no difference how he makes such payment. Thus sureties who pay the creditor in the creditor's own obligations<sup>26</sup> and a surety who borrows money on his own notes, with which he pays the debt, but who has not paid such notes,<sup>27</sup> are

<sup>23</sup> *Watts v. Eufaula Nat. Bank*, 76 Ala. 474.

<sup>24</sup> That subrogation to be availed of must be pleaded see: *Strnad v. Strnad*, Tex. Civ. App., 1902, 68 S. W. Rep. 69; *Watts v. Eufaula Nat. Bank*, 76 Ala. 474. Holding that in a bill to be subrogated to a creditor's lien upon the principal's lands the co-sureties are necessary parties, see *Hook v. Richeson*, 115 Ill. 431.

<sup>25</sup> *Gilliam v. Esselman*, 5 Sneed (Tenn.), 86. See, also, *Harlan v. Sweeney*, 1 B. J. Lea (Tenn.), 682.

If the debt was one for which the principal was not liable there is no subrogation: *Sponhaur v. Malloy*, 21 Ind. App. 287, 52 N. E. Rep. 245; *Dickson v. Bailey*, 172 Pa. St. 161, 33 Atl. Rep. 705; *Dayton v. Stahl*, Mich., Mch., 1903, 93 N. W. Rep. 878; *Springer v. Foster*, 27 Ind. App. 15, 60 N. E. Rep. 720.

<sup>26</sup> *City of Keokuk v. Love*, 31 Iowa, 119.

<sup>27</sup> *Stedman v. Freeman*, 15 Ind. 86. The acceptance of the promissory notes of sureties in satisfaction of the demand against the



entitled to subrogation. As the surety, when subrogated, stands in the shoes of the creditor, he is not entitled to any greater rights than the creditor was immediately before payment.<sup>28</sup> The right to subrogation may be waived by the surety. Thus, where one surety consented that another surety might receive an indemnity from the principal for his sole benefit, it was held that the surety so consenting could not afterwards be subrogated to and share in such indemnity, but was bound by his waiver, even though no consideration passed between the sureties.<sup>29</sup> A judgment was recovered against a principal, which became a lien on his land. Afterwards a judgment for the same debt was recovered against B, a surety, which he paid. Afterwards C recovered a judgment against B, and still later D recovered a judgment against B. After the recovery of all the judgments, the creditor assigned the judgment against the principal to B, who was entitled to subrogation thereto, and B on the same day assigned the judgment to D. Held, he might lawfully do so, and that D thereby obtained precedence in said assigned judgment over C. The court said that B's "right of substitution is a personal one, which he might waive, and what right has his creditor to insist that it shall be exercised, not for his benefit, but against his will?"<sup>30</sup> A surety upon payment of the debt is entitled to subrogation to all the securities held by the creditor for the payment of such debt at the time the same is paid, even though such securities were acquired without the knowledge of the surety, and after he became bound.<sup>31</sup> "It is a well-settled principle that the surety who has paid the debt of his principal is entitled to stand in the place of the creditor as to all securities for the debt held or

principal is as effectual as if payment had been made in money. *Knighton v. Curry*, 62 Ala. 404. But see note 23, § 232; note 12, § 143.

<sup>28</sup> *Dozier v. Lewis*, 27 Miss. 679.

<sup>29</sup> *Tyus v. De Jarnette*, 26 Ala. 280. So surety may waive his right to subrogation by accepting an independent security, which is not cumulative merely: *Watts v. Eufaula Nat. Bank*, 76 Ala. 474. But the taking of a mortgage by a surety of a collector as indemnity against loss is held no waiver of

any right of subrogation in favor of the sureties to a lien in favor of the state on the collector's lands, where such sureties have been compelled to pay the state for the default of the collector: *Crawford v. Richeson*, 101 Ill. 351.

<sup>30</sup> *Harrisburg Bank v. German*, 3 Pa. St. 300. But see *Neff v. Miller*, 8 Pa. St. 347.

<sup>31</sup> *Scanland v. Settle*, Meigs (Tenn.) 169; *Scott v. Featherstone*, 5 La. Ann. 306; *Smith v. McLeod*, 3 Ired. Eq. (N. C.) 390.



acquired by the creditor, and to have the same benefit from them as the creditor might have had. \* \* If the creditor parts with or renders unavailable securities, or any fund which he would be entitled to apply in discharge of his debt, the surety becomes exonerated to the extent of the value of such securities, because securities which the creditor is entitled to apply in discharge of his debt he is bound to apply, or to hold them as a trustee, ready to be applied for the benefit of the surety.”<sup>32</sup> Any laches by a creditor in the care or management of collateral securities will, if loss ensues therefrom, discharge a surety pro tanto. This follows from the right of a surety, when he pays the debt of his principal, to be subrogated to the rights of the creditor as to all collateral held by him for the payment of the debt. The right of subrogation implies an obligation on the part of the creditor to do no act by which that right will be frustrated.<sup>33</sup>

**§ 333. Person who occupies situation of surety or guarantor entitled to subrogation.**—Any one who stands in the position of a surety or guarantor, whether strictly and technically such or not, is entitled to subrogation the same as a surety or guarantor. Thus, the grantor of land who has been obliged to pay a mortgage which had been assumed by the grantee as part of the purchase money is entitled to subrogation.<sup>34</sup> One of two joint purchasers of real estate, who has paid more than his share of the purchase money, occupies the position of a surety as to such excess and is entitled to subrogation, and his right in that regard will prevail over the right of dower of the widow of the other joint purchaser.<sup>35</sup> So where one of several principals agreed to pay a debt, upon funds for that purpose being placed in his hands by the other principals, such other principals occupy the position of sureties, and, if compelled to pay the debt, they are entitled to subrogation.<sup>36</sup> The

<sup>32</sup> *Collum v. Emanuel*, 1 Ala. 23, per Collier, C. J.

<sup>33</sup> *Nelson v. Munch*, 28 Minn. 314; *Smith v. Ferris*, 143 N. Y. 495, 39 N. E. Rep. 3.

<sup>34</sup> *Marsh v. Pike*, 10 Paige's Ch. 595; *Willard v. Wood*, 1 App. Cas. (D. C.) 44. In *Hall v. Hoxsey*, 84 Ill. 616, it is intimated that if the surety of a tenant should pay rent

due the landlord he might be subrogated to all the rights of the landlord as to the unexpired term, including the right to distrain, if the lessor had reserved that right in his lease.

<sup>35</sup> *Wheatley's Heirs v. Calhoun*, 12 Leigh (Va.) 264.

<sup>36</sup> *Buchanan v. Clark*, 10 Gratt (Va.) 164.

same thing was held where one partner was obliged to pay the firm debts after selling out to the other partners, who agreed to pay the same.<sup>37</sup> Although, at law, one who accepts a bill for the accommodation of the drawer is regarded in favor of a bona fide holder as the principal debtor, yet, as between such acceptor and the drawer, the acceptor stands in the relation of a surety, and in equity is entitled, on payment of the bill, to be subrogated to the position of such holder of the bill in respect to any securities of the drawer held by such holder to secure the payment thereof.<sup>38</sup> Where a creditor has two funds to which he may resort for the satisfaction of his debt, the one of which is primarily, and the other only secondarily, liable for the payment thereof, and the creditor makes the money out of the fund secondarily liable, the owner of such fund stands in the situation of a surety for the owner of the primary fund, and is entitled to subrogation.<sup>39</sup> An accommodation indorser of a promissory note, who has been compelled to pay the same, is held entitled to be subrogated to the rights of the original creditor.<sup>40</sup> One of two joint makers of a note, who by reason of being a joint maker is a surety for the payment of the share of the other joint maker,<sup>41</sup> may pay the judgment recovered against both by the creditor and be subrogated to the rights of the judgment creditor.<sup>42</sup> The sureties on a mortgage note having paid the note are held subrogated to the rights of the mortgagee in the proceeds of an insurance policy on the mortgaged property.<sup>43</sup> Judgment was recovered against a constable and the sureties on his official bond for wrongful sale of property under execution. The sureties paid the judgment. Held, that they were subrogated to the constable's right to recover on a note which he had taken in payment for the goods sold.<sup>44</sup> Two directors of a corporation, at its request, became sureties on a bond to release an attachment and were obliged to pay. Held, that they became subrogated to the

<sup>37</sup> *Frow, Jacobs & Co.'s Estate*, 28 So. Rep. 960, note 15, § 38, § 73 Pa. St. 459; note 1, § 1. 48.

<sup>38</sup> *Bank of Toronto v. Hunter*, 4 Bosworth (N. Y.), 646. <sup>42</sup> *McClure v. Lucas*, 2 Ind. App. 32, 28 N. E. Rep. 153.

<sup>39</sup> *Eddy v. Traver*, 6 Paige's Ch. 521. <sup>43</sup> *Aetna Life Insurance Co. v. Thompson*, 68 N. H. 20, 40 Atl. Rep. 396.

<sup>40</sup> *Hoffman v. Butler*, 105 Ind. 371. <sup>44</sup> *Meyer Bros. Drug Co. v. Davis*,

<sup>41</sup> *Clark v. Dane*, 128 Ala. 122, 68 Ark. 112, 56 S. W. Rep. 788.

rights of the attaching creditor.<sup>45</sup> A county collector paid his debt to the bank in which he deposited county funds by a check on such funds. Held, that his sureties having made good the shortage thus occasioned in his accounts with the state, were subrogated to the state's right to recover from the bank the money thus misappropriated.<sup>46</sup> Other cases are cited in a note.<sup>47</sup>

**§ 334. Surety may enforce subrogation by suit in chancery.**—At an early day, a surety who paid a bond signed by himself and a principal was held to be entitled by suit in chancery to compel the assignment of the bond to himself.<sup>1</sup> Judgment was recovered against a principal and surety, and execution was issued against the surety, who filed a bill to compel the creditor to assign the judgment to him upon payment of the debt. The creditor did not wish to do this, as he wanted the judgment extinguished, so as to let in some subsequent securities he had taken from the principal. The court of chancery ordered the judgment to be assigned.<sup>2</sup> So it has been held that a surety who pays the amount of the debt into court is entitled to a decree for subrogation. The court said: "A surety who satisfies the debt for which he is liable is entitled to have from

<sup>45</sup> Gray v. Taylor, 59 N. J. Eq. 621, 44 Atl. Rep. 668.

<sup>46</sup> Carroll County Bank v. Rhoades, 69 Ark. 43.

<sup>47</sup> Lee v. Butler, 167 Mass. 426, 46 N. E. Rep. 52, where the administrator of a guarantor, upon paying the debt, was held subrogated to the securities held by the creditor and to land into which they had been converted by foreclosure. In Todd v. Oglebay (Ind.), 64 N. E. Rep. 32, a mortgagor sold the mortgaged property to a vendee, who assumed the mortgage. The mortgage was foreclosed and a deficiency judgment was entered against the vendor and paid by him. The vendee (or rather his assignee) redeemed. Held, that the vendor became subrogated to the rights of the mortgagee to the extent of the deficiency decree paid

by him, and entitled to have the property resold to secure repayment to him of that amount. In Pleasants v. Fay, 13 App. Cas. (D. C.) 237, the vendee of land assumed to pay a mortgage on it, both vendor and vendee forgetting or being ignorant of the fact that vendor had already paid it. Held, that the vendor was entitled to a vendor's lien against the vendee for the amount paid by him.

<sup>1</sup> Morgan v. Seymour, 1 Reports in Chancery, 120 (decided A. D. 1640). To a contrary effect, where the surety offered to pay the debt, and demanded an assignment, see Gammon v. Stone, 1 Vesey, Sr. 339, —the chancellor there saying that the assignment was useless. Calvert v. Peebles, 82 N. C. 334.

<sup>2</sup> Hill v. Kelly, Ridgeway, Lapp & Schoales (Irish), 265.

the creditor whose debt he pays, the securities which such creditor has obtained from the debtor; and if such securities are not voluntarily given up, it is the right of the surety to come to this court to have such security delivered.”<sup>3</sup> Sureties who have paid the debt of their principal have a right to file a bill in chancery to set aside an illegal sale of property mortgaged by their principal for the payment of the debt, and to have the proceeds properly applied.<sup>4</sup> After the creditor has been paid he cannot interfere to prevent a decree of subrogation in favor of one of several defendants in a judgment who has paid the debt. “His claim is satisfied, and he has no right to interfere with any disposition which the court thinks proper to make of the judgment as between the defendants.”<sup>5</sup> Certain sureties of a railroad company were by decree of court subrogated to the rights of the creditor against the company, and the decree provided that unless the money was paid within ten days the road should not be operated. The money was not paid and the road was operated by a trustee, the company being insolvent, and the trustee was attached for contempt. The court said the right of subrogation was purely equitable, and the extent to which it would be exercised depended upon circumstances. Whether it will be extended to the extremest point depends upon whether it is necessary to the protection of the sureties. Stopping the operation of the road would only depreciate it in value, and in no way benefit the sureties, and the attachment was discharged.<sup>6</sup>

**§ 335. How far surety will be subrogated to rights of creditor in suits commenced by him for recovery of the debt.**—If a debt is paid by a surety, and the creditor assigns to him any collateral security therefor, the debt will be regarded as still subsisting and undischarged, so far as is necessary to support the security. It has been held that an attachment is a collateral security for the payment of the debt, and if the debt with the action or execution is assigned to a surety, to enable him to avail himself of the property attached, the debt will be considered unpaid for that purpose only. “The rule that a surety may take an assignment of any security for the payment of

<sup>3</sup> *Goddard v. Whyte*, 2 Giff. 449, per Sir John Stuart, V. C.

<sup>5</sup> *Springer's Adm'r v. Springer*, 43 Pa. St. 518, per Lowrie, C. J.

<sup>4</sup> *Lowndes v. Chisholm*, 2 McCord Eq. (S. C.) 455.

<sup>6</sup> *In re Hewitt*, 10 C. E. Green (N. J.) 210.

the debt which is held by the creditor unavoidably implies an exception to the general rule that the payment of a debt by a co-debtor discharges the other co-debtors, whether the debt rests in contract merely or is merged in a judgment. It is of the nature of all securities for a debt to be the mere incidents of that debt and entirely dependent upon it. Payment of a debt discharges all the securities for it. The mortgage either of real or personal property is discharged by payment of the mortgage debt; and in the same way pledges are at once at an end when the debt is paid. If, then, it was held that by the payment of a debt by the surety the debt was entirely discharged, then all the collateral securities of the creditor must be also discharged. He would no longer have anything to assign, and the equitable principle that the surety is entitled to the benefit of all the securities of the creditor would be entirely defeated. But it has never been so held, but the debt is regarded as still unpaid and unsatisfied so far, and perhaps no further, than is necessary to the preservation of the surety's interest in such securities."<sup>7</sup> A verbal assignment of an attachment has been held sufficient in such a case.<sup>8</sup> A surety by recognizance, who pays the whole amount into court when pressed with crown process, is entitled to use the crown securities in order to levy a moiety from his co-surety, and the fact that he has received indemnity from the principal does not interfere with such right, but he must share his indemnity with the co-surety.<sup>9</sup> Principal and sureties executed a note, and the principal died. The creditor stated, swore to, and filed his account against the estate of the principal in the probate court. One of the sureties paid the debt, and it was held that he was entitled to stand in the place of the creditor as to the steps previously taken to enforce the claim against the estate of the principal, and was subrogated to his right to prosecute the same to an allowance, and to demand payment of the administrator, in the class in which it was placed by the original filing. The court said: "For the purpose of ob-

<sup>7</sup> Edgerly v. Emerson, 23 N. H. 555, per Bell, J. A decision to a contrary effect concerning a replevin bond taken in a suit was rendered in Moore v. Campbell, 36 Vt. 361.

<sup>8</sup> Brewer v. Franklin Mills, 42 N. H. 292.

<sup>9</sup> Latouche v. Pallas, Hayes (Irish) 450.

taining indemnity from the principal, he is considered as at once subrogated to all the rights, remedies and securities of the creditor, and entitled to all his liens, priorities and means of payment against the principal."<sup>10</sup> But where, pending a suit on a note against the principal and indorser jointly, the indorser paid the note, it was held that this payment was a bar to the further prosecution of the suit, even at the instance and for the benefit of the indorser.<sup>11</sup>

**§ 336. Subrogation will not be allowed when it is inequitable or will prejudice rights of creditor—Instances.**—Subrogation cannot be enforced when its enforcement would be contrary to equity, for the whole doctrine is the creature of equity; nor can it be enforced to the prejudice of the creditor with reference to the debt for which the surety is liable.<sup>12</sup> Thus, a principal bought land and took a bond for its conveyance, and also gave bond with surety for part of the purchase money. The principal sold the conveyance bond to another, and the surety knew of the sale at the time thereof, but made no objection, and afterwards took a mortgage on other property from the principal for indemnity, and suffered the principal to leave the state with other property. Held, that the surety, upon being compelled to pay the debt, would not be subrogated to the vendor's equitable lien, and thus get precedence of the purchaser of the conveyance bond. Having tacitly assented to its sale and taken other security, he was equitably estopped to claim subrogation.<sup>13</sup> A and B gave a joint and several note to C for \$450, and to secure the same executed to him a mortgage on six pieces of land, three of which belonged to A and three to B. The note and mortgage were signed by B as the surety of A, but this did not appear from the instruments. Afterwards A mortgaged one of the same pieces of land to D to secure \$100, and D afterwards became the legal holder of the first note and mortgage by assignment from C. The mortgage for \$100 was foreclosed by D, who then brought a suit against A and B to foreclose the mortgage

<sup>10</sup> Braught v. Griffith, 16 Iowa, 26, per Dillon, J.

ing opinion on rehearing of Hayden v. Huff, 60 Neb. 625, 83 N. W.

<sup>11</sup> Griffin v. Hampton, 21 Ga. 198. Rep. 920.

<sup>12</sup> Stamford Bank v. Benedict, 15 Conn. 437; Peters v. Huff, Neb. (Ky.) 131.

<sup>13</sup> Henley v. Stemmons, 4 B. Mon.

Dec., 1901, 88 N. W. Rep. 179, be-



given by them. B filed a cross-bill, and claimed that upon payment of the \$450 note he was entitled to hold all three pieces of the land mortgaged by A as his indemnity, and that the subsequent mortgage to secure \$100 should be subject to the prior mortgage, to which he claimed to be subrogated. D did not appear to have had notice that B was a surety. It was held that B was not entitled to subrogation, on the ground that D had no notice of his rights as surety, and would, without fault on his part, be prejudiced if subrogation was allowed.<sup>14</sup> A party sold a tract of land and took three notes of the vendee for the purchase money, taking no other security than retaining his vendor's lien. Apprehending that the land if sold would not pay the notes, the vendor instituted on the second note an attachment suit against the purchaser, and levied on certain horses, to secure the release of which the purchaser gave a bond with sureties. Judgment was rendered for the plaintiff in the attachment suit. Afterwards the vendor obtained judgment on the third note, and sold the land and applied the proceeds to the payment of the third note. The sureties in the bond given in the attachment suit filed a bill claiming to be subrogated to the lien of the judgment obtained in the attachment suit, and to have the proceeds of the sale of the land applied to the payment of that judgment, claiming that it was a lien on the land prior to the lien of the judgment obtained on the third note. Held, they were not entitled to the relief, because to grant it would not be to place them in the position of the creditor with reference to the liens, but to take from the creditor a security which he had obtained and cause him to lose the debt.<sup>15</sup> It is held that subrogation will not be allowed as against an innocent third party without notice.<sup>16</sup>

<sup>14</sup> *Orvis v. Newell*, 17 Conn. 97.

<sup>15</sup> *Crump v. McMurtry*, 8 Mo. 408. Holding that a surety will not be subrogated so as to defeat an interest acquired and held by a third person, when that interest, though subordinate to that of the creditor, is prior in date to the undertaking of the surety, see *Farmers' & Drivers' Bank v. Sherley*, 12 Bush (Ky.) 304. See, to the same effect, *Fishback v. Bodman & Co.*, 14 Bush (Ky.) 117.

<sup>16</sup> In *Coonrad v. Kelly*, 113 Fed. Rep. 378, Booth on May 1, 1899, gave his mortgage for \$10,000 to plaintiff, who recorded it May 6 following. On May 3, 1899, Booth gave his other mortgage for \$8,000 to Howlett for value, who recorded it on the same day, and on June 12 following sold it for value to the Dime Savings Institution. The proceeds of plaintiff's mortgage were used in part to pay and cancel an existing mortgage for about



§ 337. **The same continued.**—A executed a mortgage to secure several notes due from him to B, and B assigned all the notes except the first one to C. Afterwards A sold the mortgaged premises to D, who agreed to pay all the notes, but did not, and the mortgage was foreclosed. A paid B the note held by him, with the understanding that such payment should not extinguish the note, and had it transferred to a third party. The mortgaged premises did not bring enough to pay all the notes, and the proceeds were ordered to be paid on the notes in the order of their maturity. A claimed that by means of the principles applicable to subrogation the note he had paid to B should be first paid from such proceeds. Held, the claim was not well founded. Although by the transaction A occupied the position of a surety for D, yet he was a principal as to C, and the proceeds of the mortgage must be first applied to paying the notes held by C.<sup>17</sup> A county treasurer gave bond with

\$5,000 held by the Mutual Life Insurance Company of New York. Plaintiff, on bill to foreclose his \$10,000 mortgage, failed to show any notice to Howlett or the bank other than the record. Held, that the Howlett mortgage took precedence and that plaintiff was not entitled, as against the holder thereof, to be subrogated to the rights of the holder of the mortgage which had been paid with his money. In *Oglesby v. Foley*, 153 Ill. 19, 38 N. E. Rep. 557, a master in chancery, being authorized by decree in partition to make sale of certain land and take mortgage notes for deferred payments fraudulently wrote into the decree a provision authorizing him to sell such notes at their face value and distribute the proceeds. Having made the sale and sold the notes to innocent purchasers for value, he embezzled part of the proceeds and the sureties on his official bond having made good his default filed their bill to be subrogated to the rights of the heirs to compel the

purchasers at the master's sale, who were not parties to the partition suit, and who had already paid their purchase money notes, to pay them a second time, on the ground that they should have seen to it that the master had authority, to transfer the notes to the subsequent holders, to whom they made payment. Held, that the bill was properly dismissed for want of equity. "In our view of the case, the forgery is of little importance," said the court (p. 24). "If the decree had been silent as to the right of the master to negotiate the notes, and if it be conceded that, in the absence of such authority, he could not lawfully assign them (which is conceded only for the argument), and the master had transferred them and received the money, and the makers had afterwards paid them in full to his assignee without fraud, we know of no legal or equitable principle upon which a second payment could have been demanded."

<sup>17</sup> *Massie v. Mann*, 17 Iowa 131.

sureties in the sum of £7,000, and became a defaulter to the extent of £18,000. The sureties filed a bill, claiming that upon payment of the £7,000 they were entitled to sue on the bond and stand in the place of the creditor for that sum. The court said that if the crown had been fully paid the subrogation would have been decreed, for the crown would then have been a mere trustee; but as a large balance remained due the crown, the subrogation would not be made. "If the debts due to the crown and a subject be equal in degree, the prerogative of the crown gives priority to the former."<sup>18</sup> Under certain peculiar circumstances, where it would be inequitable to refuse it, subrogation will be allowed, although it prejudice the claim of the creditor against the principal. Thus a bond with surety in the penal sum of £10,000 was conditioned for the payment of all such sums as should be advanced to the principal. Twenty thousand pounds were advanced to the principal, who then became bankrupt. The surety paid the £10,000 and filed a petition to be subrogated to the rights of the creditor against the estate of the principal, where the claim for £20,000 had been proved. Held, he was entitled to be subrogated for the £10,000 paid by him, and to have precedence out of the bankrupt's effects over the other £10,000 due the creditors. The sureties had a right, although the bond was conditioned for the payment of all advances, to suppose that the advances would not exceed £10,000, the penalty of the bond. The chancellor said: "I think the bankers (creditors) are not entitled in equity to say as against the surety that their demand is more than £10,000, the amount of the bond he has given, upon which he would be *prima facie* entitled to stand in their place; as to the residue of their debt, they ought to be considered, if I may so express it, as their own insurers."<sup>19</sup>

**§ 338. Surety not entitled to subrogation until the whole debt is paid.**—As a general rule subrogation cannot be enforced until the whole debt is paid to the creditor. Part may be paid by the principal and part by the creditor, and the surety then be entitled to subrogation, but the entire debt must be extinguished before subrogation can take place. It would not

<sup>18</sup> *The Queen v. O'Callaghan*, 1 Irish Eq. 439.

<sup>19</sup> *Ex parte Rushforth*, 10 Vesey, 409, per Lord Eldon, C.

subserve the ends of justice to consider the assignment of an entire debt to a surety as effected by operation of law, where he had paid but a part of it and still owed a balance to the creditor, and a court of chancery would not countenance such an anomaly as a *pro tanto* assignment, the effects of which could only be to give distinct interests in the same debt to both creditor and surety. Until the creditor is fully satisfied, there cannot usually be any interference with his rights or his securities which might even by bare possibility prejudice or embarrass him in any way in the collection of the residue of his claim.<sup>20</sup> A surety who has paid interest on a note secured by mortgage where the principal remains unpaid is not entitled to subrogation as to such payments.<sup>21</sup> But a surety for a mortgagor who pays part of the mortgage is, as against the mortgagor, entitled to a charge on the mortgaged estate in a suit brought by the mortgagee to foreclose a mortgage.<sup>22</sup> A creditor who holds, without special stipulations due its application, security for various notes due from his debtor, some of which bear the name of sureties, may, in case of the insolvency of the principal and of some of the sureties, apply the same towards the payment of such of the notes as may be necessary for his own protection, and solvent sureties upon other of the notes cannot avail themselves thereof in any way in equity without paying or offering to pay the whole of the notes for which the security was given. Where a surety in such a case sought relief, the court said: "It is obvious that, in order to become entitled to such substitution, he must first pay the whole of the debt or debts for which the property is mortgaged or the collateral security is given, to the creditor, for it would be manifestly unjust, and a plain violation of his rights, to compel him to relinquish any portion of the property before

<sup>20</sup> Hollingsworth v. Floyd, 2 Har. & Gill (Md.), 87; Kyner v. Kyner, 6 Watts (Pa.), 221; Receivers of N. J. Midland R. R. Co. v. Wortendyke, 27 N. J. Eq. 658; Bank of Pennsylvania v. Potius, 10 Watts (Pa.), 148; Swan v. Patterson, 7 Md. 164; Ex parte Rushforth, 10 Vesey, 409; Magee v. Legette, 48 Miss. 139; McConnell v. Beattie, 34 Ark. 113; Schoonover v. Allen,

40 Ark. 132. To contrary effect, see Williams v. Tipton, 5 (Humph.) Tenn. 66.

<sup>21</sup> Gannett v. Blodgett, 39 N. H. 150; Neptune Ins. Co. v. Dorsey, 3 Md. Ch. 334; Swan v. Patterson, 7 Md. 164.

<sup>22</sup> Gedy v. Matson, 25 Beav. 310; Stuckman v. Roose, 147 Ind. 402, 46 N. E. Rep. 680.

the obligation, for the performance of which it was conveyed to him as security, had been fully kept and complied with.”<sup>23</sup> Where a trust fund was provided for the payment of several notes of a principal, on one of which was a surety, and the surety paid such note, it was held he was entitled to be subrogated to the rights of the creditor, and to share pro rata in the proceeds of the trust fund, the decision being put upon the ground that such were the express terms of the trust.<sup>24</sup> Suit having been brought against principal and sureties on a city treasurer’s bond, the sureties claimed a set-off, and also filed a cross-petition, claiming to be subrogated to certain rights of the city against a bank. Judgment was rendered against the sureties, but subrogation was denied them, and they then paid the judgment and appealed from the order denying them subrogation. It was claimed that the sureties were not entitled to subrogation till they had paid the debt, and as they had not paid it when the decree was rendered, the decree was right. The court said: “All this is answered by the single proposition that the power of a court of equity is not limited to settling the rights of parties upon what has been done in the past, but it reaches forth and declares their duties and rights for the future, and in the exercise of this latter power it should have decreed that when the sureties paid the debt of their principal they should be subrogated to the rights of the creditors.”<sup>25</sup>

**§ 339. Surety not entitled to subrogation after statute of limitations has run, nor if he take separate indemnity, unless he renounces it.**—Where a surety who has paid the debt does not act before his claim is barred at law by the statute of limitations, manifesting his intention to put himself in the place of the original creditor, and thereby subrogating himself to the creditor’s rights, equity will not subrogate him to those rights.<sup>26</sup>

<sup>23</sup> Wilcox v. Fairhaven Bank, 7 Allen 270, per Merrick, J.

<sup>24</sup> Allison v. Sutherlin, 50 Mo. 274.

<sup>25</sup> City of Keokuk v. Love, 31 Iowa, 119, per Cole, J.

<sup>26</sup> Rittenhouse v. Levering, 6 Watts & Serg. (Pa.) 190; Joyce v. Joyce, 1 Bush (Ky.), 474; Fink v. Mahaffy, 8 Watts (Pa.), 384; Bank of Pennsylvania v. Potius, 10

Watts (Pa.), 148; Simpson v. McPhail, 17 Bradw. (Ill. App.) 499; Guild v. McDaniels, 43 Kan. 548; Arbogast v. Hays, 98 Ind. 26. A delay of nearly eighteen years to demand subrogation to a judgment against two sureties by a surety who has discharged the same is laches, and a court of equity will not act. Pickering v. Leiberman (Dist. Ct. Dist. Del), 41 Fed. Rep.

If the surety, knowing of the existence of a mortgage given by the principal for the payment of a debt, take a distinct security for his indemnity from the principal, it has been held that he thereby waives his right to subrogation to the mortgage held by the principal. In such a case the court said: "He must proceed under one or other of the two rights which he claims. If he had bound himself to pay the mortgage and had done so, he would then have been entitled to the benefit of the mortgage. He has not done so. He has bargained by a separate instrument for an indemnity, which is perfectly distinct.

\* \* If a surety pay off the mortgage he is entitled to the benefit of all the securities. But here the plaintiff has contracted with the mortgagor, for whom he is surety, that he should receive a particular species of indemnity if he pay off any part of the principal or interest of the mortgage. That indemnity he is entitled to, and not to the benefit of the mortgage paid off." <sup>27</sup> It has, however, been held that a surety who

376. It has been held that the limitation applicable to a surety's right to subrogation is the period applicable under the statute of limitations to implied promises: *Junker v. Rush*, 136 Ill. 179, 26 N. E. Rep. 499, affirming *Junker v. Kuhnen*, 18 Ill. App. 478. In *Hopewell v. Kerr*, 9 Ind. App. 11, 36 N. E. Rep. 48, it was held that plaintiff who as surety had paid a judgment against his principal, might sue the principal upon his implied promise of reimbursement, in which event a six years statute of limitations would apply, or he might sue him as assignee, by subrogation, of the judgment, in which event, perhaps, the statute of limitations applicable to suits upon judgments might apply. The pleadings should indicate upon which theory a recovery was sought. Citing *Lilly v. Dunn*, 96 Ind. 220; *Hall v. Myers*, 90 Ga. 674, at 684, 16 S. E. Rep. 653; *Sublett v. McKinney*, 19 Tex. 438. Where subrogation is asked on the ground of

payment of a mortgage by mistake, held that the statute of limitations begins to run from the time of payment, not the time of discovery of the mistake: *Pollock v. Wright*, 15 S. D. 134, 87 N. W. Rep. 584; *Zuellig v. Hemerlie*, 60 Ohio St. 27, 53 N. E. Rep. 447, 71 Am. St. Rep. 707; *Scott v. Nichols*, 27 Miss. 94, 61 Am. Dec. 503, and note; *Gilmore v. Ham*, 142 N. Y. 1, 36 N. E. Rep. 826, 40 Am. St. Rep. 554.

<sup>27</sup> *Cooper v. Jenkins*, 32 Beav. 337, per Sir John Romilly, M. R.; *Cornwell's Appeal*, 7 Watts & Serg. (Pa.) 305. See also note 10, § 324, citing *Huntington v. Proceeds of The Advance*, 72 Fed. Rep. 793, 19 C. C. A. 194, affirming 63 Fed. Rep. 726. But, in *Union Trust Co. v. Morrison*, 125 U. S. 591, 31 L. Ed. 825, 8 Sup. Ct. Rep. 1004, where the surety on an injunction bond had been obliged to pay a judgment of \$15,000, and had received by way of indemnity a chattel mortgage on two locomotives from

has taken a particular indemnity from the principal will, upon payment of the debt, be entitled to subrogation to securities which the creditor acquired after the taking of such indemnity.<sup>28</sup> And it seems that where a surety has taken a particular indemnity from the principal he has a right to elect whether he will rely upon his particular indemnity or be subrogated to the rights of the creditor.<sup>29</sup>

**§ 340. When surety who becomes such during prosecution of remedy against principal not entitled to subrogation.**—A surety who was not originally bound for the debt, but who comes in during the prosecution of a remedy for the debt against the principal, cannot, by subrogation, obtain a preference over creditors of the principal whose liens attached before the surety became bound. Thus, three notes, payable annually, were executed and a lien retained on land to secure them. Judgment was obtained on the first note, which was replevied (stayed). The surety in the replevin bond paid it, and it was assigned to him. The holder of the third note brought suit to enforce the lien on the land, and it was held that his lien was superior to any right which the surety could obtain by means of subrogation.<sup>30</sup> The same thing was held where a judgment had been obtained against a principal who had given a mortgage on land to secure the debt, and he gave an injunc-

the principal, a railroad company, which locomotives were then subject to the lien of an earlier mortgage, it was held that the acceptance of the chattel mortgage was a circumstance indicating that the surety "intended to look to the property, and not alone to the personal security of the company" (p. 610), and not necessarily indicating that he intended to look to that as his sole security, and it was held that since his becoming such surety had saved the property of the railroad for the mortgagees he was entitled to a lien prior to that of the first mortgage for his reimbursement.

<sup>28</sup> *Lake v. Brutton*, 8 De Gex, Macn. & Gor. 440.

<sup>29</sup> *Flannagan v. Forrest*, 94 Ga. 685, 21 S. E. Rep. 712, cited in note to § 357 post, in which case it was held that foreclosure by a surety of a mortgage that was given by his principal (on a note) by way of indemnity was a renunciation of the surety's right to subrogation to the rights of the creditor.

<sup>30</sup> *Bank of Hopkinsville v. Rudy*, 2 Bush (Ky.), 326. To same effect, where the surety became such for the purpose of staying an execution, see *Armstrong's Appeal*, 5 Watts & Serg. (Pa.) 352. For an application of the same principle to surety on notes for interest due on mortgage, see *Swan v. Patterson*, 7 Md. 164.



tion bond, with surety, to restrain the collection of the judgment. The court said: "We are decidedly of the opinion that a surety who first comes in as a surety in an obligation incidental to the prosecution of the legal remedy against the person of the debtor is *prima facie* to be considered as trusting to his principal only, for whom alone he is surety; that upon his paying the debt he is entitled to stand in the creditor's place only as to his remedies against the person and property of the principal, and that as to any prior surety, or any prior interest in the property which may be under pledge, he must occupy the place of the debtor."<sup>31</sup> But, where a judgment was recovered against principal and surety, upon which a *ca. sa.* was issued, and the surety arrested, and he turned out certain slaves to procure the discharge of his body from custody, and then gave a forthcoming bond for the slaves, with A as surety, which bond was forfeited, and A had the debt to pay, it was held that A was entitled to subrogation to the creditor's rights in the original judgment, and could enforce the lien of that judgment against land of the principal bound by the same.<sup>32</sup> Judgment was recovered against A and B, which became a lien on the land of A. Afterwards B alone prosecuted a writ of error from the judgment, and gave C as surety on his error bond. The judgment was affirmed, and judgment was rendered against B and C in the supreme court, which C had to pay. Held, he was entitled to be subrogated to the lien of the judgment creditor against the land of A. The judgment below remained in force and unsatisfied, and A was bound for it when it was affirmed as much as B, and C having discharged it, was entitled to subrogation.<sup>33</sup>

**§ 341. Surety who pays entitled to subrogation to creditor's rights against co-surety.**—A surety who pays the debt for which he and a co-surety are liable will be subrogated to the rights

<sup>31</sup> *Patterson v. Pope*, 5 Dana (Ky.), 241, per Marshall, J. And see, also, *Fishback v. Bodman*, 14 Bush (Ky.) 117. So where a surety whose obligation was not coeval with the original debt or the execution of the surety therefor pays such debt, he will not, as against intervening liens acquired after contracting the original debt, but

before payment by the surety, be entitled to the benefit of the lien of such security. *Powell v. Allen*, 11 Bradw. (Ill. App.) 129. But see *Rodgers v. M'Cluers' Adm'r*, 4 Gratt (Va.) 81.

<sup>32</sup> *Leake v. Ferguson*, 2 Gratt. (Va.) 419.

<sup>33</sup> *Taul v. Epperson*, 38 Tex. 492.



of the creditor against the co-surety to the same extent that he would be subrogated to the rights of the creditor against the principal.<sup>34</sup> In holding this principle an eminent judge said: "Where a person has paid money for which others are responsible, the equitable claim which such payment gives him on those who were so responsible shall be clothed with the legal garb with which the contract he has discharged was invested, and shall be substituted, to every equitable intent and purpose, in the place of the creditor whose claim he has discharged. This principle of substitution is completely established in the books, and being established, it must apply to all persons who are parties to the security, so far as is equitable. The cases suppose the surety to stand in the place of the creditor as completely as if the instrument had been transferred to him or to a trustee for his use. Under this supposition, he would be at full liberty to proceed against every person bound by the instrument. Equity would undoubtedly restrain him from obtaining more from any individual than the just proportion of that individual; but to that extent his claim upon his co-surety is precisely as valid as upon his principal."<sup>35</sup> Where two sureties signed a joint and several promissory note, under seal, in which there was a warrant to confess judgment, and one of them paid it, and the word "paid" was written across its face, it was held that the surety making such

<sup>34</sup> In *Cummings v. May*, 110 Ala. 479, 20 So. Rep. 307, two of three sureties on a tax collector's bond paid in full a judgment of \$4,000 recovered by the state on account of a defalcation by their principal and compromised a like judgment of \$11,000 recovered by the county by paying \$1,374.40 in cash and giving their notes for \$2,500 more, which were afterwards released, and, then, filed their bill to compel their co-surety to contribute. The Alabama Code (sec. 527) makes the bond a lien in favor of the state or county on the real estate of the sureties from the date of default. It was held that the sureties who compromised were

subrogated to the rights of the county against their co-surety and that their lien took precedence of two mortgages which their co-surety had placed on his property subsequent to the default of the principal and prior to the judgment which the state and county obtained against principal and sureties on the bond. Same case on earlier appeal: *Cummings v. May*, 91 Ala. 233, 8 So. Rep. 790. The fact that the surety pays the debt after it has been reduced to judgment does not affect his right to subrogation against a co-surety: *Peirce v. Garrett*, 65 Ill. App. 682, at 686.

<sup>35</sup> Per Marshall, C. J., in *Lidder-*

payment might have judgment entered on the note in the name of the payee to his use, and have execution thereon against his co-surety for his proportion. The court said: "An intent to prevent the extinguishment of the debt will be presumed whenever it is the interest of the paying surety it be kept alive.

\* \* A surety who pays his principal's debt is entitled to be subrogated to all the rights and remedies of the creditor against his co-surety in the same manner as against the principal. An actual assignment is unnecessary. The right of substitution is the substantial thing; the actual substitution is unimportant. The right of substitution being shown, and the surety having paid the debt, he succeeds by operation of law to the rights of the creditor."<sup>35a</sup> A joint judgment was rendered against C and H, who were the sureties of K. H replevied (stayed)

dale v. Robinson, 2 Brock. 159. Holding the same view, see Hess' Estate, 69 Pa. St. 272; Howell v. Reams, 73 N. C. 391; Croft v. Moore, 9 Watts (Pa.), 451; Burrows v. McWhann, 1 Des. Eq. (S. C.) 409. Contra, Bank v. Adger, 2 Hill, Eq. (S. C.) 262. In Sublett v. McKinney, 19 Tex. 438, the court held that an accommodation acceptor, upon paying the draft, was "entitled to be substituted, as to the very debt itself, to the creditor," so that he might sue the drawer upon the draft as a written instrument within the same period that the drawee might have sued him. The same thing was stated more elaborately in Hull v. Myers, 90 Ga. 674, 16 S. E. Rep. 653, where it was held that one of several indorsers paying a note might sue, on the note, a co-endorser for contribution. In Croft v. Moore, 9 Watts (Pa.) 451, after judgment had been obtained against maker and three indorsers of a note, and two of the indorsers had paid it, one of the paying sureties was held entitled to be substituted, on his own petition, as party plaintiff,

in the same action, so that he might collect from the maker the amount paid by him. Opinion by Gibson, J. Fleming v. Beaver, 2 Rawle (Pa.) 128; Wright v. Grover, 82 Pa. St. 80, where one of two sureties on a judgment note who had paid it was allowed to confess a judgment upon it in the name of the payee to his use and have execution against his co-surety for half the amount paid. Hess' Estate, 69 Pa. St. 272; Howell v. Reams, 73 N. C. 391, in which case one of two sureties on a bond, paying it, was held to be a "bond creditor" of his co-surety and as such entitled to be paid from the assets of his estate. Ovem v. Wrightson, 51 Md. 34, 34 Am. Rep. 286, in which case sureties of a tax collector, after making good a default, were held entitled to the state's right of repayment as a preferred creditor.

<sup>35a</sup> Wright v. Grover & Baker S. M. Co., 82 Pa. St. 800, per Mercur, J. And see, also, Duffield v. Cooper, 87 Pa. St. 443. See note 19 to § 317, citing Hull v. Meyers, 90 Ga. 674, 16 S. E. Rep. 653, *supra*.

the judgment, with M and others as sureties, and M had the debt to pay. Held, M was not the surety of C, who did not join in the replevin, but M having paid the debt of H, for which C was co-surety with H, if H was entitled to contribution from C, M would be subrogated to that right, and could through that means recover from C.<sup>36</sup> A surety obtained from his principal an assignment of a mortgage as an indemnity, from which he received a certain sum. The lands of his co-surety were sold to pay the debt of the principal. Held, the creditors of such co-surety, whose liens were disappointed by such sale, had the right, with the consent of the co-surety, to be subrogated to the judgment held by the original creditor against the surety to the extent of one-half of the amount thus received by him from the mortgage and applied to the payment of the joint liabilities of the sureties.<sup>37</sup> Judgment was recovered against three co-sureties, and execution was levied on land belonging to each of them. Two of them paid the judgment and filed a bill to be subrogated to the lien of the levy against the land of the third. Held, they were entitled to the subrogation. The court said the judgment was not extinguished by the payment. The English rule was different, but the American and better rule was that the payment did not extinguish the judgment unless such was the intention of those who paid. It was rather a purchase of the judgment, and would be so treated where equity required. "Where the intention with which the payment is made requires that the security should survive either generally or against particular persons, and the situation and relation of the parties will fairly admit it, a court of equity will generally, in this country, respect the intention and treat the security as in being to the end desired, and recognize and enforce the right of subrogation."<sup>38</sup>

**§ 342. Cases holding surety who pays amount of judgment entitled to subrogation thereto without assignment.**—The rule that a surety who pays the debt for which he is bound is entitled to subrogation to the rights of the creditor to some extent is recognized by all the British and American courts, but there is great conflict among the cases as to the extent to which subrogation will be carried. One of the most fruitful sources

<sup>36</sup> *Crom v. Murphy*, 12 B. Mon. (Ky.) 444.

<sup>38</sup> *Smith v. Rumsey*, 33 Mich. 183, per Graves, J.

<sup>37</sup> *Moore v. Bray*, 10 Pa. St. 519.

of such conflict is whether the payment by a surety of the amount of a judgment rendered against the principal for the debt extinguishes the judgment so as to cut off the surety from a right to subrogation thereto. If the surety makes such payment with the intention of extinguishing the judgment, the payment will have that effect. But if nothing appears as to the intent with which the payment is made, the better opinion seems to be that the judgment is discharged so far as any benefits which the creditor might otherwise personally derive therefrom is concerned, but is kept alive as between all parties thereto, for the purpose of enforcing the rights of the surety; and it will be presumed that it was the intention of the surety to keep the judgment alive, so that he may be subrogated to the creditor's rights thereunder.<sup>39</sup> In such case no assignment nor agreement for assignment of the judgment is necessary, as the rights of the surety result from the operation of law.<sup>40</sup> Nor does it make any difference that the surety, when he paid, did not know that there was any right of subrogation.<sup>41</sup> The levy of an execution having created an incumbrance on the estate of a person of unsound mind, his committee enjoined the collection of the judgment. The injunction was dissolved, and the sureties in the injunction bond had to pay the debt. Held, the committee did not lose its right of priority by enjoining the debt in good faith, and the sureties in the injunction bond had a right to be subrogated to the priority which the committee would have had if it had paid the execution.<sup>42</sup> Judgment was recovered against principal and surety, after which the principal gave absolute

<sup>39</sup> Neilson v. Fry, 16 Ohio St. 552; Eddy v. Traver, 6 Paige's Ch. 521; Hill v. Manser, 11 Gratt. (Va.) 522; Merryman v. The State, 5 Harris & Johns. (Md.) 423; Richter v. Cummings, 60 Pa. St. 441; Ferguson's Adm'r v. Carson's Adm'r, 86 Mo. 673; Turner v. Teague, 73 Ala. 554. In Waldrip v. Black, 74 Cal. 409, it is held that the surety who has paid a note becomes the equitable assignee thereof, and, as holder, may foreclose a mortgage given to indemnify him. The surety's right to subrogation is not

affected, because he did not obtain an actual assignment of the judgment paid (Lightbown v. McMyn, Law Rep. 33 Ch. Div. 575), notwithstanding he was entitled to such assignment. Benne v. Schnecko, 100 Mo. 250.

<sup>40</sup> Fleming v. Beaver, 2 Rawle (Pa.), 128; Kinard v. Baird, 20 S. C. 377; Lightbown v. McMyn, Law Rep. 33 Ch. Div. 575.

<sup>41</sup> Dempsey v. Bush, 18 Ohio St. 376.

<sup>42</sup> Salter v. Salter's Creditors, 6 Bush (Ky.), 624.

bail, and such bail was afterwards sued, and judgment was obtained against him for the debt. The surety paid part of the first judgment. Held, he was entitled to be subrogated to the judgment against the bail, who had "interposed to procure a personal advantage to the principal, and to the detriment of the surety, who might perhaps have been exonerated had the proceedings not been stayed against the principal."<sup>43</sup> Where separate judgments were recovered against principal and surety, and land of the principal was levied on, and the surety paid the judgment against himself, it was held that such payment operated in law and equity as an assignment of the judgment against the principal to the surety, and that the surety might proceed on such judgment for his own benefit.<sup>44</sup> So where separate judgments for the same debt were recovered against principal and surety, and the surety paid the judgment against himself, and thereupon the sheriff entered satisfaction on both executions, it was held that the surety would be allowed to vacate the entry of satisfaction on the execution against the principal, and to set up the judgment against him as a lien on his estate.<sup>45</sup>

**§ 343. Cases holding that surety who pays amount of judgment and takes assignment thereof can enforce judgment.**—If the surety, at the time he pays the amount of a judgment against the principal, takes or stipulates for an assignment thereof, his intention not to extinguish the same is thereby manifest. And in such case, where the judgment was jointly against the principal and surety, it was held that the judgment was not extinguished, but that the surety should, as a judgment creditor, have the benefit thereof against the estate of the principal.<sup>1</sup> The same thing was held where separate judg-

<sup>43</sup> Burns v. Huntingdon Bank, 1 Pen. & Watts (Pa.) 395, per Gibson, C. J.

<sup>44</sup> Sotheren v. Reed, 4 Harris & Johns. (Md.) 307. To similar effect, and as to right of surety to file bill to subject equitable estate of principal, see Lyon v. Bolling, 9 Ala. 463. Contra, Dowbiggen v. Bourne, 2 Younge & Collyer (Exch.), 462, where it was held, in such case, that the judgment

was extinguished by the payment, and a court of equity refused to compel an assignment thereof.

<sup>45</sup> Perkins v. Kershaw, 1 Hill, Eq. (S. C.) 344. Contra, Sherwood v. Collier, 3 Dev. Law (N. C.), 380, where, in a similar case, it was held the judgment against the principal was extinguished by the payment of the judgment against the surety.

<sup>1</sup> Neal v. Nash, 23 Ohio St. 483;

ments for the same debt were rendered against principal and surety, and the surety at the time of paying the judgment stipulated for, and afterwards obtained, an assignment to himself of the judgment against the principal.<sup>2</sup> Separate suits were brought against the maker and indorser of a note, and the indorser paid the amount due upon an agreement between him and the holder that the suit against the maker should proceed for the benefit of the indorser. Held, the maker could not in the suit against him avail himself of the payment thus made by the indorser.<sup>3</sup> Where there was a judgment against principal and surety, and the creditor insisted on holding his judgment and enforcing a creditor's bill founded upon it, it was held that equity would compel him to receive payment of the debt from the surety and to assign the judgment to the surety.<sup>4</sup> Where a surety took an assignment of a judgment paid by him, it was held that he might sue out a garnishment on the judgment and resist a claim of exemption which was not available against the plaintiff.<sup>5</sup> Where there was a decree against an administrator and his surety, and the latter paid the same and took an assignment thereof, it was held that he could enforce the decree by attachment against the administrator.<sup>6</sup>

*Goodyear v. Watson*, 14 Barb. (N. Y.) 481; *Norris v. Ham*, R. M. Charl. (Ga.) 267; *Norris v. Evans*, 2 B. Mon. (Ky.) 84. The following cases hold that the surety who has paid a judgment or decree against his principal is entitled to have the same assigned to himself: *Benne v. Schnecko*, 100 Mo. 250; *Bragg v. Patterson*, 85 Ala. 233; *Harris v. Frank*, 29 Kan. 200; or to a third person designated by him for his benefit (*Townsend v. Whitney*, 75 N. Y. 425, affirming 15 Hun 93; *Searing v. Berr*, 58 Iowa 20; *Katz v. Moessinger*, 110 Ill. 372); or that he may purchase the same (*Allen v. Powell*, 108 Ill. 584); or that he may treat the judgment or decree as satisfied and discharged and resort to action against his principal. *Katz v.*

*Moessinger*, 110 Ill. 372. Under statute it is held that a surety cannot sue his principal on a judgment unless it has been assigned to him. *Fearn v. Ward*, 80 Ala. 555; *Blackman v. Joiner*, 81 Ala. 344. See, on this subject, *Johnston v. Amana Lodge*, 92 Ind. 150; *Gatewood v. Gatewood*, 75 Va. 407.

<sup>2</sup> *Thompson v. Palmer*, 3 Rich. Eq. (S. C.) 139.

<sup>3</sup> *Mechanics' Bank v. Hazard*, 13 Johns, 353.

<sup>4</sup> *McDougald v. Dougherty*, 14 Ga. 674.

<sup>5</sup> *Giddens v. Williamson*, 65 Ala. 439; *Vanderveer v. Ware*, 65 Ala. 606.

<sup>6</sup> *Townsend v. Whitney*, 75 N. Y. 425, affirming 15 Hun 93.



§ 344. **Cases holding that payment of amount of judgment by surety extinguishes it and prevents subrogation thereto.**—On the other hand there is a class of cases which hold that, where a judgment is rendered against principal and surety, payment of the amount by the surety extinguishes the judgment, and the surety can thereafter derive no benefits therefrom by means of subrogation.<sup>7</sup> This doctrine has been carried to the extent of holding that the surety who paid a joint judgment against himself and his principal extinguished it, even though he did not intend to do so, and took an assignment of it to himself. The court said that the only way he could keep the judgment alive was to have it assigned to some third person.<sup>8</sup> Where a judgment was recovered and execution issued against the maker and several indorsers of a note, among whom was R, a mere accommodation indorser, who paid the judgment, it was held that a court of law had no power to permit him to sue out execution against the parties to the judgment, who stood prior to him on the note. Payment extinguished the judgment at law, and he could only be subrogated, if at all, in equity.<sup>9</sup> Principal and sureties in a promissory note were sued jointly, and judgment and fi. fa. went against them jointly. The sureties paid the fi. fa., and the sheriff made an entry to that effect on it. Held, the sureties had no right to have the fi. fa. returned and take out a ca. sa. and arrest the principal.<sup>10</sup> Sometimes a method is provided by statute by which a surety upon paying the judgment can have the fact of his suretyship entered of record and can thereafter control it. If the surety fails to comply with the requirements of such a statute the judgment is treated as having been paid.<sup>11</sup>

§ 345. **Whether surety who pays specialty debt of principal entitled to rank as specialty creditor.**—Although there is con-

<sup>7</sup> Laval v. Rowley, 17 Ind. 36; 589; Chandler v. Higgins, 109 Ill. Morrison v. Marvin, 6 Ala. 797; 602.

State v. Miller, 5 Blackf. (Ind.) 381; McKee v. Amonett, 6 La. Ann. 207; Dinkins v. Bailey, 23 Miss. 284. <sup>9</sup> Ontario Bank v. Walker, 1 Hill (N. Y.), 652.

<sup>10</sup> Elam v. Rawson, 21 Ga. 139.

<sup>11</sup> In Patterson v. Clark, 101 Ga. 214, 28 S. E. Rep. 623, a creditor having obtained a joint judgment against principal and surety, the surety paid the judgment and failed to take the steps required  
<sup>8</sup> Briley v. Sugg, 1 Dev. & Bat. Eq. (N. C.) 366. To similar effect, see Pressler v. Stallworth, 37 Ala. 402; Vanderveer v. Ware, 65 Ala. 606; Tiddy v. Harris, 101 N. C.



dict of authority on this point also, the prevailing and better opinion is that the surety who pays the sealed obligation of his principal does not, in the absence of an intention to that effect, thereby extinguish the same and become a simple contract creditor of the principal, but that he is, by reason of such payment, subrogated to the rights of the creditor in the sealed instrument and entitled to rank as a specialty creditor of the principal. In holding this principle an able court said that the civil law, the old English authorities and the great weight of American authority held the surety entitled to subrogation to the very place with all the rights of the creditor, while the later English cases held that payment by the surety extinguished the specialty and left the surety a simple contract creditor. "The rights of the surety in this matter depend on no subtle technicality, but upon an equity which springs out of the fact of payment, and out of his relation to the principal debtor." At common law the specialty may be extinguished, but in equity the surety is regarded as a purchaser thereof. A purchaser of a negotiable security would acquire all the rights of the creditor. How can he occupy a position in a court of equity more favorable than the surety? The surety is universally held to have the same rights as to collateral securities as the creditor, and to have the right to be subrogated to them. The principles of natural justice and reason pass them to him. "The substitution of the surety is not for the creditor as he stands related to the principal after payment, but as he stood related to him before the payment. He is substituted to such rights as the creditor then had against the principal, one of which unquestionably was to enforce his bond against the principal, and, if he was insolvent, to be let in as

by the statutes to have the fact of his suretyship appear of record or to have the judgment marked to his use. It was held that in a subsequent contest between creditors of the principal he could not treat the judgment which was superior, as a lien, to other claims, as alive and control the execution, but it would be regarded as paid. "Not having taken the required steps in the form pointed out by law

to have the fact of his suretyship entered of record, and the authorized order issued," said the court, "Patterson was not entitled in this contest, being between himself and others who are judgment creditors of the alleged principal, to control the execution so paid by him, for the purpose of contesting with such creditors in the distribution of the fund."

a bond creditor." By doing this no one is injured any more than if the creditor had himself enforced payment against the principal as a bond creditor.<sup>12</sup> As already said, there is a class of cases which hold that payment of a specialty by a surety extinguishes it so as to prevent any subrogation thereto, and this though the intention be not to extinguish it, and the surety take an assignment of it to himself. The general rule that the surety is entitled to subrogation to the securities held by the creditor is admitted, but it has been said that this rule must be qualified "by considering it to apply to such securities as continue to exist, and do not get back upon payment to the person of the principal debtor."<sup>13</sup>

**§ 346. Surety entitled to subrogation to all securities held by creditor—General observations—English statute.**—When it is conceded that on principles of natural justice the surety who has paid the debt is equitably entitled to the securities therefor held by the creditor, it seems that the same reasons which entitle him to any of the securities entitle him to all of them. It is difficult to conceive of any equitable reason why one security for the debt should be extinguished by payment more

<sup>12</sup> Per Nisbet, J., in *Lumpkin v. Mills*, 4 Ga. 343. Holding the same thing, see *Powell's Ex'rs v. White*, 11 Leigh (Va.), 309; *Davis v. Smith*, 5 Ga. 274; *Tinsley v. Oliver's Adm'r*, 5 Munf. (Va.) 419; *Ex parte Ware*, 5 Rich. Eq. (S. C.) 473; *Grider v. Payne*, 9 Dana (Ky.) 188; *Shultz v. Carter*, *Speer's Eq.* (S. C.) 533. The debt may be assigned to the surety by the creditor, and the assignment will carry with it all securities or rights of the creditor, and it is immaterial whether there is an actual assignment or not; for if, upon equitable principles, the surety is entitled to it, a court of equity will consider that as done which ought to have been done, and, if necessary for the surety's protection, will decree an assignment to be made. *Manford v. Firth*, 68 Ind. 83. Holding that

the surety will be ranked as a specialty creditor when necessary to his protection, and otherwise not, see *Kendrick v. Forney*, 22 Gratt. (Va.) 748. Holding that a surety will be subrogated to the benefit of a recognizance when it is not extinguished at law, see *Salkeld v. Abbott*, *Hayes* (Irish) 576. As to subrogation to promissory note by party who pays the same, see *Rockingham Bank v. Claggett*, 29 N. H. 292. To prevent the bar of the statute of limitations, see *Smith v. Swain*, 7 Rich. Eq. (S. C.) 112.

<sup>13</sup> *Copis v. Middleton*, 1 Turner & Russ. 224, per Lord Eldon, J.; *Jones v. Davids*, 4 Russ. 277; *Hodgson v. Shaw*, 3 Mylne & Keen, 183; *Foster v. Trustees of Athenaeum*, 3 Ala. 302; *Bledsoe v. Nixon*, 68 N. C. 521; *Buckner v. Morris*, 2 J. J. Marsh. (Ky.) 121.

than another; and the whole doctrine of subrogation is one of equity. A note, bond, mortgage, pledge and judgment are all equally securities for the debt and collateral to it. If payment by the surety extinguishes one of them, why does it not extinguish them all? The reasoning which makes a distinction is highly technical, and certainly has no foundation in equity.<sup>14</sup> This subject has been set at rest in England by act of parliament, which provides that: "Every person who, being surety for the debt or duty of another, or being liable with another for any debt or duty, shall pay such debt or perform such duty, shall be entitled to have assigned to him, or to a trustee for him, every judgment, specialty or other security which shall be held by the creditor in respect of such debt or duty, whether such judgment, specialty or other security shall or shall not be deemed at law to have been satisfied by the payment of the debt or performance of the duty, and such person shall be entitled to stand in the place of the creditor in any action or other proceeding at law or in equity, in order to obtain from the principal debtor or any co-surety, co-contractor or co-debtor, as the case may be, indemnification for the advances made and loss sustained by the person who shall have so paid such debt or performed such duty; and such payment or performance so made by such surety shall not be pleadable in bar of any such action or other proceeding by him; provided always that no co-surety, co-contractor or co-debtor shall be entitled to recover from any other co-surety, co-contractor or co-debtor, by the means aforesaid, more than the just proportion to which, as between those parties themselves, such last-mentioned person shall be justly liable."<sup>15</sup>

**§ 347. Surety who pays entitled to subrogation to mortgage given by principal to creditor for security of debt.**—A surety who pays the debt of his principal is entitled to subrogation to a mortgage given by the principal to the creditor for the security of the debt,<sup>16</sup> and he may, with<sup>17</sup> or without<sup>18</sup> a formal

<sup>14</sup> Supporting the doctrine of the text, see *Gerber v. Sharp*, 72 Ind. 553. *Copis v. Middleton*, 1 Turner & Russ. 224; *Fawcetts v. Kimmey*, 33 Ala. 261; *Miller v. Pendleton*, 4

<sup>15</sup> Mercantile Law Amendment Act, 19 and 20 Vict., ch. 97, sec. 5. *Hen. & Munf. (Va.)* 436; *Green v. McDonald*, 70 Vt. 372, 40 Atl. Rep.

<sup>16</sup> *Gossin v. Brown*, 11 Pa. St. 527; *Jacques v. Fackney*, 64 Ill. 87; *1035*. The mortgage in such a case is not only regarded as being for

assignment thereof, have the same foreclosed in his own name, for his benefit. He cannot, however, usually enforce a mortgage or lien given for the security of the debt, unless he first pays the debt.<sup>19</sup> A, being indebted to B, gave him a chattel mortgage on certain property to secure the debt. C was a surety for the same debt and was obliged to pay it, and took an assignment of the mortgage from B. During the continuance of the mortgage, D took the property included in the mortgage and converted it, and C sued D for the property. Held, he was entitled to recover its value from D.<sup>20</sup> The surety who pays a debt secured by mortgage will, by means of subrogation thereto, have preference over a subsequent mortgage on the same property, given by the principal to the creditor to secure a subsequent debt.<sup>21</sup> Thus, A mortgaged his freehold and copyhold estates to C to secure £6,000, and B (A's daughter) by the same mortgage conveyed her freehold and copyhold estate to secure A's debt. It was provided in the mortgage that A's property should be primarily liable for the £6,000. Afterwards A made a second mortgage on his same property to secure a further loan of £700 made him by C. Held, C was not entitled as against B to tack his second mortgage to the first, but that B was entitled to redeem the first mortgage upon payment of the £6,000. C, when he took the second mortgage, had full knowledge of all the facts, "and, therefore, he could only take subject to such rights as the daughters had acquired by reason of their having concurred in the former deed. Now, it is quite clear that a surety paying off the debt of his principal is entitled to a transfer of all the securities held by the creditor, in order that he may make them available against the debtor as the original creditor might have

the creditor's security but the surety's indemnity as well. *Beaver v. Slanker*, Adm'r, 94 Ill. 175. Where a partner mortgaged private property to secure a firm debt, held, that as surety for the partnership he was entitled to be subrogated to the rights of a mortgagee. *National Bank v. Cushing*, 53 Vt. 321.

<sup>17</sup> *Norton v. Soule*, 2 Greenl. (Me.) 341. See, also, *Brown v.*

*Kirk*, 20 Mo. App. 524; *Beaver v. Slanker*, 94 Ill. 175.

<sup>18</sup> *McLean v. Towle*, 3 Sandf. Ch. 117.

<sup>19</sup> *Conwell v. McCowan*, 53 Ill. 363; *Lee v. Griffin*, 31 Miss. 632; *Brown v. Kirk*, 20 Mo. App. 524.

<sup>20</sup> *Lewis v. Palmer*, 28 N. Y. 271.

<sup>21</sup> To this general effect, see *National Exchange Bank v. Silliman*, 65 N. Y. 475.

done. \* \* The equity gives to the surety a right to call for a transfer of the securities, and so binds those securities into whatever hands they may come, with notice of the charge.”<sup>22</sup> So where a surety, on a note secured by mortgage on the land of the principal, paid the note, and the creditor, without the assent of the surety, entered satisfaction of the mortgage, so as to leave the same subject to the lien of a subsequent judgment recovered by the creditor against the principal, and proceeded to levy the same upon the land, it was held that the mortgage, having been given to secure the debt, was as much for the benefit of the surety as the creditor, and the surety, having paid the debt, was entitled to the benefit of the mortgage to the extent of his payment, and this right was prior to the lien of the judgment, and the land having been sold under a power in a prior mortgage, leaving a surplus, the surety was entitled to receive such surplus to reimburse himself for what he had so paid.<sup>23</sup> A, having obtained from B the advance of money, conveyed certain lands by way of mortgage to secure the amount. C, as surety for A, conveyed a charge of £5,000 further, to secure the debt. The proviso of redemption was conditioned that if A or C, or either of them, should on a day therein named repay B the sum borrowed, B would reconvey the lands and charges on the uses on which they had been held before the execution of the deed. The period of redemption having expired, the debt was paid out of C’s charges. Held, that notwithstanding the form of the proviso of redemption, C was entitled to the benefit of B’s securities on A’s lands.<sup>24</sup> Where one of two joint sureties, holding a mortgage on property given to them jointly by the principal for their indemnity, pays a part of the debt, and releases a part of the mortgaged property, the other surety may oppose the value of the property released to that amount of the claim against him for contribution. The co-surety who makes such payment acquires in equity an exclusive right to that amount of the property mortgaged for their security.<sup>25</sup> P made a mortgage to R to

<sup>22</sup> *Bowker v. Bull*, 1 Simons (N. S.) 29, per Lord Cranworth, V. C., followed in *Forbes v. Jackson*, Law Rep. (19 Ch. Div.) 615; and *In re Kirkwood’s Estate*, Irish Law Rep. (1 Ch. Div.) 108, disapproving *Williams v. Owen*, 13 Simons 597, which is to contrary effect.

<sup>23</sup> *City National Bank v. Dudgeon*, 65 Ill. 11; *Pierce v. Garrett*, 65 Ill. App. 682, 686; *Beaver v. Slanker*, 94 Ill. 175, 182.

<sup>24</sup> *McNeale v. Reed*, 7 Irish Ch. Rep. 251.

<sup>25</sup> *Roberts v. Sayre*, 6 T. B. Mon. (Ky.) 188.

indemnify him as surety for several debts. For some of these debts M became bound as P's surety, and thereby released R from such debts as he (M) became bound for. There did not appear to have been any agreement for an assignment of the mortgage to M, and if there was such an agreement it had not been carried out. Held, that to the extent that M became bound and released R, the lien of the mortgage was extinguished, both as to R and the creditor, and therefore M could not as to such debts be subrogated to it.<sup>26</sup>

**§ 348. Indemnitor of surety who pays debt entitled to subrogation—Subrogation against third parties with notice—Marshaling assets—Vendor's lien.**—A party who agrees to indemnify a surety against loss by reason of his obligation as surety, and who afterwards pays the debt for which the surety is bound, is entitled to subrogation the same as the surety would have been if he had paid the debt. His equities are the same as the surety's would have been, and the payment by him is not in such case voluntary.<sup>27</sup> A surety being entitled to the benefit of all the securities for the debt which are available for his indemnity, a person taking any of such securities from the principal, with notice of the facts, is bound in equity to hold them for the indemnity of the surety, and subject to all the equities which the sureties could originally enforce. Where there are first and second mortgages on real estate to secure debts due different parties, and a surety for the debt secured by the first mortgage pays it, but the holder of the second mortgage, with knowledge of the first mortgage, gets the legal title, such surety has, to the extent of the amount paid by him, a priority in the land over the holder of the second mortgage.<sup>28</sup> Equity will not marshal assets to the prejudice of a surety so as to destroy his right to subrogation. Thus, A was

<sup>26</sup> Hunter v. Richardson, 1 Duvall (Ky.) 247. To a contrary effect, where a third person paid the debt for which the surety was liable under an agreement that the mortgage for indemnity should be assigned to him, see Brien v. Smith, 9 Watts & Serg. (Pa.) 78.

<sup>27</sup> Rittenhouse v. Levering, 6 Watts & Serg. (Pa.) 190.

<sup>28</sup> Drew v. Lockett, 32 Beav. 499.

Guarantors of a mortgage, compelled to pay a deficiency thereon, are entitled to be subrogated to all the securities which are held as collateral to the debt secured by the original mortgage, and, therefore, to a subsequent mortgage obtained by the mortgagee as additional security. Havens v. Willis, 100 N. Y. 482.

indebted to B, and placed in his hands property to pay the debt, and C also mortgaged his land to secure the same debt. B obtained judgment for the debt against A, and other creditors of A obtained subsequent judgments against him. The subsequent judgment creditors filed a bill to have the securities marshaled, and sought to have B's debt satisfied out of the premises mortgaged by C. Held, they were not entitled to the relief. If C had paid the debt he would have been entitled to subrogation to B's judgment against A, and, moreover, if the marshaling was allowed, the effect would be to compel C to pay the subsequent judgment creditors.<sup>29</sup> Two judgments were recovered for the same debt, one against A, the principal, and the other against B, a surety, which became liens on the land of each of them. Afterwards B mortgaged a piece of land to C, and afterwards D recovered a judgment against A. Then D purchased the judgments against A and B first mentioned, and sold property of A on the last judgment, more than enough to satisfy the first judgments, and applied the money to the payment of the last judgment. D then levied an execution issued on the first judgment against B on the land mortgaged to C. Held, that C's equity in the mortgaged premises was superior to D's. The property of A was the primary fund for the payment of the first judgments and after D bought the judgments he stood in the place of the original holder, and must apply the money realized from the sale to the payment of the first judgments, which were a first lien on the land of A.<sup>30</sup>

**§ 349. Subrogee takes only the rights of the creditor—Subrogation of the insurer.**—As the surety by means of subrogation stands in the very place of the creditor, he cannot occupy any better position than the creditor did at the time the debt was paid to him.<sup>31</sup> Where a party bought a piece of land and

<sup>29</sup> Joseph v. Heaton, 5 Grant's Ch. 636.

<sup>30</sup> Wise v. Shepherd, 13 Ill. 41.

<sup>31</sup> Houston v. Branch Bank, 25 Ala. 250. In Swarts v. Siegel, 117 Fed. Rep. 13 (C. C. A.), Siegel was accommodation indorser on notes aggregating \$25,000 which the Fourth National Bank of St. Louis

discounted for the Siegel Hillman Dry Goods Co. The dry goods company paid the bank \$14,600 on the notes and within four months thereafter was adjudged bankrupt. Thereafter Siegel paid the bank the balance due on the notes, \$10,535.46, and for that amount filed his claim against the estate of the



gave a note for the purchase money with a surety on the note, and the land was conveyed to the purchaser by deed, and no mortgage was taken to secure the note, it was held that the vendor, by taking the note with surety, had waived his vendor's lien, and the surety could not by suit in chancery have the land sold and applied to the payment of the debt, so as to cut off subsequent judgment creditors of the principal.<sup>32</sup> Where land is sold, and the purchaser gives bond with surety for the payment of the purchase money, and the title is retained as a further security for its payment, the surety for the original purchase money has the first equity to be indemnified, and his claim is preferred to that of a purchaser of the equity of redemption at a sheriff's sale or of any subsequent incumbrancer.<sup>33</sup> An insurer's right to be subrogated to the rights of the insured upon paying the loss has already been alluded to. In an action by an insurer against a carrier to recover the amount paid to the insured for loss of freight caused by negligence of defendant, the United States supreme court, by Mr.

bankrupt, as subrogee of the bank. It was held that his claim could be allowed only on condition of his repaying to the estate of the bankrupt the \$14,600 which the bankrupt had paid to the bank, just as the bank would have had to do if it had presented the claim. The subrogee, being an assignee, has no greater rights than the party to whose rights he is subrogated.

<sup>32</sup> Bradford, Adm'r, v. Marvin, 2 Fla. 463. To similar effect see Miller v. Miller, Phillip's Eq. (N. C.) 85. While, as a general rule, a vendor's lien is waived by the acceptance of other security, it is held that such lien is not waived by the acceptance of a married woman as surety, where, by statute, her contract of suretyship is void. Felton v. Smith, 84 Ind. 485. Where the purchaser of land gave in payment a note with surety, and then mortgaged the land to the surety to indemnify him, and the surety, who was compelled to pay

the note, foreclosed his mortgage after the purchaser's death, it was held that his claim was superior to that of the widow, since by paying the note he became subrogated to the vendor's lien. Ballew v. Roler, 124 Ind. 557. See Henley v. Stemmons, 4 B. Mon. (Ky.) 131, where it is held that payment by a surety extinguishes a vendor's lien. In a contract between vendor and vendee, as to settlement of an adverse claim, the sureties of the vendee for the prosecution of the suit are entitled, in case of any damages sustained in the failure of such suit, to be subrogated to the rights of the vendee against the vendor for recovery of such damages and interest. Am. Land Co. v. Grady, 33 Ark. 550.

<sup>33</sup> Shoffner v. Fogleman, Winston, Law & Eq. (N. C.) 12. On same subject, see Ghiselin v. Fergusson, 4 Harris & Johns. (Md.) 522; Burk v. Chrisman, 3 B. Mon. (Ky.) 50.

Justice Gray, in affirming a judgment against the carrier, stated the law thus: "From the very nature of the contract of insurance as a contract of indemnity the insurer, upon paying to the insured the amount of a loss, total or partial, of the goods insured, becomes, without any formal assignment, or any express stipulation to that effect in the policy, subrogated in a corresponding amount of the assured's right of action against the carrier or other person responsible for the loss; and in a court of admiralty may assert in his own name that right of the shipper. \* \* In the present case the libellant, before the filing of the libel, paid to each of the shippers the greater part of the insurance, and thereby became entitled to recover so much at least, from the carrier. The rest of the insurance money was paid by the libellant before the argument in the district court, and that amount might have been claimed by amendment, if not under the original libel. \* \*'"<sup>34</sup>

**§ 350. Subrogation of sheriff's sureties.**—Where a sheriff sold land on a decree of partition, and took a note for the purchase money, and his sureties were obliged to pay the heirs the money for which the land sold, it was held that such sureties were entitled to be subrogated to all the rights in the note which such heirs had, and to prosecute a suit in the name of the sheriff, and have the proceeds of the note.<sup>35</sup> Where a sheriff falsely returned that he had made an execution, and one of his sureties paid the plaintiff in execution the amount thereof, it was held that he was entitled to have the sheriff's return set aside, and a new execution issued against the defendant in the judgment, although the sheriff had confessed a judgment in favor of his sureties for a sum including the above mentioned sum paid by the surety, but such judgment had not been paid.<sup>36</sup> Execution was issued against A, and placed in the hands of the sheriff, who failed to make due return, and judgment was therefore rendered against the sheriff and his sureties for the amount of the execution, which the sureties paid. Held, they were entitled, without obtaining any judgment, to file a bill to be subrogated to the rights of the creditor in the judgment against A, and to enforce such judgment

<sup>34</sup> *Liverpool & Great West. Steam. Co. v. Phenix Insurance Co.*, Mo. 279.

129 U. S. 397, 32 L. Ed. 788 at 799, <sup>35</sup> *Sweet, Adm'r, v. Jeffries*, 48 Saint v. Ledyard, 14 Ala. 244. 9 Sup. Ct. Rep. 469.

against certain effects of A liable thereto. The court said: "This right of substitution subsists in favor of a person who is compelled to pay the debt of another in order to protect his own interest."<sup>37</sup> A sheriff appointed a deputy, who gave bond with surety, and collected money and used it. The sureties of the sheriff were obliged to pay the money thus collected, and the sheriff being insolvent, it was held that they were entitled to file a bill against, and obtain indemnity from, the surety on the bond of the deputy for the money thus paid by them.<sup>38</sup> A recovered a judgment against B, and execution was issued and delivered to the sheriff, who levied on a county order as the property of B, and turned the same over to A, who credited the execution for that amount. C sued the sheriff and his sureties for the order, claiming that it was his, and recovered, and the sureties paid the judgment against them and the sheriff, and sued A for the amount of the order. Held, they were entitled to recover. The order belonged to C, and he might have sued A for it instead of the sheriff and his sureties, and it was proper that the sureties who had paid the value of the order should be subrogated to the claim of C against A, and permitted to enforce it.<sup>39</sup>

**§ 351. Subrogation of sureties of administrator and of county and city treasurer.**—Where an administrator, being about to leave the state, deposits the assets of the estate with a person in trust that he will pay the next of kin of the intestate, the sureties of such administrator, who have been obliged to pay judgments recovered against them by the next of kin, have a right to call upon the trustee for the assets so received by him, and have a right to be subrogated to the rights of such of the next of kin as have held them responsible.<sup>40</sup> Where an administrator pays debts of the intestate, to an amount exceeding the assets, he may subject the real estate in the hands of the heirs to his reimbursement, and the surety of an administrator

<sup>37</sup> Bittick v. Wilkins, 7 Heisk. (Tenn.) 307, per Deadrick, J. Contra, Stout v. Dilts, 1 Southard (N. J.) 218.

<sup>38</sup> Brinson v. Thomas, 2 Jones' Eq. (N. C.) 414; Blalock v. Peake, 3 Jones' Eq. (N. C.) 323.

<sup>39</sup> Skiff v. Cross, 21 Iowa 459. Where a sheriff's surety pays into

the treasury taxes due and unpaid by his principal, it is held that he cannot be subrogated to the rights of the state when the taxes have never been held as debts under the statute: Jones v. Gibson, 82 Ky. 561.

<sup>40</sup> Kennedy v. Pickens, 3 Ired. Eq. (N. C.) 147.

who has so disbursed his funds may be subrogated to the rights of his principal.<sup>41</sup> Where the note of a deceased debtor was paid by the note of his administratrix, and both notes were indorsed by the same surety, who was obliged to pay the last note, it was held that such surety could not by suit in chancery enforce the first note against the estate of the principal, as it had been paid and extinguished. But if the estate was in any manner indebted to the administratrix, the surety might, by reason of his suretyship for the administratrix, reach the estate in that way to the amount of such indebtedness.<sup>42</sup> The law provided that a county treasurer should give two bonds, one to the state and one to the county, and this was done. The county was by law liable to the state for money collected by the treasurer for the state. The treasurer became a defaulter to the state, and the county paid the amount of the defalcation. Held, the county was entitled to recover against the sureties on the bond to the state.<sup>43</sup> Certain parties became the sureties of a city treasurer. The treasurer deposited a large sum of money, which belonged to the city, in a bank, and for which it might have sued the bank. The treasurer made default, and the sureties paid the amount of the defalcation, and claimed to be subrogated to the rights of the city against the bank. It was contended that they could only be subrogated to the rights of the city against the treasurer, but the court held them entitled to subrogation to the rights of the city against the bank, and said: "The equities of sureties to subrogation extends not only to the rights of the creditor as against the principal, but to all rights of the creditor respecting the debt which the sureties pay."<sup>44</sup>

<sup>41</sup> Taylor v. Taylor, 8 B. Mon. (Ky.) 419. See, also, Schoolfield's Adm'r v. Rudd, 9 B. Mon. (Ky.) 291; Muldoon v. Crawford's Adm'r, 14 Bush (Ky.) 125.

<sup>42</sup> Brown v. Lang, 4 Ala. 50. For other cases on subrogation of sureties of an administrator, consult Pierce v. Holzer, 65 Mich. 263; Wernecke v. Kenyon's Adm'r, 66 Mo. 275; Cowgill v. Linville, 20 Mo. App. 138. And see Ward's Appeal, 100 Pa. St. 289. A surety

of a trustee who has been damaged is entitled to be subrogated to the rights of the trustee. Boyd v. Myers, 12 B. J. Lea (Tenn.) 175. And see to general effect the right of a surety of a county treasurer to be subrogated to the rights of the county, Boltz's Estate, 133 Pa. St. 77.

<sup>43</sup> Elden v. Commonwealth, 55 Pa. St. 485.

<sup>44</sup> City of Keokuk v. Love, 31 Iowa 119.

**§ 352. Subrogation of sureties of guardian.**—Sureties of a guardian are held subrogated to all the rights and remedies of the ward against the guardian, even before judgment and execution have been obtained against him, if they can show that they were legally bound to pay, or if their principal was insolvent before payment.<sup>45</sup> Where an insolvent guardian makes an assignment for the benefit of creditors, and the sureties on his bond pay amounts due the ward, they are held subrogated in the assignment to the rights of the ward.<sup>46</sup> Sureties on the bond of a deceased guardian who are compelled to pay moneys to the ward that were in the guardian's hands at the time of his death are held subrogated to the ward's remedies against the heirs and representatives of the deceased guardian, and, therefore, may subject the guardian's homestead to the satisfaction of their demand.<sup>47</sup> And where the surety of a guardian pays a ward money found to be due and unpaid, he will be held subrogated to the ward's right to enforce a resulting trust against the guardian, arising out of his purchase of land with the funds of the ward, and he may have such land sold for his reimbursement.<sup>48</sup> The surety of a guardian who is compelled to pay money to a succeeding guardian of a ward will be held subrogated to all the rights of such succeeding guardian against other persons for the same money.<sup>49</sup>

**§ 353. When surety subrogated to lien of state or county.**—The sureties on the official bond of a defaulting treasurer or tax-collector, against whom judgment has been obtained in favor of the state or county, and who have made good their principal's default,<sup>1</sup> are entitled on general equitable principles, and without any formal order of substitution,<sup>2</sup> to be subrogated to the rights and remedies in favor of the state or

<sup>45</sup> *Fishback v. Weaver*, 34 Ark. 569; *Adams and Alexander v. Gleaves*, 10 B. J. Lea (Tenn.) 367.

<sup>46</sup> *Ogburn v. Wilson*, 93 N. C. 115.

<sup>47</sup> *Gilbert v. Neely, Adm'r*, 35 Ark. 24. In which case the widow and heirs of the guardian are necessary parties defendant. *Gilbert v. Neely, Adm'r*, 35 Ark. 24.

<sup>48</sup> *Rice v. Rice*, 108 Ill. 199.

<sup>49</sup> *Fogarty v. Ream*, 100 Ill. 366.

<sup>1</sup> That is, the equity of subrogation will not arise in favor of the sureties until they have made payment of the debt. *Turner v. Teague*, 73 Ala. 554. And it is immaterial whether the payment is voluntary or by sale of the surety's property. *Hook v. Richeson*, 115 Ill. 431. See, on this subject, *Crawford v. Richeson*, 101 Ill. 351.

<sup>2</sup> *Boltz's Estate*, 133 Pa. St. 77.

county and to have the same enforced for their indemnity.<sup>3</sup> The fact that a surety has released part of his indemnity without notice of equities in others is held not to defeat his right to be subrogated to the lien created by statute in favor of the state.<sup>4</sup> A surety to the crown, who has paid the debt of his deceased principal, is entitled to the crown's priority in the administration of his principal's estate.<sup>5</sup> It is held that a mortgagee who pays taxes on the mortgaged property becomes subrogated to the lien of the state.<sup>6</sup> When it is necessary in order to protect his interests a purchaser at tax sale has been held subrogated to the rights of the state,<sup>7</sup> especially where the tax sale is void,<sup>8</sup> and where he pays subsequent taxes,

<sup>3</sup> Knighton v. Curry, 62 Ala. 404; Schwessler v. Dudley, 80 Ala. 547; Livingston v. Anderson, 80 Ga. 175; Irby v. Livingston, 81 Ga. 281; Hook v. Richeson, 115 Ill. 431; Richeson v. Crawford, 94 Ill. 165. But contra, as to sureties on a recognizance, United States v. Ryder, 110 U. S. 729; Hunter v. United States, 5 Peters 173; United States v. Hunter, 5 Wash. 446; Boltz's Estate, 133 Pa. St. 77; Schwessler v. Dudley, 80 Ala. 547, 2 So. Rep. 526; Knighton v. Curry, 62 Ala. 404. In Knoll v. Marshall County, Iowa, Oct., 1901, 87 N. W. Rep. 657, it was held that the surety of a liquor dealer who had made good to the state his principal's default in failing to pay a license tax was not subrogated to the statutory lien in favor of the state for the amount of the tax against the premises occupied by the saloon. Apparently none of the foregoing authorities were brought to the court's attention. Ovem v. Wrightson, 51 Md. 34.

<sup>4</sup> Crawford v. Richeson, 101 Ill. 351.

<sup>5</sup> In re Lord Churchill, Manisty v. Churchill, Law Rep. (39 Ch. Div.) 174; Stokes v. Little, 65 Ill. App. 254. Compare Estate of Ram-

say v. Whitbeck, 183 Ill. 550, reversing 81 Ill. App. 214, and 74 Ill. App. 524, note 6, § 20.

<sup>6</sup> In Lester v. Richardson, 69 Ark. 198, 62 S. W. Rep. 62, it was held that a junior mortgagee paying taxes, penalties and costs against the mortgaged land was subrogated to the paramount lien of the state to recover the money so paid first out of the proceeds of the sale of the mortgaged property.

<sup>7</sup> Adams v. Osgood, 60 Neb. 779, 84 N. W. Rep. 257. Same case on prior appeal, 42 Neb. 450, 60 N. W. Rep. 869; 55 Neb. 766, 76 N. W. Rep. 446. Citations to this point: Merriam v. Hemple, 17 Neb. 345, 22 N. W. Rep. 775; Roads v. Estabrook, 35 Neb. 297, 53 N. W. Rep. 64; Medland v. Connell, 57 Neb. 10, 77 N. W. Rep. 437; Grant v. Bartholomew, 57 Neb. 673, 78 N. W. Rep. 314; Leavitt v. Bartholomew, Neb., Feb., 1903, 93 N. W. Rep. 856.

<sup>8</sup> To the rights of the county: Green v. Hellman, 61 Neb. 875, 86 N. W. Rep. 912; Adams v. Osgood, 42 Neb. 450, 60 N. W. Rep. 869; Stegeman v. Faulkner, 42 Neb. 53, 60 N. W. Rep. 319; Dillon v. Merriam, 22 Neb. 151, 34 N. W. Rep. 344; Medland v. Linton, 60 Neb.



believing that he has a prior lien to protect.<sup>9</sup> It has been held that there is no subrogation of a purchaser at judicial sale who pays disputed taxes without protest before he obtains title.<sup>10</sup>

**§ 354. Surety for part of debt no right to subrogation to securities for another part of same debt—Similar cases.**—A surety for a part of a debt is not entitled to the benefit of a security given by the debtor to the creditor at another time for a separate and distinct part of the same debt.<sup>11</sup> Defendants lent A at the same time two sums, one of £2,000 and one of £3,000, each on separate and distinct securities, and the plaintiff was surety for the £2,000 but not for the other sum. Held, that the plaintiff, on paying the £2,000, was not entitled to have the securities therefor transferred to him until the £3,000 also were paid. The court said that as against the principal it was well settled that the creditor could tack his claims and retain all the securities till the £3,000 were paid. A surety upon paying the debt is entitled to all the securities held by the creditor, “provided the creditor has no lien upon them or right to make them available against the principal debtor, to enforce the payment of a debt different from that

249, 82 N. W. Rep. 866; Carman v. Harris, 61 Neb. 635, 85 N. W. Rep. 848; Gregory v. Bartlett, 55 Ark. 30, 17 S. W. Rep. 344; Reed v. Kalfsbeck, 147 Ind. 148, 45 N. E. Rep. 476.

<sup>9</sup> In John v. Connell, 61 Neb. 267, 85 N. W. Rep. 82, it was held that when the holder of a tax certificate, valid or not, pays subsequent taxes in good faith and having reason to believe that he has a lien to protect, he becomes subrogated to the rights of the public and entitled to enforce the lien acquired thereby. See, also, Wilson v. Butler County, 26 Neb. 676, 42 N. W. Rep. 891, 4 L. R. A. 589; Merriam v. Hemple, 17 Neb. 345, 22 N. W. Rep. 775.

<sup>10</sup> Montgomery v. City Council

of Charleston (So. Car.), 99 Fed. Rep. 825, 40 C. C. A. 108.

<sup>11</sup> Wade v. Coope, 2 Simons 155. See also In re Hamilton Trust's, 10 Manitoba Law Rep. 573, in which case A and B mortgaged three lots, two of which A owned, to secure a loan by C to B, for which A, with C's knowledge, was surety. The mortgage was foreclosed and all three lots were sold for an amount more than enough to pay the mortgage. Held, that A's right to be reimbursed his loss out of the excess proceeds of the sale was not affected by the fact that B had placed a subsequent mortgage upon his own lots in favor of C to secure payment of a further loan. Citing Drew v. Lockett, 32 Beav. 499; Higgins v. Frankis, 15 L. J. Ch. 329 (1846).



which the surety has paid. But if the creditor has such a right and one arising out of the transaction itself, of which the suretyship forms a part, then the right of the surety to the benefit of these securities is subordinate to the right of the creditor to make them available for the payment of his other claims, and can only be made available after the paramount right is satisfied."<sup>12</sup> A, being indebted to B, lodged several securities with him as collateral for that debt; A afterwards borrowed a further sum of money from B, for which C became his surety, but there was no express agreement that the securities already deposited should cover the latter advance. A became bankrupt, and B called upon C to pay the second debt. The securities in the hands of B were more than sufficient to pay the first debt, and it was held that C should be allowed the surplus in reduction of the second debt.<sup>13</sup> One paying the whole of a mortgage for part of which another is liable becomes subrogated to the mortgagee's right to recover from such other party.<sup>14</sup>

**§ 355. When surety subrogated to creditor's right to set aside fraudulent conveyances by principal—Other cases.**—Where principal and surety were liable for a debt and the principal conveyed certain slaves without consideration, and the surety was afterwards obliged to pay the debt, it was held that he had the same right to file a bill to set aside the conveyance of the slaves as fraudulent that the creditor had before payment by the surety.<sup>15</sup> It has been held that two

<sup>12</sup> Farebrother v. Wodenhouse, 23 Beav. 18, per Sir John Romilly, M. R. To similar effect, where a creditor has a security for an entire debt, payable in instalments, for one only of which the surety is bound. In such case the surety, on payment of the instalment, cannot have the benefit of the security which was provided for the entire debt. Grubbs v. Wysors, 32 Gratt. (Va.) 127. To the effect that surety who pays the bond of himself and principal is entitled to subrogation to former bond for same debt given by principal, see

Hodgson v. Shaw, 3 Mylne & Keen. 183.

<sup>13</sup> Praed v. Gardiner, 2 Cox. 86.

<sup>14</sup> Corners v. Mackey, 147 N. Y. 574, 42 N. E. Rep. 29.

<sup>15</sup> Tatum v. Tatum, 1 Ired. Eq. (N. C.) 113. And he is subrogated to the rights of the creditor to set aside such fraudulent conveyances even though he had knowledge of the fraud at the time he became surety. Martin v. Walker, 12 Hun (N. Y.) 46. In Sanders v. Watson, 14 Ala. 198, it was held that a surety who paid a judgment against himself and principal ex-

co-sureties, who have paid the debt of the principal, may jointly file a bill to be subrogated to a lien of the creditor for the debt on land of the principal.<sup>16</sup> It has also been held that a surety who contests his liability, and a trustee to whom property has been conveyed for the indemnity of such surety, cannot be joined as defendants in the same suit.<sup>17</sup> A gave a mortgage to B, who was surety on a note, to indemnify him from loss as such, which mortgage was conditioned to be void if A should pay or satisfy the note by renewal or otherwise. A renewed the note with different sureties, and B assigned the mortgage to the new sureties. Before such assignment A had mortgaged the premises to C. Held, that C was entitled to hold the property. The first mortgage became functus officio and had performed its office by its terms when the note was renewed. A new mortgage then given would not have taken precedence over the mortgage given to C, and an assignment of the old one gave no greater rights.<sup>18</sup> A as principal and B as surety executed a bond to C, conditioned to make a title to land on payment of the purchase money. Before the purchase money was all paid the land was sold at sheriff's sale to satisfy executions against A, who became insolvent. C sued B for a failure to make title to the land, and recovered. Held, that B, to the extent of the money thus paid by him, had a right to follow the land into the hands of the purchaser at sheriff's sale. He was entitled to subrogation to the right which C had to file a bill for specific performance, and follow the land.<sup>19</sup>

tinguished the judgment, and that he could not file a bill to set aside a fraudulent conveyance by the principal without first getting a judgment against him.

<sup>16</sup> Kleiser v. Scott, 6 Dana (Ky.) 137.

<sup>17</sup> People v. Skidmore, 17 Cal. 260.

<sup>18</sup> Bonham v. Galloway, 13 Ill. 68.

<sup>19</sup> Freeman v. Mebane, 2 Jones' Eq. (N. C.) 44. For other cases of surety's right to subrogation, see Silk v. Eyre, Irish Rep. 9 Eq. 393; Wright v. Morley, 11 Ves. 12. Holding that an accommodation accep-

tor of a bill of exchange is not, under certain peculiar circumstances, entitled to subrogation to mortgage for indemnity of accommodation indorser of same bill, see Gomez v. Lazarus, 1 Dev. Eq. (N. C.) 205. Holding that a creditor of a partnership can be compelled to proceed against surviving partner, who has funds of the firm in his hands sufficient to pay the debt, before proceeding against property conveyed by dead partner in his life-time as indemnity for his surety, see Newsom v. McLendon, 6 Ga. 392. As to right of guar-

**§ 356. When surety not entitled to subrogation as against special bail of the principal for the same debt—Other cases.**—Separate suits on a bond were brought against the principal, A, and the surety, B, and A was held to bail, and gave C as surety in the bail bond. D bought the judgments which were recovered in the suits, and was about to proceed against B, when he filed a bill and offered to pay what remained due on the judgment against him, and claimed to be subrogated to the rights of the creditor against C. Held, the right of subrogation did not exist, as C had not been fixed as bail when B offered to pay the judgment.<sup>20</sup> A, B and C being joint sureties, judgment was rendered against them, which became a lien on the land of each. Afterwards A sold his land to D, and B and C became insolvent, and sold their land to F. Execution was issued by the creditor and levied on the land purchased by D, who paid the entire debt, and requested the creditor to assign the judgment to him, which request was refused. D then filed his bill against the creditor, and B, C and F, to subject the land sold by B and C to F to the payment of two-thirds of the debt paid by him, and it was held he was entitled to the relief sought. The court said: “While he would have no redress at law in such a case, equity, in furtherance of justice, will subrogate him to the rights of his grantor, and charge the land bound by the lien in the hands of the other sureties, or their grantees, who purchased with notice.”<sup>21</sup> Judgment was recovered against principal and surety for \$1,900. Property of the surety was sold on execution, which realized \$815.93, which was applied on the judgment. Afterwards the property of the principal was sold, and realized enough to pay the balance of said judgment, and all other judgments, against the principal of prior or equal date, and left money enough in the hands of the creditor to repay the surety the amount realized from the sale of his property. Held, that the surety’s right to this money was superior to the right of the creditor to retain it to pay a subsequent debt due by the principal to the creditor.<sup>22</sup>

antor who pays debts of a firm to  
come on property bought by one  
partner with supposed profits of  
the firm, see *Greene’s Ex’rs v.*  
*Ferrie*, 1 Des. (S. C.) 164.

<sup>20</sup> *Creager v. Brengle*, 5 Harris &  
*Johns*. (Md.) 234.

<sup>21</sup> *Furnold v. The Bank of the*  
*State of Missouri*, 44 Mo. 336.

<sup>22</sup> *Hardcastle v. Commercial*

**§ 357. When creditor entitled to securities given by principal to surety for his indemnity.**—As a general rule, where a surety, or a person standing in the situation of a surety, for the payment of a debt, receives a security for his indemnity, and to discharge such indebtedness, the principal creditor is in equity entitled to the full benefit of that security, and it makes no difference that such principal creditor did not act upon the credit of such security in the first instance, or even know of its existence. “The authorities place the principle upon the ground that as the security is a trust created for the better securing of the debt, it attaches to it, and hence it is that it may be made available by the creditor, although unknown to him.”<sup>23</sup> The right of the creditor is the same when the security is a

Bank, 1 Har. (Del.) 374; National Exchange Bank v. Silliman, 65 N. Y. 475. Holding that a creditor of a surety is entitled to be subrogated to a judgment which the surety's property has paid, in preference to a subsequent creditor to whom the surety has assigned his right to subrogation, see Houston's Appeal, 69 Pa. St. 483, overruling Harrisburg Bank v. German, 3 Pa. St. 300. For a questionable case, holding that the equity of a purchaser from a purchaser of land who has not paid for it has a prior claim on the land to a surety for the purchase money who has paid the same, see Rush v. The State, 20 Ind. 432. For a case deciding that under its peculiar circumstances the holder of a bill could not be subrogated to a mortgage given for the indemnity of an accommodation acceptor, see St. Louis Building & Savings Ass'n v. Clark, 36 Mo. 601. For a peculiar case in which a surety was held entitled to subrogation to a mortgage given by the principal after the surety became liable, and after another mortgage on the same property for a less number and

aggregate amount of debts had been canceled, see Cory v. Leonard, 56 N. Y. 494.

<sup>23</sup> Kramer & Rahm's Appeal, 37 Pa. St. 71, per Thompson, J.; Curtis v. Tyler, 9 Paige's Ch. 432; New London Bank v. Lee, 11 Conn. 112; Rice's Appeal, 79 Pa. St. 168; Owens v. Miller, 29 Md. 144; Seibert v. True, 8 Kan. 52; Saylors v. Saylors, 3 Heisk. (Tenn.) 525; Seibert v. Thompson, 8 Kan. 65; Branch v. The Macon & Brunswick R. R. Co., 2 Woods, 385; Alabama Gold Life Ins. Co. v. Anderson, 67 Ala. 425; Daniel v. Hunt, 77 Ala. 567; Smith v. Gillam, 80 Ala. 296; Richards v. Yoder, 10 Neb. 429; Stearns v. Bates, 46 Conn. 306; In re Fickett, 72 Me. 266; Thornton v. Nat. Exch. Bank, 71 Mo. 221; Barton v. Croydon, 63 N. H. 417; Guill's Adm'r v. Corinth Deposit Bank, Ky., June, 1902, 68 S. W. Rep. 870, 24 Ky. Law Rep. 482; Courier Journal Job Printing Co. v. Schaeffer-Meyer Brewing Co., 101 Fed. Rep. 699, 41 C. C. A. 614, at page 620, and cases there cited; Meeker v. Waldron, 62 Neb. 689, 87 N. W. Rep. 539; Harlan County v. Whitney, Neb., June,

mortgage or other lien given the surety by the principal after the principal and surety have both become bound, even though there may have been no previous agreement that indemnity

1902, 90 N. W. Rep. 993, in which case plaintiff county availed itself of a mortgage given by its county treasurer to the sureties on his official bond, to cover a shortage in his accounts. *Blair State Bank v. Stewart*, 57 Neb. 58, 63, 77 N. W. Rep. 370. In *Brown & Heywood Co. v. Ligon* (C. C. Mo.), 92 Fed. Rep. 851, Long, having obtained a contract with Pierce County for the building of a court house and jail at Tacoma, furnished a bond in \$270,000 signed by Addison and others as sureties, conditioned for the performance of his contract, for saving Pierce County harmless from all liens, &c., and for payment for labor and materials. Thereafter he furnished another bond in \$270,000 signed by Ligon and others as sureties, conditioned that the said Long "shall well and truly perform and fulfill the conditions of the contract entered into between him and the said county \* \* and at all times herein save harmless the said J. R. Addison and others \* \* of and from the obligation which the above named sureties have entered into with the said J. T. Long and the said county of Pierce, and of and from all action, cost and damage for and by reason thereof." Judgments having been recovered against Long for over \$20,000 for materials, the judgment creditors assigned their claims to one of their number, and, joined by all the sureties on the first, or Addison, bond, filed their bill to compel Ligon and others, sureties on the indemnity bond, to pay the judg-

ments. It was held that they were entitled to such relief, either on the ground that they, as creditors, were subrogated to the rights of the sureties under the indemnity bond, or on the ground that the indemnity bond was an agreement made for their benefit. In *D. S. Tompkins Co. v. Catawba Mills* (C. C., S. C.), 82 Fed. Rep. 780, plaintiff held notes of defendant corporation indorsed by its directors. Defendants conveyed its mill property to trustees by way of personal security for the indorsers. Held (p. 784), that plaintiff became subrogated to the rights of such indorsers and might, without first obtaining judgment, maintain its bill for the appointment of a receiver, the sale of the property and the marshalling of assets. The court cited and relied upon *Union National Bank v. Rich*, 106 Mich. 319, 64 N. W. Rep. 339, in which case a limited partnership borrowed \$8,000 from plaintiff bank, giving its note with one of its members as indorser, and then executed a chattel mortgage of all its property to secure such indorser. It was held, citing the text, that the bank became at once subrogated to the indorser's rights under the chattel mortgage and might, without reducing its note to judgment, maintain its bill to compel the application of the mortgaged property to the payment of its note. In *Whitehead v. Henderson*, 67 Ark. 200, 56 S. W. Rep. 1065, plaintiff, Henderson, loaned \$200 to Wilks, taking Wilks' note with Gallaher as surety. After maturity, Wilks'

should be given.<sup>24</sup> To entitle the creditor to enforce this right in equity, it is not necessary that he should have exhausted his

note being unpaid, plaintiff assigned it to Gallaher, taking Gallahers' note in lieu thereof. Gallaher then left the state, having first transferred to Whitehead a mortgage which Wilks had made to indemnify him as surety. Held, that plaintiff was subrogated to the rights of Gallaher to foreclose the mortgage and to have the transfer thereof to Whitehead set aside as fraudulent. In *Flannagan v. Forrest*, 94 Ga. 685, 21 S. E. Rep. 712, Matthews having signed Williford's note as surety, took from Williford a mortgage on his stock of goods by way of indemnity, and afterwards paid the note by giving to the bank to which it was payable his own note for the amount due upon it. He then became insolvent and never paid his own note. It was held that as against other creditors of Williford, he was entitled to foreclose the mortgage for the benefit of the bank to which he has assigned it as collateral to his own note. The court said that after maturity and payment of the principal's note the surety was entitled to foreclose the mortgage, "though the payment be made, not in money or property, but by executing a several promissory note, which the creditor accepts in full payment of the joint note." A foreclosure of the mortgage was held to amount to a renunciation by the surety of his right to be subrogated to the creditor's status on the joint note, "and the joint note is thus wholly extinguished, not only as to the surety, but as to the principal." In *Hopkins v. Warner*, 109 Calif. 133, 41 Pac. Rep. 868, it is said

that the mortgagee is entitled to a deficiency judgment against the mortgagor's grantee, who has assumed the mortgage on the equitable principle which the California Code states thus: "A creditor is entitled to the benefit of everything which a surety has received from the debtor by way of security for the performance of the obligation, and may, upon the maturity of the obligation, compel the application of such security to its satisfaction." See also *Tulare County Bank v. Madden*, 109 Calif. 312, 41 Pac. Rep. 1092. Where property is conveyed to sureties to indemnify them on account of their suretyship, the creditor may pursue the property in their hands and force them to apply it in satisfaction of the debt, although the personal remedy against them is barred by the statute of limitations. *Long v. Miller*, 93 N. C. 227. Bill by creditor to secure payment out of land mortgaged by his debtor to secure his debtors sureties on his bond as trustee, held barred by ten-year statute of limitations of Missouri: *Darnold v. Simpson*, 114 Fed. Rep. 368.

<sup>24</sup> *Paris v. Hulett*, 26 Vt. 308; *Darst v. Bates*, 51 Ill. 439; *Saylors v. Saylors*, 3 Heisk. (Tenn.) 525; *Burroughs v. United States*, 2 Paine, 569; *Haven v. Foley*, 18 Mo. 136; *Troy v. Smith*, 33 Ala. 469; *Vail v. Foster*, 4 N. Y. 312; *Smith v. Gillam*, 80 Ala. 296; *McMullen v. Neal's Adm'r*, 60 Ala. 552; *Loehr v. Colborn*, 92 Ind. 24. See, also, *Ijams v. Gaither*, 93 N. C. 358, distinguished in *Cooper v. Middleton*, 94 N. C. 86; *Merrill v. Merrill*, 53 Vt. 74; *Durham v.*



remedies at law or have reduced his debt to judgment.<sup>25</sup> A mortgage given by the principal maker of a promissory note to his surety on the note, conditioned that the principal will pay the note and save the surety harmless, creates a trust and lien which subsists after the creditor's claim on the surety for the payment of the note is barred at law by the statute of limitations, and though the fee of the mortgaged property has by foreclosure become vested in the surety. The trust, which inures to the benefit of the creditor, subsists till the debt is paid, and may be enforced against any one who takes the property with notice.<sup>26</sup> After a trust of this kind has been created it cannot usually be defeated without the consent of all parties in interest, unless it be by a conveyance to a bona fide purchaser without notice.<sup>27</sup> Special circumstances may create an exception to this rule. Thus J mortgaged certain real estate to B, to indemnify him for drafts which he accepted as J's surety. Afterwards B mortgaged to Q all his interest in the property mortgaged to him for indemnity, to secure a loan made by Q to J. It was the intention of all the parties to the transaction to give Q a first lien on the prem-

Craig, 79 Ind. 117; *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. Rep. 716; *Albion State Bank v. Knickerbocker*, 125 Mich. 311, 84 N. W. Rep. 311, citing the text. *Union National Bank v. Rasch*, 106 Mich. 319, 64 N. W. Rep. 339. The fact that the surety has conveyed the mortgaged property given to secure him is held not to defeat the equitable rights of the creditor: *Hartford & N. Y. Transportation Co. v. First Nat. Bank*, 46 Conn. 569. See also *Plant v. Storey*, 131 Ind. 46, 30 N. E. Rep. 886, in which case the wife, being secondarily liable for debts of the husband, the husband gave her a chattel mortgage of his stock of goods, which mortgage was conditioned to be void if the husband should pay the debts in question and save the wife harmless. It was held that this security inured to

the benefit of the creditor, and that the creditor might foreclose it. To the same effect: *Kidd v. Hurley*, 54 N. J. Eq. 177, 33 Atl. Rep. 1057.

<sup>25</sup> *Safford v. Wade's Ex'r*, 61 Ala. 214; *Kinsey v. McDearmon*, 5 Cold. (Tenn.) 392; *Ray v. Proffet*, 15 B. J. Lea (Tenn.) 517.

<sup>26</sup> *Eastman v. Foster*, 8 Met. (Mass.) 19. Explaining above and refusing relief to creditor where there was still a debt due from principal to surety, see *First Congregational Society v. Snow*, 1 Cush. 510. To same effect as *Eastman v. Foster*, where principal conveyed property to trustee for indemnity of surety, see *Cullum v. Branch Bank at Mobile*, 23 Ala. 797.

<sup>27</sup> *Ross v. Wilson*, 7 Smedes & Mar. (Miss.) 753; *Carpenter v. Bowen*, 42 Miss. 28.



ises. J and B were then both solvent, but afterwards failed, at which time the debt of Q was unpaid, as were the acceptances of B under the original mortgage. Certain holders of such acceptances filed a bill against Q to subject the mortgaged premises to the payment of the acceptances held by them. Held, they were not entitled to relief. The first mortgage was made for the personal security of B, and while J and B were solvent no equities arose in favor of the acceptors, and while no such equities existed B had a right to surrender the security or make such disposition of it as he saw proper.<sup>28</sup> Where a surety, upon the conveyance of land by his principal to indemnify him against his contingent liabilities, substitutes his own note for that of his principal, the original liability remains undischarged and the creditor is held entitled to avail himself of the security, which he may enforce whether the surety is damnified or not.<sup>29</sup>

**§ 358. When creditor entitled to securities given by principal to surety for his indemnity, continued.**—If the principal confesses a judgment in favor of the surety for his indemnity, and the surety afterwards dies, and his estate is thereby discharged from liability, it has been held that the creditor is nevertheless entitled to the benefit of the judgment.<sup>30</sup> Where a principal mortgaged property to a surety for his indemnity, and also to secure a debt due the surety, and the surety afterwards became insolvent and assigned all his effects, it was held that the creditor (to indemnify the surety against whose debt the mortgage had been given) was entitled to a preference in the mortgaged premises over the assignee holding the debt due from the principal to the surety, also secured by the mortgage.<sup>31</sup> A

<sup>28</sup> Jones v. Quinnipack, 29 Conn. 25.

<sup>29</sup> Matthews v. Joyce, 85 N. C. 258. But see Flannagan v. Forrest, 94 Ga. 685, 21 S. E. Rep. 712. A fund set apart by a debtor to indemnify a surety will, when the surety's liability becomes fixed, be applied to the payment of the debt. Tolle v. Boeckeler, 12 Mo. App. 54.

<sup>30</sup> Crosby v. Crafts, 5 Hun (N. Y.) 327. To a similar effect, and holding that surety may, before

paying the debt, assign such a judgment to the creditor, and that the creditor may enforce it, see Bank v. Douglass, 4 Watts (Pa.) 95.

<sup>31</sup> Ten Eyck v. Holmes, 3 Sandf. Ch. 428. To a similar effect, and holding that the right of the creditor to the security does not depend upon the liability of the surety to be damnified, see Ohio Life Ins. Co. v. Ledyard, 8 Ala. 866.

mortgage was given a surety, by the principal, to secure him against loss on account of several claims for which he was surety, and also to secure a debt due the surety by the principal. The surety was discharged from his liability as such, by time given the principal. Held, that the proceeds of the mortgaged property should be applied pro rata to the payment of all the debts.<sup>32</sup> A being the surety of B in two obligations, B entered into a bond with C as his surety, conditioned to save and keep harmless A on account of his suretyship, and to obtain his release from the two obligations. A was sued on the obligations, and judgment was recovered against him, and he being insolvent, the bond of indemnity was assigned to the creditor, and he sued C on it, claiming that it was a fund in the hands of A for the payment of the debt, which he was entitled to reach. The court said that the bond of indemnity was not given simply for the personal indemnity of the surety, for the release of the two obligations could not be obtained without the consent of the creditor, and as the two obligations had not been released, it was held the bond of indemnity was forfeited, and the creditor might recover on it against C.<sup>33</sup> When a mortgage, given by a principal to his surety for indemnity, is informally assigned by the surety to the creditor, such assignment will be upheld in equity.<sup>34</sup> A guarantied the debt of B by parol, and B placed in A's hands collaterals for his indemnity, from which A realized a sum in money. The creditor sued A for the debt. Held, he could not recover on the guaranty, because of the Statute of Frauds, but could recover for money had and received, to the extent of the money received by A as above.<sup>35</sup> Where joint judgment is recovered against principal and surety, and the lands of the principal are sold at sheriff's sale, and the proceeds applied to the payment of such judgment, the judgment creditors of the surety have an equity to be subrogated, as against the principal, to the debt thus created against the principal and in favor of the surety, and to the lien of the judgment against the principal and surety, and to have priority of claim in the order of their respective judgments to the extent that they were deprived of the

<sup>32</sup> Helm's Adm'r v. Young, 9 B. Mon. (Ky.) 394.

<sup>34</sup> Carlisle v. Wilkins' Adm'r, 51 Ala. 371.

<sup>33</sup> King v. Harman's Heirs, 6 La. (Curry) 607.

<sup>35</sup> Jack v. Morrison, 48 Pa. St. 113.

proceeds of the surety's lands by reason of the judgment against the principal and surety. "Where the joint debt ought to be paid by one of the debtors, a court of equity will so marshal the securities as to compel the joint creditors to have recourse to that debtor, so as to leave the estate of the other open to the claims of his individual creditors; or, if the joint creditor has already appropriated the latter fund, it will permit the several creditors to come in pro tanto, by way of subrogation, upon the fund which ought to have paid the joint debt."<sup>36</sup> Where a debtor conveyed to trustees certain property for the indemnity of various sureties of his who were bound for different debts, it was held that one of the creditors might, in his own name, sustain a suit in chancery for the distribution of the property against all other parties concerned.<sup>37</sup> Where the guardian of several wards gave a separate bond to each ward, with different sureties on each bond, and conveyed to each of the sureties separately different pieces of property for their indemnity, it was held that the wards could not bring a joint suit against the sureties jointly for subrogation.<sup>38</sup> The defendant in replevin, upon obtaining judgment for the property on its value, if the judgment is not satisfied, becomes entitled, by subrogation, to whatever right, title or interest the sureties on the replevin bond may have in any money or other property that has been provided by the replevin plaintiff for their security, and may proceed, in chancery, to realize upon it without first reverting to other remedies against the replevin plaintiff.<sup>39</sup>

<sup>36</sup> *Neff v. Miller*, 8 Pa. St. 347.

<sup>37</sup> *Bank of United States v. Stewart*, 4 Dana (Ky.) 27.

<sup>38</sup> *Norton v. Miller*, 25 Ark. 108.

<sup>39</sup> In *Ross v. Morse*, Mich., Jany., 1902, 88 N. W. Rep. 881, A replevined some lumber from B, sold it for \$5,000 and deposited the proceeds in bank to secure C and D, the sureties on his replevin bond. B obtained judgment against A. in the replevin suit, for \$6,000, and filed his petition in chancery to have the \$5,000 deposit applied in payment of his judgment. Held, that he was entitled to it. Citing

*Mannawsaw v. Wallace*, 87 Mich. 543, 49 N. W. Rep. 1082, and *Union National Bank v. Rasch*, 106 Mich. 328, 64 N. W. Rep. 339. The latter case holds that the creditor need not first exhaust his remedy against the principal before proceeding in equity to realize on the collateral put up for the sureties. In *Swift & Co. v. Kortrecht*, 112 Fed. Rep. 709, 50 C. C. A. 429, Kortrecht, in 1894, borrowed \$4,000 from the Memphis National Bank, securing repayment by trust deed conveying land in Memphis, part of which belonged to his wife, who

**§ 359. Subrogees participate pro rata when the fund is insufficient to pay all.**—Where a fund to which several subrogees are entitled is insufficient to pay them all they share it pro rata. It has been held that, unless the terms of the agreement so provide, priority of time does not give priority of right. A brewing company mortgaged certain land to indemnify, to the amount of \$25,000, the mortgagees against any loss they might suffer by becoming its sureties during the next four years. After certain of the mortgagees had become obligated as such sureties to an amount exceeding \$25,000, one of

joined in the trust deed. In 1896 Swift & Co. obtained a judgment of about \$3,000 against him, from which he appealed, and, upon its affirmance, stayed by means of an injunction until he had recovered a decree of equitable set-off of \$1,100 against Swift & Co. To secure Graham, who was surety on the notes to the bank and surety on the injunction and appeal bonds, Kortrecht and his wife conveyed to Sears, 106 acres of land. On a bill by Swift & Co. to subject this land to the lien of the excess of their judgment over the set-off, it was held that both the bank and Swift were entitled to be subrogated to the right of Graham, the surety, in the 106 acres, that the bank must first have recourse to the trust deed of Kortrecht's Memphis real estate, then his wife's Memphis real estate, then to the 106 acres, and that Swift was entitled to payment out of the overplus, if any remained, after satisfaction of the bank's claim. Also that the homestead estate of Kortrecht took precedence of both creditors. "The rule has long been settled that all securities given by the debtor for the payment of his debt inure to the benefit of the creditor," said Severens, J. (p. 713): "It is not necessary that they be

given directly to the creditor or in express terms contain an agreement to pay the debt. If given to a surety to secure him equity treats it as collateral to the debt. Some of the decided cases suggest a distinction which would exclude from the operation of the rule those cases where the language of the securing instrument indicates only a purpose to indemnify a surety, and does not indicate any agreement to pay the principal debt. But it does not appear to us that there is any solid ground for this distinction. It rests upon the idea that the creditor's right can be no larger than that of the surety, which is measured by the terms of his security. But when the debtor procures his surety to become liable for the debt, an implied obligation immediately falls upon the debtor to pay the debt himself. And this obligation is of so distinct and positive a character that, if the debtor fails to meet it, the surety may file a bill in equity to compel him to do so. \* \* The obligation is equally effective as if it were literally expressed. How else shall the debtor save his surety harmless than by satisfying the obligation? There is therefore no enlargement of the debtor's obligation by the subrogation of the creditor."

them, Schaffer, became surety on a note to the Courier Journal Company, which, after the brewing company had been declared bankrupt, filed its petition to be subrogated to Schaffer's rights under the indemnifying mortgage. The trial court held that those who became sureties earlier in point of time had priority of right to such subrogation. Held, that this was error, that the true theory was that the mortgage was to protect any and all of the mortgagees who might become the brewing company's surety at any time within the next four years, and therefore all were entitled to be subrogated pro rata to the several sureties' rights under the mortgage.<sup>40</sup> General terms in an agreement for indemnity are construed so as to include all beneficiaries rather than only those specifically mentioned.<sup>41</sup>

**§ 360. Creditor cannot avail himself of personal indemnity given surety unless surety could have done so.**—The right of the creditor to reach securities provided by the principal for the indemnity of the surety depends in many cases on the terms of the agreement for indemnity, and the time when such right of the creditor is sought to be enforced.<sup>42</sup> The law on

<sup>40</sup> *Courier Journal Job Printing Co. v. Schaeffer-Meyer Brewing Co.*, 41 C. C. A. 614, 101 Fed. Rep. 699. Note 39 to § 358. In *Coons v. Clifford*, 58 Ohio St. 480, 51 N. E. Rep. 39, the maker of notes of various dates payable to different payees at different times executed a mortgage to indemnify sureties thereon. Upon foreclosure of the mortgage it was held that the holders of the various notes should share in the fund pro rata, that priority of date gives no priority of lien. See, to same effect, *Shaw v. Newsom*, 78 Ind. 335, in which case the court said that the rule would be otherwise if the notes were payable to the same payee.

<sup>41</sup> In *Chambers v. Prewitt*, 172 Ill. 615, John P. Smith, being indebted to a bank upon his four notes, each of which was guaranteed by James D. Smith and Lloyd

B. Smith, mortgaged certain land to the guarantors to secure those four notes, describing them in the mortgage and providing that "when each and all of which [notes] shall have been duly paid by said John P. Smith, together with any other sums for which said James D. Smith and Lloyd B. Smith or either of them may be liable, either as surety or guarantor of and for the said John P. Smith, the said James D. Smith and Lloyd B. Smith shall and will reconvey" &c. It was held that the proceeds of a foreclosure sale of the land must be divided pro rata among all the notes upon which James D. and Lloyd B. Smith were sureties, although none but the four held by the bank were described in the mortgage.

<sup>42</sup> Subrogation in favor of the creditor as against securities provided for the surety has been held

this subject has been well summarized. "The extent of the burdens, trusts and conditions annexed to a grant is to be learned by reading the instrument and gathering from it its intent and purpose. \* \* In subrogating \* \* the creditor to the surety's place as to any indemnity given him, there can be neither increase nor diminution of rights as they actually existed in favor of the surety. If, therefore, the indemnity is against a contingent liability, there can be no substitution until the liability has become absolute. \* \* If a mortgage

to rest upon the principle that a trust for the benefit of the creditor attaches to the property the instant it is appropriated to the benefit of the surety, the execution of which may be enforced at the suit of the creditor as cestui que trust. *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. Rep. 716. It has also been held to rest upon that principle of natural equity which requires that the property, in whatever form it may be, of him who is ultimately liable for the payment of the debt, should be primarily applied to that purpose, in exoneration of the one who is only secondarily liable. Either view presupposes that the security has been furnished by the principal debtor at the expense of his estate, and in derogation of his ability to pay his other obligations, or, if it is furnished by a stranger, that the stranger for a sufficient consideration has made himself liable for the principal debtor's debt. *Champion v. Brown*, 6 Johns. Ch. 406. Where, however, the security is furnished by a stranger to the debt for the purpose of protecting the surety against individual loss as contradistinguished from individual liability, it has been held that there can be no subrogation of the creditor to such security. See opinion

of Williams, J., in *Henderson-Achert Co. v. John Shillito Co.*, 64 Ohio St. 236, 60 N. E. Rep. 295, at 298; *Taylor v. Farmers Bank*, 87 Ky. 398, 9 S. W. Rep. 240; *Macklin v. Northern Bank of Kentucky*, 83 Ky. 314; *Jones v. Quinnipiack Bank*, 29 Conn. 25. In *Sheffield Banking Co. v. Clayton, L. R.*, 1892, 1 Ch. 621, it was held that although the surety, who pays the principal's debt becomes subrogated to the rights of the creditor with reference to collateral that the principal debtor may have given the creditor to secure the debt, the converse of that proposition is not true, and the creditor is not entitled to the benefit of counter bonds or collateral security that has been given by the principal debtor to the surety by way of indemnity. The court, Stirling, J., examined the files in the old case of *Mawer v. Harrison* (1692), 1 Eq. Cas. Ab. 93, 20 Viners Abr. 102, which had been cited in support of the creditor's right to such counter security, and found that the reported statement was a mere dictum. It was therefore held that the creditor must be left to prove against the estate of the deceased surety for what is due him without having the exclusive benefit of the securities or the proceeds of their sale.



or other security is given to the surety, not to secure the debt or provide a fund for its payment, but to save harmless from a contingent liability or loss, that contingency must come or the injury be sustained before a right to the indemnity inures to the creditor. Where the contract is for the personal benefit of the surety, in opposition to the idea of a pledge for the debt or providing means for its payment, the creditor can claim only such rights and remedies as the surety had. If he has not been damnified and the conditions of the mortgage or other contract of indemnity are unbroken, the surety himself could assert no remedy, nor could the creditor claiming through him and in his stead have substitution. \* \* If, however, the principal has assigned a fund for the payment of the debt and the surety pays it, he is entitled to reimbursement out of the fund.”<sup>43</sup> Where a debtor mortgaged property to his indorser to indemnify him against liability on his indorsement, it was held that the creditors could not in chancery have the mortgage foreclosed where no judgment has been rendered against either principal or surety, and both were solvent. The court said the mortgage was not given to secure the debt nor to raise a fund for its payment, or the mortgagee might be held to be a trustee for the creditors; and proceeded as follows: The creditors “seek in this case to be substituted to the rights of \* \* (the surety) in a contract made with him personally for his own benefit, and they can only claim such rights as have inured to him; he has not been damnified; the conditions of the mortgage are unbroken as to him; he can yet assert no claim under them, nor could \* \* (the creditors) by being substituted to his place.”<sup>44</sup>

<sup>43</sup> *Osborn v. Noble*, 46 Miss. 449, per Simrall, J., where a creditor was held not entitled to subrogation to a fund provided for the personal indemnity of the surety. To similar effect, see *Homer v. Savings Bank*, 7 Conn. 478. See, also, *Van Orden v. Durham*, 35 Calif. 136. Holding that there is no distinction in principle, whether the mortgage or other lien is held by the creditor himself or by a surety, see *Smith v. Gillam*, 80 Ala. 296,

overruling *Watson v. Rose's Ex'rs*, 51 Ala. 292, in which latter case it was held that a creditor whose debt was extinguished was not entitled to be subrogated to indemnity of surety. See on this subject, generally, as to the right of the creditor to be subrogated to the benefit of securities taken from the debtor, *Forrest's Ex'rs v. Luddington*, 68 Ala. 1.

<sup>44</sup> *Ohio Life Ins. & Trust Co. v. Reeder*, 18 Ohio, 35. To the same

§ 361. **Creditor cannot avail himself of indemnity given surety by a stranger or co-surety.**—While as a general rule a security given by a principal to his surety operates eo instanti as a security to the creditor for the payment of the debt, yet it is held that where such security is given by a stranger to the surety, and not for the payment of the debt, a trust does not attach in favor of the creditor and he cannot be subrogated to the surety's rights. When the security was given by the principal's wife, it was held that she was a stranger to the debt within the meaning of the rule.<sup>45</sup> And where a surety against whom judgment had been rendered was insolvent, it was held that the creditor could not subject property mortgaged to the surety by a daughter of the principal to indemnify and save him harmless, when it was not the intention that such property should be applied to the payment of the debt.<sup>46</sup> Where one of two sureties gives a mortgage of his real estate to his co-surety to protect him against loss by reason of his suretyship, it is held that a creditor of the principal is not entitled to be subrogated in place of the co-surety and enjoy the benefit of the mortgage. The court said there

effect, where a trust deed was given conditioned for the indemnity of the surety in case judgment was had against him, and no judgment was rendered, but both principal and surety were discharged in bankruptcy. *Bush v. Stamps*, 26 Miss. 463; *Bibb v. Martin*, 14 Smedes & Mar. (Miss.) 87. The rule deducible from the Mississippi decisions is thus stated in *Pool v. Doster*, 59 Miss. 258, 263: "That to make a security available to the creditor, it must be conditioned for the payment of the debt, and for enforcement on default in its payment; in other words, it must be expressed to be for the security of the debt, and to be enforceable for its payment; for otherwise it will not be held to be enforceable in behalf of the creditor. And even if the security is conditioned for payment of the debt, but stipulates for its enforce-

ment in a specified contingency, it will be held to be a mere indemnity to the surety, and only enforceable as such according to its terms."

<sup>45</sup> *Taylor v. Farmers' Bank of Kentucky*, 87 Ky. 398.

<sup>46</sup> *Macklin v. Northern Bank of Kentucky*, 83 Ky. 314. Compare *Magoffin v. Boyle National Bank*, Ky., Sept., 1902, no official report, 69 S. W. Rep. 702, where it was held that a woman's mortgage of her separate property (real estate) to secure the debt as well as to indemnify her husband's surety could be availed of by the creditor, a national bank. *Fortier v. New Orleans Nat. Bank*, 112 U. S. 439, 5 Sup. Ct. Rep. 234, 28 L. Ed. 764, notwithstanding that the surety had been discharged in bankruptcy and could suffer no loss. *Black v. Kaiser*, 91 Ky. 427, 16 S. W. Rep. 89.

was a distinction between the rights of the creditor where the principal furnishes the securities to the surety, and where they were furnished by one co-surety to the other.<sup>47</sup>

**§ 362. Creditor cannot be subrogated to personal indemnity of surety after surety is discharged.**—Where the security is merely personal to the surety, and cannot be construed as a pledge for the security of the debt, if the surety is discharged from liability the creditor cannot afterwards take anything by subrogation to his rights. The obvious reason for this rule is that the surety being discharged cannot be damnified, and the creditor claiming only through the surety, and occupying his place, can have no greater rights than he. If, on the other hand, the security is a pledge for the payment of the debt as well as a personal indemnity for the surety, the discharge of the surety will not deprive the creditor of a claim on the security for the payment of the debt. This result is not in such case due to a subrogation of the creditor to the rights of the surety, but to the fact that the principal has created a trust fund for the payment of the debt, and the creditor may enforce such trust notwithstanding the discharge of the surety. Certain parties became sureties of another on notes for property purchased, and took a chattel mortgage from their principal for indemnity against loss on account of that and other suretyship obligations assumed by them for the principal. The principal purchased more goods from the creditor upon the representation that he would get the notes of the sureties for both purchases, and the creditor thereupon canceled the notes which the sureties had signed, and bills were sent to the sureties for the whole amount of the purchases, which they refused to accept. Held, that the sureties being discharged the creditor could not be subrogated to, and enforce the mortgages given for, their personal indemnity.<sup>48</sup> A surety received a promissory note from the principal as an indemnity against loss from an indorsement. This note he afterwards handed over to the creditor as a collateral security for the debt, and the creditor brought suit on it. Pending such suit the statute of limitations became a bar to a recovery against the surety on the note which he had indorsed. This

<sup>47</sup> *Hampton v. Phipps*, 108 U. S. 260.

<sup>48</sup> *Constant v. Matteson*, 22 Ill. 546.

fact was pleaded *puis darrein continuance*, and it was held that as the creditor took the note as collateral security merely, and stood in the place of the surety, and the surety had been released from liability and could not recover on the note for his indemnity, the creditor could not recover on it.<sup>49</sup> When the rents arising from certain property were pledged to a surety for the payment of the debt, and the surety afterwards became invested with the legal title to the property, it was held that the pledge was merged and could not afterwards be asserted by the creditor.<sup>50</sup>

**§ 363. General principles of subrogation—Miscellaneous cases illustrating doctrine of subrogation.**—The doctrine of subrogation of securities presupposes an existing indebtedness, and it can only be invoked by one under liability.<sup>1</sup> To entitle a surety, who has paid his principal's debt, to be subrogated to the creditor's securities, it is immaterial whether the creditor could or could not have collected of the principal.<sup>2</sup> Where a surety is entitled to subrogation upon payment of the debt, he may compel the creditor to execute and file a transfer of his securities, to be delivered to him upon payment.<sup>3</sup> On the ground that a surety to a note who pays an amount due thereon becomes subrogated to all the rights of the holder thereof, it is held that the surety may be subrogated to the holder's right of estoppel.<sup>4</sup> The right of a surety who has paid his principal's debt to be subrogated to the rights, liens and securities of the creditor can only be asserted by a civil action commenced by service of summons.<sup>5</sup> A surety on an appeal bond has a right to be subrogated to the lien of the judgment appealed from and paid by him;<sup>6</sup> and his equities are held superior to those of a purchaser in good faith who buys the land on which the judgment is a lien after the execu-

<sup>49</sup> *Russell v. La Roque*, 13 Ala. 149. For other cases holding that, when surety is discharged, creditor cannot enforce a security given for his indemnity, see *Havens v. Foudry*, 4 Met. (Ky.) 247; *Bank of Virginia v. Boisseau*, 12 Leigh (Va.) 387; *Hopewell v. Bank of Cumberland*, 10 Leigh (Va.) 206.

<sup>50</sup> *Rankin v. Wilsey*, 17 Iowa 463.

<sup>1</sup> *Bank of Mobile v. Mobile & Ohio R. R. Co.*, 69 Ala. 305.

<sup>2</sup> *Conner v. Howe*, 35 Minn. 518.

<sup>3</sup> *Knoblauch v. Foglesong*, 37 Minn. 320.

<sup>4</sup> *Campbell v. Goodall*, 8 Bradw. (Ill. App.) 266.

<sup>5</sup> *Calvert v. Peebles*, 82 N. C. 334.

<sup>6</sup> *Burgett v. Paxton*, 99 Ill. 288.

tion of the appeal bond.<sup>7</sup> A surety for church trustees on their note for the payment of money advanced to build the church, who pays the obligation of his principal, is entitled to be subrogated to the rights of the trustees to subject the church to the payment of the debt.<sup>8</sup> The administrator, and not the heirs, of a deceased surety on a note may pay the debt upon default by the principal and maintain an action against the principal.<sup>9</sup> A surety paying a judgment against the principal, the maker of a note, has no right to subrogation against an indorser, even though he takes an assignment of the judgment against maker and indorser.<sup>10</sup>

<sup>7</sup> Peirce v. Higgins, 101 Ind. 178.

<sup>8</sup> Bushong v. Taylor, 82 Mo. 660.

<sup>9</sup> Harris v. Harris, 92 Ill. App. 455, 457.

<sup>10</sup> March v. Barnet, 121 Calif. 419, 53 Pac. Rep. 933. It is by subrogation that the assignee of stock in a corporation succeeds to the rights of his assignor with reference thereto. In Fouche v. Merchants Nat'l Bank, 110 Ga. 827 at 836, 36 S. E. Rep. 256, a proceeding by a creditor to enforce payment of its judgment against a corporation by enforcing the stock liability of shareholders, the court said (p. 836): "It is a general principle of law, well recognized both upon authority and reason, that the transferee of shares of stock in a corporation is not only subrogated to all the rights and interests of the original subscriber and transferor of such stock, but such transferee also incurs the liability originally upon the subscriber to the stock for the non-payment of dues that may exist on the subscription. This is not merely an arbitrary rule of law fixed by courts in adjudications upon this subject, but is really founded upon solid reason. When an original owner of or subscriber to stock transfers the same,

and the name of the transferee is entered upon the books of the company as the owner and holder of the stock, the original subscriber thereby, as a general rule, becomes discharged from all obligations to the company by virtue of his subscription, and his transferee necessarily takes his place by an implied undertaking to assume those obligations and duties." And in that case it was held that a bank which had, in payment of a debt, received 90 shares of stock marked full paid and non-assessable, and had no notice that they were in fact almost wholly unpaid, was liable for the unpaid balance. Compare note 5, § 1, as to the principle; Higgins v. Illinois Trust & Savings Bank, 193 Ill. 394, as to the rule in Illinois. See, generally, miscellaneous cases further illustrating the subject of this chapter: Lochenmeyer v. Fogarty, 112 Ill. 572; Darst v. Bates, 95 Ill. 493; Moore v. Topliff, 107 Ill. 241; Rice v. Rice, 108 Ill. 199; Babcock v. Blanchard, 86 Ill. 165; Richeson v. Crawford, 94 Ill. 165; Callaway Co. Savings Bank v. Terry, 13 Mo. App. 99; Bauer v. Gray, 18 Mo. App. 164; Rubey v. Watson, 22 Mo. App. 428; May v. Burk, 80 Mo. 675; Logan v.

Mitchell, 67 Mo. 524; Sawyers v. Morris, 82 Ind. 204; Duncan, Fox & Co. v. North & South Wales Bank, Law Rep. (6 H. of L. App. Cases), 1; Osborne v. Smith (Cir. Ct. D. Minn.), 18 Fed. Rep. 126; Torp v. Gulseth, 37 Minn. 135; Wilson v. Burney, 8 Neb. 39; Lynch v. Hancock. 14 S. C. 66; Eidson v. Huff, 29 Gratt. (Va.) 338. Vert v. Voss, 74 Ind. 565; Rice v.



## CHAPTER XIII.

### OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY PAYMENT.

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| <p>§ 364. How payments made by the principal should be applied.</p> <p>365. How the law will apply payments in certain cases.</p> <p>366. What will amount to payment—Special instances.</p> <p>367. If debt once paid, it cannot be revived against surety—Special instances.</p> <p>368. When payment made by principal and accepted by creditor does not discharge surety.</p> <p>369. Funds which have been appropriated by the principal for the payment of the debt cannot be diverted from that purpose without consent of surety.</p> | <p>§ 370. When debt is paid by principal, surety discharged, no matter where money came from—When creditor obliged to retain money in his hands belonging to principal.</p> <p>371. Cases holding surety discharged by payment under special circumstances.</p> <p>372. How payments by officer applied when he has two different sets of sureties.</p> <p>373. If principal tender amount of debt to creditor, who refuses to receive it, surety is discharged.</p> <p>374. Sufficiency of tender.</p> <p>375. Discharge of surety by creditor accepting part payment of debt in satisfaction for whole.</p> |
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**§ 364. How payments made by the principal should be applied.**—When the liability of a surety or guarantor is for the debt of another, such liability, of course, ceases upon the payment of the debt.<sup>11</sup> With reference to the application of pay-

<sup>11</sup> It has been held that imprisonment of one who has been fined does not constitute a payment and release his sureties who are bound for the payment of his fine. *Town of Sheffield v. O'Day*, 7 Ill. App. 339, was sci. fa. on the appeal bond of O'Day who, having been fined \$130 for violation of an ordinance, appealed and allowed his

appeal to be dismissed. The sureties pleaded that the commitment of O'Day to jail for six months or until the fine be paid at the statutory rate of 50 cents for each day's imprisonment operated as an election to take the body of the debtor in execution and discharged them. Held, Pillsbury, J., that "the effort to coerce payment by

ments, the general and well-known rule is that a debtor who owes several debts to the same creditor has the right, at the time of making a payment, to apply it to any one of the debts he pleases. If he makes no appropriation of a general payment, the creditor may apply it as he sees fit.<sup>12</sup> And where

imprisonment is beneficial to the sureties; at least it cannot be said to be to their prejudice, and therefore they are not released." Citing *Ex parte Bollig*, 31 Ill. 88, to the effect that the imprisonment in such a case is but a mode provided for collecting the fine and costs; that the imprisonment was an incident to the power to fine and could not be regarded in the light of punishment, and that therefore the common law rule that the arrest of a debtor under *capias ad satisfaciendum* operated as a satisfaction of the judgment during his confinement did not apply. *Petefish, Skiles & Co. v. Watkins*, 124 Ill. 384. In *Pettyjohn v. Liebscher*, 92 Ga. 149, 17 S. E. Rep. 1007, it was held that where the principal's debt has been paid by goods given to the creditor, there can be no recovery against the surety. In *Heist v. Tobias*, 182 Pa. St. 442, 38 Atl. Rep. 579, the surety on a note took judgment by confession against the maker by way of indemnifying himself against loss by reason of his suretyship. After the note was paid by a relative of the maker, he assigned the judgment to the party paying the note in order to secure her against loss. Held, that the assignee of the judgment took nothing, because her payment of the note was an extinguishment of the indebtedness represented by the judgment, and after such payment the surety had nothing to assign. In *Cason v. Heath*, 86 Ga.

438, 12 S. E. Rep. 678, Cason gave Heath the money with which to purchase Heath's note from Baker, who held it. Baker received the money, and delivered the note to Heath without having any knowledge that Heath was acting for Cason, and supposing that he was acting for himself. Held, that the transaction was a payment and not a sale of the note, and that Thompson, a surety on the note, was discharged from liability. "Because to make it a sale required the assent of both the minds of Baker and Heath. Both minds not having assented to the same thing, and Heath, the maker of the note, having carried the money to Baker, the holder thereof, and paid it to him, and he having surrendered the note to Heath, in law it amounted to a payment by the maker." Citing text. In *Chamblee v. Davie*, 89 Ga. 205, 14 S. E. Rep. 195, defendant pleaded that he signed the note in question as surety and was induced to do so by the payee's agreeing to take the principal's land in payment, in the event of default. Held, that this stated no defense, without a showing that the land was tendered to the payee.

<sup>12</sup> *Pelzer, Rodgers & Co. v. Steadman*, 22 S. C. 279. Defendants guarantied the payment of all drafts, at maturity, which should be drawn by the agent of the Guano Company in New York; the amount guarantied at any one time not to exceed \$13,000. The agent drew a draft for \$13,000 on the

it is not appropriated by either the debtor or the creditor, the law will apply it according to the justice and equity of the case.<sup>13</sup> The mere fact that there is a surety for one of the debts will not make any difference in this rule when a payment is

company, and shortly afterwards another draft for \$8,000 to the order of the same payees. After both drafts had been protested the payees notified their New York agents who held the drafts that a payment of \$2,144 had been made which was to be credited on the \$8,000 draft, which was done. It appeared that no application was made at the time of payment by the debtor, and that, though the application by the creditor was made after suit brought on the \$13,000 draft, it was done as soon as possible, and it was held that the creditor had the right to make the application: *Bank of California v. Webb*, 94 N. Y. 467, affirming 16 J. & S. (N. Y. Super. Ct.) 175. The creditor may make such application up to the very last moment: *Miles v. Fowkes*, 5 Bing. N. C. 455; *In re Sherry*, 1884, L. R. 25 Ch. Div. 692, at 702; *City Discount Co. v. McLean*, L. R. 9 C. P. 692, at 700, per Blackburn, J.; *Agricultural Ins. Co. v. Sargeant*, 26 Can. Sup. Ct. 29, at 36; *Simpson v. Ingham*, 2 B. & C. 65; *Coxe Bros. v. Milbroth*, Wis., Dec., 1902, 92 N. W. Rep. 560.

<sup>13</sup> Application of payments is absolutely in control of debtor first, creditor next, court next: *State v. Sooy*, 39 N. J. Law 539, cited and followed in *Walker Co. v. Fidelity & Deposit Co. of Md.*, 107 Fed. Rep. 851, 47 C. C. A. 15; *Conduit v. Ryan*, 3 Ind. App. 1, 29 N. E. Rep. 160, where the general doctrine as to application of payments is clearly stated by New,

C. J. The court held that the fact that part of a running account was covered by a continuing guaranty did not affect the application of payments in the slightest degree, nor did the revocation of the guaranty. The effort of the court in each case is to find out what application the debtor intended to make, and for that purpose all the facts and circumstances should be taken into consideration. *Hughes v. Heyman*, 4 App. Cas. D. C., 444. In *Georgia State Building and Loan Association v. American Investment Company*, 101 Ga. 413, 29 S. E. Rep. 299, Carlton having borrowed about \$1,200 from plaintiff association, conveyed to it certain real estate as security and as further security the defendant gave to the association its bond in \$400, conditioned (p. 414) that Carlton should "promptly pay to the said obligee the instalments of stock, interest and premium first falling due under the contract between said principal and said obligee, as and when the same shall become due and payable, until the amount so paid shall aggregate the sum of \$400." Carlton having defaulted, the association obtained judgment against him for about \$1,300, had his real estate sold under execution and applied the proceeds of the sale, \$410, to the judgment, and then brought suit against defendant on its guaranty. It was held that the \$410 was applicable to the instalments first falling due and that the guarantor was released. "There are two reasons

made by the principal.<sup>14</sup> Where the principal debtor pays part of the principal sum due and the whole of a highly usurious rate of interest stipulated for, the surety is bound by this application of payment.<sup>15</sup> Where a mortgage or other security is given by a principal to secure several debts due one creditor, for one of which debts a surety is liable, and there

why, in our judgment, the plaintiff is not entitled to have such recovery against the guarantor," said the court. "First as the whole debt due by the borrowers consists of the monthly instalments, and the aggregate amount is made up from the successive instalments, when any sum is paid by the borrowers, or is realized from the securities in the hands of the association, the same should be appropriated to the payment of the monthly instalments first falling due; and the fact that these monthly instalments have been reduced to judgment for a gross amount would not entitle the association to simply treat the amount collected as a general credit on such judgment, but, following the plan and scheme of the association, it would, so far as the guarantor is concerned, be held to apply to the payment of successive instalments first falling due. Second, the contract of guaranty was to make good the payment of instalments first falling due, up to a given amount. The plan and scheme of this contract was, that instalments was the method agreed on to pay the debt. It was within the power of the association, before the sale of the real estate pledged to it by the borrowers, to collect from the guarantor such of the monthly instalments, within the limit of the guaranty, as were not paid. When, however, it elected to abandon this system of payment

by monthly instalments, and included in the judgment obtained the amount for which the guarantor was liable, and collected from the sale of the property under this judgment an amount sufficient to pay the liability of the guarantor, the amount so realized must be held to extinguish the obligation of the latter." In *Gunster v. Jessup*, 192 Pa. St. 223, 43 Atl. Rep. 994, the sureties on the official bond of a bank cashier paid to the bank's assignee a sum of money largely in excess of the penalty of their bond, so that the cashier was enabled to escape criminal prosecution. There was no specific application of such payments. Held, that it was for the jury to say whether or not they were intended to apply in extinguishment of the sureties' liability on the bond and judgment on a finding in favor of the sureties was affirmed. To the same effect: *Bishop v. Hart*, 114 Iowa 96, 86 N. W. Rep. 218. See also § 372.

<sup>14</sup> *Allen v. Culver*, 3 Denio 284; *Pemberton v. Oakes*, 4 Russ. 154; *Harding v. Tift*, 75 N. Y. 461; *Dr. Blair Medical Co. v. United States Fidelity & Guaranty Co.*, Iowa, Feb. 1902, 89 N. W. Rep. 20; *Tapper v. New Home Sewing Machine Co.*, 22 Ind. App. 313, 53 N. E. Rep. 202. In the application of payments the law generally favors a surety. *Bond v. Armstrong*, 88 Ind. 65. See also cases cited in note 17, § 364.

<sup>15</sup> *Allen v. Jones*, 8 Minn. 202.

is no agreement nor anything to indicate the intent of the parties as to how the proceeds of the security shall be applied, the creditor may apply such proceeds to the payment of the debts for which the surety is not liable.<sup>16</sup> Where three notes are secured by a trust deed, and the two first due are also signed by a surety, the creditor may, after the maturity of all the notes, apply the proceeds of the trust premises to the payment of the note last due on which there is no surety. The fact that he required sureties on the two first notes was evidence that he was not satisfied with the security of the trust deed.<sup>17</sup> Principal and surety were liable for a debt, and afterwards the principal obtained further advances from the creditor, at the same time depositing with him certain copper to secure his indebtedness, but without specifying what indebtedness. The principal failed, and the creditor, against the objection of the surety, applied the proceeds of the copper to the payment of the subsequent advances. Held, he might lawfully do so. As the principal made no application of the payment, the creditor had the right to apply it as he pleased, "upon the ordinary principle which entitles a creditor, in the absence of any direction from the debtor paying, to apply the money he receives to whichever of several debts arising he pleases."<sup>18</sup> Where part of a guaranty was as follows: "I guaranty to you the payment of any debt which he, the principal, may contract with you from time to time, as a running balance of account, to any amount not exceeding £400," and

<sup>16</sup> *Stamford Bank v. Benedict*, 15 Conn. 437; *Martin v. Pope*, 6 Ala. 532; *Gaston v. Barney*, 11 Ohio St. 506.

<sup>17</sup> *Mathews v. Switzler*, 46 Mo. 301. But where the notes secured by the mortgage are part those of the mortgagor alone, on which there is a surety, and part those of the mortgager and another, on which there is no surety, it has been held that the proceeds must be applied to the payment of the notes on which there is a surety. *Merrimack County Bank v. Brown*, 12 N. H. 320. It has been held also that where the creditor by

process of law obtains a sum less than the entire indebtedness, he must apply the amount realized pro rata upon the secured and the unsecured portions of it. The sureties are not entitled to have it applied first in their favor. *Hood v. Coleman Planing Mill Co.*, 27 Ont. App. Reps. 203. Citing 2 *White & Tudor L. C.*, 7th Ed. 565; *Hobson v. Bass*, L. R. 6 Ch. 792; *Gray v. Leckham*, L. R. 7 Ch. 780; *Goodwin v. Grey* (1874), 22 W. R. 312.

<sup>18</sup> Per Dr. Lushington, in *The Bank of Bengal v. Radakissen Mitter*, 4 Moore's Privy Council Cas. 140.

the principal became indebted in £625, and afterwards, by composition with his creditors, paid enough to reduce the whole claim to £356, it was held that the guarantor was entitled to a ratable proportion of the dividend paid by the debtor, and was only liable for so much of the £400 as remained after deducting such proportion.<sup>19</sup> It has also been held that the assignee of two judgments from different plaintiffs against the same defendant, on the older of which judgments there is a surety, and on the younger of which there is none, must apply the money raised by the sheriff from a sale of the defendant's property to the discharge of the older judgment.<sup>20</sup> An agreement between principal and surety that a payment by the principal shall be applied to the note on which the surety is liable will not prevent its application by the creditor, who had no notice of the agreement, to another note.<sup>21</sup> Where a mortgage is made to secure several sureties the proceeds must be ratably divided.<sup>22</sup>

**§ 365. How the law will apply payments in certain cases.—** Where neither the principal debtor nor the creditor applies the payment, the law will apply it according to the justice of the case. A principal owed the creditor for rent for three years, the rent of the first year being secured by bond with

<sup>19</sup> *Bardwell v. Lydall*, 7 Bing. 489; *Id.*, 5 Moore & Payne 327.

<sup>20</sup> *Simmons v. Cates*, 56 Ga. 609.

<sup>21</sup> *Harding v. Tift*, 75 N. Y. 461. Compare *Agricultural Insurance Co. v. Sargeant*, 26 Can. Sup. Ct. 29.

<sup>22</sup> In *Kyle v. Chattahoochee National Bank*, 96 Ga. 693, 24 S. E. Rep. 149, the Paragon Mfg. Co. executed a mortgage to secure its indebtedness on open account to plaintiff bank and to secure also various accommodation notes made by Kyle and others to its order and by it endorsed to the bank and received by the bank as accommodation paper. Held that upon foreclosure of the mortgage, the bank was not entitled to use part of the proceeds to quiet vari-

ous unsecured creditors who were attacking the mortgage or to apply it first to the payment of the unsecured open account but that the accommodation makers, being sureties, were entitled to have the entire proceeds applied pro rata on their various notes and the open account. "When the bank accepted the mortgage," said the court, "it assumed along with the security the duty of executing the trust resulting from the considerations which led up to its execution. Each of these accommodation makers had a vested interest in all sums which should be realized upon the foreclosure of the mortgage. The mortgage itself was equivalent to an appropriation in advance of the fund."



surety. The creditor owed the principal on an account running through the three years, the account of the first year being less than that year's rent; and the whole account being larger. Held, the whole account should be first appropriated to the first year's rent. The court said that where the parties made no application of payments, the law would generally appropriate them to the oldest indebtedness.<sup>23</sup> Where an account is delivered by an agent, in which he charges himself with a balance, and he continues to receive money for his principal, his subsequent payments are not necessarily to be applied to the extinction of the previous balance where the subsequent receipts are equal to the subsequent payments; and the court left it to the jury to say, under all the circumstances, how the payments should be applied.<sup>24</sup> Security was given by a surety for goods to be supplied to his principal, it being stipulated that the security should not apply to a then existing debt. Goods were subsequently supplied to the principal, and payments made by him from time to time, in respect to some of which a discount was allowed for prompt payment. There was no express evidence of application of payments by any one; but the court thought, from the course of dealing, that the intention was to apply the payments to the latter items for which the surety was liable, and it was held that they should be so applied.<sup>25</sup> Where a county collector owed sums both for a preceding as well as the last official year, and after the close of his last year paid to his successor a sum of money less than his entire indebtedness, and there is nothing to show whence the money was derived or whether it was received by him during either of his official years, and no application of the payment was made by either debtor or creditor, it was held that the law would apply it to the oldest debt, in the absence of any equity in favor of third parties requiring a different application.<sup>26</sup> Moneys recovered by his sureties from a defaulting postmaster and by them paid

<sup>23</sup> *Hollister v. Davis*, 54 Pa. St. 508. Holding that where no application has been made, and there is a running account, and payments made from time to time, the first payments made will be applied to the oldest item of indebtedness, see *Pemberton v. Oakes*, 4 Russ. 154. And see *Pardee v. Markle*, 111 Pa. St. 548.

<sup>24</sup> *Lysaght v. Walker*, 5 Bligh (N. R.) 1.

<sup>25</sup> *Maryatts v. White*, 2 Starkie 101.

<sup>26</sup> *Frost v. Mixsell*, 38 N. J. Eq. 586.



over to the United States must be applied to the reduction of his general indebtedness to the government and not to the liability of his sureties.<sup>27</sup>

**§ 366. What will amount to payment—Special instances.—** Questions sometimes arise as to what constitutes payment of the debt. It has been held that a levy of an execution on property of the principal and advertising it for sale is not such a satisfaction of the debt as will prevent a levy on property of the surety for the same debt.<sup>28</sup> But it has been held that the imprisonment of the principal on execution for the debt is, so long as it continues, a satisfaction of the debt, which bars the creditor for that time from all other remedy therefor.<sup>29</sup> If the holder of a note agree to release the principal upon payment of one-half the amount due, and such payment is made, neither the principal nor surety is discharged from the balance of the note because there is no consideration for the agreement.<sup>30</sup> Where a party signs a note for a certain amount, for one-half of which he is principal and for the other half surety, payment by him of the half for which he is principal,

<sup>27</sup> *Alexander v. United States*, 57 Fed. Rep. 828, 6 C. C. A. 602, 16 U. S. App. 158.

<sup>28</sup> *Fuller v. Loring*, 42 Me. 481. To same effect, where creditor distrained property of principal for rent, see *King v. Blackmore*, 72 Pa. St. 347. In *McCalla v. Knox*, 84 Ga. 291, 10 S. E. Rep. 624, on an execution against principal and surety, enough of the principal's property was sold to pay off the judgment. By order of the court, without any fraud, it was applied upon void executions against the principal alone. Held that the surety was not released, but remained bound the same as if there had been no sale. In *Smith v. Ferris*, 143 N. Y. 495, 39 N. E. Rep. 3, A sold a mortgage for \$4,000 to B, guaranteeing payment of it "according to its terms," until it was reduced to \$3,000. The mortgaged building was destroyed

by fire, and the mortgagee received \$2,700 insurance. Held, reversing the court below, that the guarantor remained liable for \$1,000. The court said that the payment of the insurance was not a payment on the mortgage "according to its terms" and that the guarantor should not be allowed to remit the purchaser of the mortgage exclusively to the land and the personal liability of the mortgagor for the unpaid balance of his debt. A surety's answer that the creditor had "received" from the principal sufficient money and property to pay the debt, held to state no defense; it may have been received only as security. *First Nat'l Bank v. Wilbern*, Neb., June, 1902, 90 N. W. Rep. 1126.

<sup>29</sup> *Koenig v. Steckel*, 58 N. Y. 475.

<sup>30</sup> *Oberndorff v. Union Bank*, 31 Md. 126.

and a receipt by the creditor in full for such half, does not discharge him from the other half.<sup>31</sup> It has been held that, if a party guaranty a mortgage and die, and the mortgage afterwards becomes the property of his estate, the guaranty is extinguished, and cannot thereafter be enforced if assigned by the administrator of the estate to a third person.<sup>32</sup> Where a surety pays the creditor a certain amount to release him from obligation as such, the amount so paid cannot be applied as a payment on the debt in favor of the principal.<sup>33</sup> A surety may pay the debt for which he is contingently liable, so as to satisfy the requirements of section 19 of the United States bankrupt act, by giving his individual note therefor, if such note is expressly received as payment.<sup>34</sup> The acceptance of a new security for an existing debt does not operate as a payment unless so intended by the parties.<sup>35</sup> Collateral given by a surety for his share of a note is held not such a payment as

<sup>31</sup> *Sterling v. Stewart*, 74 Pa. St. 445.

<sup>32</sup> *Fluck v. Hager*, 51 Pa. St. 459.

<sup>33</sup> *Peer v. Kean*, 14 Mich. 354. In *Gilstrap v. Smith*, 101 Ga. 120, 28 S. E. Rep. 608, the holder of a note was paid \$100 by a surety for his release from all liability as surety. Held that the maker of the note could not claim credit for the \$100. "It was not made to satisfy the debt, but was designed only to secure the release of the surety. \* \*"

<sup>34</sup> *In re Morrill*, 2 Saw. 356. See, on this subject, what has been held to amount to a payment, *Taylor v. Lohman*, 74 Ind. 418. Note 23 to § 232.

<sup>35</sup> *Kemmerer's Appeal*, 102 Pa. St. 558. That it is a question of fact for the jury whether a note which the creditor accepted from the debtor was received in payment of the account and release of the guarantor or as additional security. See *Coxe Bros. & Co. v. Milbroth*, 110 Wis. 499, 86 N. W. Rep. 174. In *Metropolitan Rubber*

*Co. v. Orendorf* (Mo.), 85 Fed. Rep. 348, 29 C. C. A. 188, 56 U. S. App. 426, two defendants, the treasurer and a director respectively of the Peters Rubber & Supply Co., had guaranteed to the extent of \$10,000 its future purchases of rubber from plaintiff without time limit. When \$5,744 was due plaintiff the Peters Co. offered to give its notes for that amount endorsed by its directors with the understanding that the guaranty above referred to should be cancelled when they were paid. Plaintiff accepted that proposition. The notes were sent without any endorsement and were paid except \$957.12. The guaranty contained a provision that the taking of notes for any balance due should not release the guarantors. It was held, reversing the circuit court, that it was a question of fact for the jury whether the notes without endorsement were accepted in lieu of the guaranty or not, and whether the guarantors were liable for subsequent purchases amounting to over \$14,000.

will discharge a co-surety who had already paid half the note and taken a receipt purporting to be a full discharge, provided the balance be paid by the other surety.<sup>36</sup> Where the principal maker of a note past due, without the knowledge or consent of his sureties thereon, borrowed money upon a new note with other sureties for the purpose of taking up the first note, with the understanding that, when so taken up, it should be transferred to such new sureties as collateral security, and the money so borrowed was used in payment of the first note, it was held that this was such a payment as discharged the sureties.<sup>37</sup> Where a principal, in his answer to an action by the surety to recover money paid, pleaded payment by the conveyance of certain real estate, and it was shown that the surety could not sell the same and realize on the debt paid, it was held there was no payment.<sup>38</sup> An instance of payment, and discharge of a surety, by taking a new note made by a third person is cited in a note.<sup>39</sup>

**§ 367. If debt once paid, it cannot be revived against surety—Special instances.**—When a bond upon which a surety is liable has once been paid by the application of certain funds to that purpose, as agreed between the principal and creditor, they cannot afterwards, by agreement between themselves, apply the sum received in payment to another purpose so as to charge a surety on the bond.<sup>40</sup> Where the principal in a

<sup>36</sup> Aldrich v. Blake, 134 Mass. 582.

<sup>37</sup> Greening v. Patten, 51 Wis. 146. Note 2, § 327.

<sup>38</sup> Lea v. McLennan, 7 Neb. 143.

<sup>39</sup> In Penna. Trust Co. v. McElroy, 112 Fed. Rep. 509, 50 C. C. A. 371, Lyons, Butterfield & Co., a limited partnership, gave its note for \$75,000, indorsed by Butterfield, its secretary and treasurer, to the Citizens' Nat'l Bank of Pittsburgh as collateral security for notes and acceptances which the bank might thereafter buy on its indorsement. Thereafter the bank bought such paper to an amount exceeding \$75,000. In September, 1899, the bank received from Butterfield three

notes of Mrs. Jane B. Foster, endorsed by him and within four months thereafter delivered to him the \$75,000 note and all but about \$3,000 of the paper bought from the limited partnership. It was held (Acheson, J.) that the transaction amounted to a payment of all the surrendered paper and that the bank could not maintain its claim therefor against Butterfield's estate in bankruptcy. Citing Arnold v. Camp, 12 Johns. 409, 7 Am. Dec. 328, and note, and Hess v. Dille, 23 W. Va. 90, 97.

<sup>40</sup> Woodman v. Mooring, 3 Dev. Law (N. C.) 237. To same effect, see Gibson v. Rix, 32 Vt. 824.

note pays it with money furnished him by a third party, and makes it up without any assignment of it being made, the debt is discharged, and the party who furnished the money cannot afterwards recover on the note against the surety therein.<sup>41</sup> So a surety who is directly and originally liable on a note cannot, after he has paid such note, re-issue it so as to bind any but himself, but it may be otherwise if he is an indorser and only secondarily liable.<sup>42</sup> A principal delivered to the creditor certain hogs, more than sufficient to pay the debt, under an agreement that so much of the proceeds as were sufficient to pay the debt should be applied to that purpose. Afterwards, without the consent of the surety, the creditor suffered the principal to sell the hogs and retain a portion of the proceeds, leaving a part of the debt unsatisfied. Held, the surety was discharged, as the facts constituted a payment of the original debt, and amounted to a new loan of a part of the proceeds of the hogs to the principal.<sup>43</sup> Where a treasurer was a banker and issued his own notes as money, and such notes were received as payment of money for which he was accountable, and the treasurer failed, and such notes were not paid, it was held that the payments in these notes constituted a sufficient payment to discharge the sureties, as the parties receiving the notes might have had gold if they had demanded it.<sup>44</sup> Where a surety pays a note after the bar of the statute of limitations has arisen, it is held that the debt does not revive against the co-sureties.<sup>45</sup>

**§ 368. When payment made by principal and accepted by creditor does not discharge surety.**—Under certain circumstances payment made by a principal and accepted by the creditor, but from which the creditor derives no benefit, will not discharge the surety. Thus, the payee of a promissory note signed by a principal and surety accepted the amount

<sup>41</sup> Eastman v. Plumer, 32 N. H. 238.

<sup>42</sup> Hopkins v. Farwell, 32 N. H. 425.

<sup>43</sup> Ruble v. Norman, 7 Bush (Ky.) 582.

<sup>44</sup> Guardians of Litchfield Union v. Green, 1 Hurl. & Nor. 884.

<sup>45</sup> Long v. Miller, 93 N. C. 227.

As to whether payment by the principal of interest on a note prevents the statute of limitations from running as to the note in favor of the surety, see Schindel v. Gates, 46 Md. 604; Green v. Greenboro Female College, 83 N. C. 449; Faulkner v. Bailey, 123 Mass. 588.

thereof from the principal in good faith, and without notice that the payment was a fraudulent preference. The principal afterwards entered into a composition deed for the benefit of his creditors; the trustees under the deed avoided the payment as a fraudulent preference, and the payee handed over the amount to the trustees. The payee then sued the surety on the note, and it was held he was liable. The court said: "The act of the creditor which discharges the surety must be an act involving something inequitable at the time it is done, and which interferes with the rights of a surety; an acceptance of money from a debtor, which the creditor thought at the time he accepted it was good and valid payment, cannot, therefore, discharge the surety. The creditor, under present circumstances, could not have refused to accept the money; its acceptance was an advantage, not an injury, to the surety."<sup>46</sup> The same thing was held where a note, signed by principal and surety, was paid by a note which was void for usury and was taken up and canceled. The court, after reviewing many cases, said: "The principle to be extracted from these cases is, that the usurious contract, being utterly void, does not extinguish or affect the original, valid contract. In other words, that a non-existing contract cannot extinguish an entity. \* \* There must be two valid subsisting obligations,

<sup>46</sup> *Petty v. Cooke*, Law Rep. 6 Q. B. 790. To the same effect, where money paid by a principal to the creditor is recovered by the assignee in bankruptcy of the principal from the creditor, see *Watson v. Poague*, 42 Iowa 582; *Pritchard v. Hitchcock*, 6 Man. & Gr. 151. See, to this point, *Northern Bank of Kentucky v. Cooke*, 13 Bush (Ky.) 340. Where the holder of a promissory note accepted in good faith from one of the principal makers, who, to the knowledge of the holder, was insolvent at the time, a conveyance of a parcel of land in payment of the note, and subsequently thereto the holder, on demand therefor, was compelled to surrender the property so conveyed to him to an assignee in bankruptcy

of the grantor, it was held that such conveyance did not operate as a payment of the note, and the surety therein was not discharged. *Harner v. Batdorf*, 35 Ohio St. 113. In *Haug v. Riley*, 101 Ga. 373, 29 S. E. Rep. 44, *Haug and Whitfield* were joint makers of a note, *Haug* being in fact only a surety. On the second day of grace *Whitfield* paid the note in full and instead of canceling it had it indorsed by the payee to the firm of which he was a member, by whom it was on the same day indorsed to *Hall*. Held that in the absence of any evidence that *Hall* had knowledge of such payment, he must be presumed to be an innocent purchaser for value and that *Haug* remained liable as surety.

the one to be extinguished and the other to be substituted for it. Hence if, at the time of the new obligation, the former constituted no debt, or if, on the other hand, the new obligation was void, there was no novation. The effect of novation is that the prior obligation, together with its accessions and privileges, is destroyed, but novation will not take place if the second obligation is void."<sup>47</sup> But where principal and surety are liable for a debt, and execution is issued and levied on property which the principal points out as his, and such property is purchased by the creditor, and the execution is returned satisfied in full, it has been held that the surety is discharged, even though it turn out that other creditors have a prior lien on the property, and the creditor who purchased it afterwards loses all benefit from it by reason of the enforcement of such prior lien. The decision is put upon the ground that whenever, by an arrangement between the principal and creditor, the creditor accepts anything in satisfaction of the debt, it is thereby discharged and cannot be revived against the surety.<sup>48</sup>

**§ 369. Funds which have been appropriated by the principal for the payment of the debt cannot be diverted from that purpose without consent of surety.**—Collaterals which are deposited by a principal with a creditor, for the security of a debt for which a surety is liable, cannot afterwards, without the consent of the surety, be applied to the payment of another debt which the principal subsequently becomes liable to pay the creditor.<sup>1</sup> The plaintiff was surety on a promissory note to the defendants for a sum lent by them to their tenant, and the defendants, also, without the knowledge of the plaintiff,

<sup>47</sup> *Mitchell v. Cotten*, Ex'r, 2 Fla. 136, per Douglas, C. J. To similar effect, see *Williams v. Gilchrist*, 11 N. H. 535.

<sup>48</sup> *Newman v. Hazlerigg*, 1 Bush (Ky.) 412.

<sup>1</sup> *Donally v. Wilson*, 5 Leigh (Va.) 329. To a similar effect, see *Mellendy v. Austin*, 69 Ill. 15. *Ensign v. Jarvis*, 147 N. Y. 687, 41 N. E. Rep. 503. In *McMullen v. Ritchie* (C. C. N. D. Ohio), 64 Fed. Rep. 253 at 264, a woman depos-

ited a lot of stock to secure her husband's debt. Afterwards her husband deposited additional securities to secure the same debt. Held, that the woman was entitled to have her husband's securities applied upon the debt secured in exoneration of her own securities and that her rights thereto took precedence of the claims of judgment creditors of her husband who had levied upon her husband's securities.



took a mortgage of the tenant's furniture to secure the same debt. The defendants afterwards, under a distress proceeding, took the same furniture for arrears of rent due from the tenant to the defendants. Held, that the proceeds of the furniture were first applicable to the payment of the note, and the defendants could not, as against the surety, apply them in payment of the rent, and this upon the principle that a surety is entitled to the benefit of all securities held by the creditor for the payment of the debt, whether he has notice of them or not.<sup>2</sup> In holding the same thing another court said: "The equity which entitles a surety to the benefit of all securities of the principal deposited with the creditor to assure payment of the debt is wholly independent of any contract between the surety and the creditor, and indeed of any knowledge on the part of the surety of the deposit of the securities. \* \* In such case the creditor is regarded as a trustee of the security deposited with him for the benefit of all parties known by him to be interested in it, and is bound to administer the trust created by the deposit, unless discharged by the surety, in his relief as well as in accordance with his own interests and those of the principal. It follows that any application of the security by the creditor to other purposes than those marked out by the terms of the deposit, or any decrease of its value by means of his negligence or mistake, discharges the surety from liability to him in that character to the extent of the misapplication or decrease of value thus occasioned."<sup>3</sup> Where a principal agreed with his sureties that the

<sup>2</sup> *Pearl v. Deacon*, 24 Beav. 186; affirmed, 1 De Gex & Jones 461. See, also, a similar case in principle, *Kinnaird v. Webster*, Law Rep. 10 Ch. Div. 139.

<sup>3</sup> *Hidden v. Bishop*, 5 R. I. 29, per Ames, C. J. In *Montgomery & Co. v. Martin*, 94 Ga. 219, 21 S. E. Rep. 513, the creditor applied the proceeds of the sale of personal property which he had been pledged as security for a note on which defendant was surety to the payment of another debt. Held, that the surety was discharged to the amount of the value of the

property that had been so misapplied but no further. In *Sherman v. Foster*, 158 N. Y. 587, 53 N. E. Rep. 504, it was held that property or money appropriated by the debtor to the payment of one debt cannot be applied by the creditor to the payment of another debt due him from the same debtor, without the debtor's consent. In *Barrett v. Bass*, 105 Ga. 421, 31 S. E. Rep. 435, the payee of a note procured the defendants to sign it as sureties by representing to them that it was already secured by the mortgage of personal property of



proceeds of certain bark should be applied to the payment of the debt and the creditor assented that it should be so applied, but was no further a party to the agreement, it was held that such proceeds could not afterwards, without the consent of the sureties, be diverted to the payment of another debt. The court said: "If he (the creditor) has in any way assented to the application of the fund to the particular debt, with notice that such direction was given to it to indemnify sureties, or, if he received the fund with that understanding, he has acquiesced in the agreement of the principal with his sureties, and it is not in the power of either to change it without the assent of the others."<sup>4</sup> A substitution of collateral for a given debt does not release the surety for the debt in the absence of a showing that he has been injured by it and then only to the extent that he has been injured.<sup>5</sup> The fact that the surety has signed renewal notes does not bar a defense on the ground of misapplication of collateral.<sup>6</sup> The defense of release by misapplication of securities may ordinarily be made at law.<sup>7</sup>

the maker. Thereafter he seized said personal property and applied it to payment of other debts of the principal. It was more than sufficient in value to pay the note. Held, that the sureties were discharged. The note contained a stipulation that the first payments thereon might be applied to other indebtedness in the payee's discretion. Held, that the seizure of the property was not a "payment," within the meaning of the stipulation.

<sup>4</sup> *Baughers' Ex'rs v. Duphorn*, 9 Gill (Md.) 314, per Frick, J.

<sup>5</sup> In *State Bank of Lock Haven v. Smith*, 155 N. Y. 185, 49 N. E. Rep. 680, a bank exchanged a judgment which it held as collateral security, for the agreement of an individual to pay the debt evidenced by the judgment out of the proceeds of an execution sale. Held, that the liability of the surety was

not affected by the exchange, in the absence of a showing that the judgment was worth more than the substituted security. See, also, *Batchelder v. Jennings*, 83 Ill. App. 569.

<sup>6</sup> In *Effinger v. Kendrick*, 114 Calif. 620, 46 Pac. Rep. 613, defendant signed a note with one Farnham at plaintiff's request in order to enable plaintiff to obtain money by discounting the note. Farnham subsequently gave the payee enough wheat to pay the note with a request that it be applied thereon, but the payee refused to so apply it because he wanted to use the note longer. Held, that the defendant, who was ignorant of such misapplication, was not liable to the payee though he had given renewal notes to take the place of the original note.

<sup>7</sup> In *Brown v. First National Bank*, 112 Fed. Rep. 901, 50 C. C.

§ 370. When debt is paid by principal, surety discharged, no matter where money came from—When creditor obliged to retain money in his hands belonging to principal.—The original defendants in a supersedeas judgment borrowed the money from A to pay the judgment, and paid it, at the same time having it assigned to A. Held, the sureties in the supersedeas were discharged. Payment by the principal, no matter where he got the money, discharged the sureties. The principal had no authority “to pledge the responsibility of the superseders who had become his sureties, and whom in law and justice he was bound to save harmless.”<sup>8</sup> Where a judgment against principal and surety was transferred to a third person, who paid for it with money borrowed on the note of the principal, it was held that the judgment must be regarded as paid, and equity would restrain its collection from the surety.<sup>9</sup> Where the administrator of an estate sued the surety on a note payable to the deceased, and the principal in the note was an heir of the deceased and entitled to a share in the estate, and was insolvent, it was held the administrator had a right to apply the principal’s share in the estate to the payment of the note, and would be obliged to do so before proceeding against the surety.<sup>10</sup> A bank held the note of a principal and surety, and shortly after the note became due it had funds in its possession belonging to the principal, which it did not apply (nor did it appear that it had any special right to apply) to the discharge of the note, and did not communicate to the surety for three years the fact that the note was not paid; it was held that the surety was not discharged. The court said: “It would be essentially altering the position of

A. 602, a bank holding as collateral security to defendant’s note a judgment, which was a lien on real estate, released such lien as to part of such real estate without defendant’s consent. Held, reversing the circuit court, not only that such release was a valid defense to the extent that defendant had been damaged thereby but also that defendant need not resort to a court of equity to avail himself of it. Citing to the latter point *Hayes v.*

*Ward*, 4 Johns. Ch. 130, 8 Amer. Dec. 556; *Bank v. Colcord*, 15 N. H. 119, 41 Am. Dec. 685, and *Rogers v. Trustees*, 46 Ill. 429; *Price v. Bank*, 124 Ill. 317, 15 N. E. Rep. 754, 7 Am. St. Rep. 367, and the text.

<sup>8</sup> *Burnet v. Courts*, 5 Harr. & Johns. (Md.) 78, per Dorsey, J.

<sup>9</sup> *Felch v. Lee*, 15 Wis. 265.

<sup>10</sup> *Wright v. Austin*, 56 Barb. (N. Y.) 6.

parties to establish that, because a banker, who holds a note of a third person for a customer, has a balance in his hands in the customer's favor at the maturity of the note, such third person is thereby discharged, if it turns out that the note was given by him as surety."<sup>11</sup>

**§ 371. Cases holding surety discharged by payment under special circumstances.**—A guaranty was as follows: "Wm. P. Wilson has this day purchased of R. S. Eddy & Co. \$617.35 dry goods, and I bind myself to pay to said R. S. Eddy & Co., or see that said Wilson does, the sum of \$400 within ninety days from this date." Within the ninety days Wilson paid Eddy & Co. \$200. Held, this should be applied on the sum due on the guaranty.<sup>12</sup> A statute gave the United States priority over the other creditors of revenue officers. Such an officer had given an official bond with sureties for \$10,000. being largely indebted to the government, he made a trust deed of his property to secure the United States, and left \$10,000 in a trunk for his sureties, with directions that they should take it and relieve themselves from liability. They took the money and paid it to the United States in exoneration of their liability, and took up their bond, the officers of the United States not knowing where the money came from. Held, the sureties were discharged; for while the United States was a preferred creditor, yet no one part of its debt was more preferred than another, and the principal might have applied the \$10,000 himself in discharging the sureties if he had seen fit.<sup>13</sup> A banker held two notes, both for the same amount, signed by A, one of which was signed by B as surety, and this note was due seven days after the other. The day after the first note became due A called to pay it, and paid the amount, but the note on which B was surety was handed him by mistake and the indorsement of the payee canceled. A took the note and kept it five months, and in the meantime both he and the payee failed. Held, the surety was discharged. The long acquiescence in the payment amounted to a ratification. The surety during all that time might have supposed the debt paid, and been lulled into security and injured.<sup>14</sup>

<sup>11</sup> Strong v. Foster, 17 C. B. (8 J. Scott) 201.

<sup>13</sup> United States v. Cochran, 2 Brock. 274.

<sup>12</sup> Eddy v. Sturgeon, 15 Mo. 198.

<sup>14</sup> Brown v. Haggerty, 26 Ill. 469.

**§ 372. How payments by officer applied when he has two different sets of sureties.**—Where there are different sets of sureties for the same officer, covering different periods of time, and payments are made by him, the following has been held to be the rule as to the manner in which they shall be applied: “First, as the debtor may direct, at or before the time of making such payment, and such direction may be given expressly or by implication. Secondly, if the debtor give no such direction, then the creditor may make the application according to his pleasure, and he may make it either at the time of such payment or afterwards, before the commencement of any controversy on the subject, though after he has once made the application he cannot change it to another without the consent of all other persons concerned. Such application by a creditor may also be made expressly or by implication. \* \* Thirdly, if neither the debtor nor the creditor make the application, then the law will make it according to the circumstances of each particular case, and if there be no other controlling circumstance the application will be made according to the order of time, paying first the oldest debt.” But, “if debts are due by a collector or other receiver of money, under bonds, with different sets of sureties (and no application of a payment by the principal is made by him), then the law will so apply the payments, if possible, as that the money collected under one bond shall be applied to the relief of the sureties in that bond, \* \* and the creditor in such case, if he be informed as to the source from which the money with which a payment may have been made was derived, cannot apply it otherwise, even with the consent or by the direction of the principal debtor.” If the principal makes the application of the payment at the time of making it, and the officer receiving it did not know where the money came from, such application will stand, even though the money collected by one set of sureties is thus used to exonerate another set

Holding that parol evidence is competent to show that a bond was given as collateral security for a debt, and that the debt is paid, see *Chester v. The Bank of Kingston*, 16 N. Y. 336. Holding that the sureties on a sheriff's official bond

must themselves, in order to be discharged, pay the amount of the bond, and cannot take advantage of payments made by the sheriff in that regard, see *Moore v. Worsham*, 5 Ala. 645.

of sureties.<sup>15</sup> Where a collector of customs was appointed to serve for two successive terms, and gave bond for each term, with different sets of sureties, it was held that payments into the treasury of money accruing and received in the second term should not be applied to the extinguishment of a balance apparently due at the end of the first term; and such money cannot be so applied by the treasury officers; and thus make the sureties in the second bond liable, when in fact there has been no defalcation during the term for which they are liable. The liability of the sureties in the two bonds is just as distinct as if two different persons had filled the office during the two terms.<sup>16</sup> By statute a postmaster was to render his account every three months, and it was further enacted that if default should be made by the postmaster at any time, and the postmaster-general did not bring suit within two years, the sureties of the postmaster should be discharged. Under this statute it was held that where a postmaster in a quarterly return showed a balance in his hands, the postmaster-general might apply the balance reported in a subsequent return to the previous balance; and where, in an account current continued for years, the postmaster-general thus made the application of balances reported by a postmaster, any deficiency on final settlement due from the postmaster would be chargeable to his last quarterly accounts; and unless two years had elapsed from the return of the last quarterly account to the time of bringing suit, the above statute would not bar a suit against the sureties.<sup>17</sup>

<sup>15</sup> Per Moncure, J., in *Chapman v. The Commonwealth*, 25 Gratt. (Va.) 721. On same subject and to same general effect, see *Pickering v. Day*, 3 Houst. (Del.) 474; *Myers v. United States*, 1 McLean 493; *Stone v. Seymour*, 15 Wend. 19; *United States v. Linn*, 2 McLean 501. To a contrary effect, see *Readfield v. Shaver*, 50 Me. 36. See, also, on this subject, *Pickering v. Day*, 2 Del. Ch. 333; *State v. Sooy*, 39 N. J. Law (10 Vroom) 539.

<sup>16</sup> *United States v. Eckford's Ex'rs*, 1 How. (U. S.) 250. And

see, also, *State v. Middleton's Sureties*, 57 Tex. 185. In *Swisher v. McWhinney*, 64 Ohio St. 343, 60 N. E. Rep. 565, it was held that where there are two sets of sureties one set liable for two defalcations by the principal and the other set liable for only one of them, an indemnity fund created for the benefit of both sets cannot be applied otherwise than to all of both sets in proportion to the entire liability of each surety. *First Nat. Bk. v. Nat. Surety Co.*, 130 Fed. Rep. 401.

<sup>17</sup> *U. S. v. Kershner*, 1 Bond 432.

§ 373. If principal tender amount of debt to creditor, who refuses to receive it, surety is discharged.—If the principal, after the debt is due, offers to pay it, and tenders the amount due to the creditor, and the creditor refuses to receive it, the surety is discharged. One of the reasons upon which this rule is founded is that the transaction amounts to a payment of the debt and a new loan to the principal. Moreover, the contract of suretyship imports entire good faith<sup>18</sup> and confidence between the parties in regard to the whole transaction, and any bad faith on the part of the creditor will discharge the surety. The surety cannot compel the creditor to receive the money, but his refusal to do so is a fraud on the surety which exposes him to greater risk and operates his discharge. If it were otherwise, the creditor would have it in his power to keep the surety under the cloud of the debt any length of time he might see proper.<sup>19</sup> So, also, if after the debt is due the surety offers to pay it and the creditor refuses to receive payment, the surety is discharged. In holding this, the court said: “If it is the legal right of the surety to pay the debt

<sup>18</sup> See “good faith” in contract of suretyship defined in *White’s Adm’r v. Life Association of America*, 63 Ala. 419, 426. The relation between creditor and surety is one of trust and confidence, and demands the utmost good faith on the part of the creditor. *Aaron v. Mendel*, 78 Ky. 427.

<sup>19</sup> *Johnson v. Ivey*, 4 Cold. (Tenn.) 608; *McQuesten v. Noyes*, 6 N. H. 19; *Sears v. Van Dusen*, 25 Mich. 351; *Joslyn v. Eastman*, 46 Vt. 258; *Musgrave v. Glasgow*, 3 Ind. 31; *Johnson v. Mills*, 10 Cush. 503; *Curiac v. Packard*, 29 Cal. 194; *Fisher v. Stockebrand*, 26 Kan. 565; *Spurgeon v. Smitha*, 114 Ind. 453; *Life Association v. Neville*, 72 Ala. 517. Contra, *Clark v. Sickler*, 64 N. Y. 231, where, notwithstanding the foregoing cases, all previously decided, it was said there was no case holding the surety discharged under such circumstances, and that they were

asked to take a new step. See, also, *Liebbrandt v. Myron Lodge*, 61 Ill. 81, where it was held that the surety was not discharged where the principal verbally offered to pay, but did not tender the money. In *O’Connor v. Morse*, 112 Calif. 31, 44 Pac. Rep. 305, *Morse, Heath and Braly* gave their non-negotiable note to Stewart to be used by him as collateral to his own note to be given to the bank, and Stewart so used it. After its maturity, *Braly* paid one-third of it and offered to pay the rest so that he might sue *Morse* and *Heath* for contribution. The bank refused to accept the money saying they would hold the note and make the money out of the other parties. Held that *Braly, Morse* and *Heath* were co-sureties and that *Braly* was relieved of all liability by the bank’s refusal to accept the money and allow him to sue his co-sureties.



and at once proceed against the principal debtor, it necessarily follows that he is entitled to have the money accepted by the creditor in order that he may proceed. It is the duty of the creditor to receive it, and a gross violation of duty and good faith on his part to refuse, thereby interposing an insurmountable obstacle in the way of the pursuit by the surety of his most prompt and efficient remedy.”<sup>20</sup> An offer by the principal to pay part of the debt, and a refusal by the creditor to receive it, will not discharge the surety.<sup>21</sup> Where principal and surety signed a joint and several promissory note, and suit was brought thereon against the principal, and pending the suit the surety tendered the amount of the note to the creditor, it was held he was not thereby discharged from liability, unless he also offered to indemnify the creditor against the costs of the action.<sup>22</sup> In order that the tender of payment may have the effect of discharging the surety, the tender must be made in money. Thus, A guarantied B against loss on account of any indorsements which he might make for C and D. Afterwards B indorsed for C and D, who failed, and offered to pay or secure B by transferring to him as much of their stock in trade as would secure him the amount for which he was liable, which offer he refused to accept. Held, A was not discharged from his guaranty by such refusal of B.<sup>23</sup> A sheriff having collected money belonging to a party offered to pay it to him, but the party refused to receive it, and the sheriff afterwards absconded without paying it. Held, the sureties on his official bond remained liable for the money. The court said that an official bond is not like an ordinary obligation to pay a debt, for it guaranties against official misconduct. “The fact of tender and refusal does not convert the official trust into a mere private liability for a money demand. The obligation to pay over money received by a sheriff in his official capacity continues an official duty until per-

<sup>20</sup> *Hayes v. Josephi*, 26 Cal. 535, per Sawyer, J. The sureties upon an undertaking on appeal are released from liability by tendering the amount for which they are bound to the creditor. *Sharp v. Miller*, 57 Cal. 415.

<sup>21</sup> *McCann v. Dennett*, 13 N. H. 528.

<sup>22</sup> *Manufacturers' Bank v. Billings*, 17 Pick. 87.

<sup>23</sup> *Williams v. Reynolds*, 11 La. (Curry) 230. To similar effect, *Rhineland v. Barrow*, 17 Johns. 538; *Wilson v. McVey*, 83 Ind. 108.



formed by payment to the party entitled. \* \* They (the sureties) can find no excuse in the fact that the injured individuals have not been cautious to fortify themselves against official misconduct. Their undertaking is that there shall be no such thing as official misconduct.”<sup>24</sup>

**§ 374. Sufficiency of tender.**—In order to discharge a surety because of a refusal on the part of the creditor to accept payment by the principal debtor, the tender of payment must have been an actual tender of the amount due the creditor in money. A mere offer to pay, not amounting to a formal tender, is nothing but gratuitous indulgence, and ordinarily does not affect the liability of the surety. “The contract of the sureties is not that the principal will offer to pay the debt at maturity, but that he will in fact pay it, or what, so far as the obligation of the sureties is concerned, is equivalent thereto, he will make an actual tender thereof. To declare that a mere offer to pay, which chronic borrowers are in the constant habit of making, without a dollar in sight, operates to discharge the sureties, would be to announce a dangerous principle; to relax if not to nullify the binding character of the sureties’ contract, in a case where their rights and remedies remain unaffected by any act of their principal or creditor. The ground upon which sureties are discharged, when an actual tender is made and rejected, is, that at the time of the creditor’s refusal to accept the money the complete satisfaction of the debt is not contingently or conditionally but absolutely under his control and in his power.”<sup>25</sup> To a complaint on a promissory note, an answer by the surety that he counted out and offered to pay plaintiff the full amount of the note and interest, and that the latter refused to accept the money, was held bad for failing to aver a readiness and willingness to pay.<sup>26</sup>

**§ 375. Discharge of surety by creditor’s accepting part payment of debt in satisfaction for whole.**—Where a receiver had in his hands funds sufficient to pay the debt, and had been

<sup>24</sup> State v. Alden, 12 Ohio 59, per Read, J.

<sup>25</sup> Winne v. Col. Springs Co., 3 Col. 155, 159, 160, per Thatcher, C. J., disapproving Sears v. Van Dusen, 25 Mich. 351. To same effect,

see White’s Adm’r v. Life Association of America, 63 Ala. 419; Life Association v. Neville, 72 Ala. 517; Hiller v. Howell, 74 Ga. 174. <sup>26</sup> Wilson v. McVey, 83 Ind. 108.

ordered by the court to pay it, but the creditor, without consent of the surety, accepted a portion of the amount due, and receipted to the receiver for the whole debt, which receipt the receiver used in making his settlement and procuring his discharge, it was held that the act of the creditor operated to discharge the surety.<sup>27</sup>

<sup>27</sup> *Heitz v. Atlee*, 67 Iowa 483. This was put upon the ground that the receipt operated not as payment but as a release of the lien that the principal had upon the fund in court, which fund was sufficient to pay the debt in full. In *Mockett v. Boston Investment Co.*, Neb., Feb., 1902, 89 N. W. Rep. 283, the sureties on a note for \$1,593.40 proved a contem-

poraneous written agreement that they should be released when the amount due was reduced to \$1,050 and also proved such reduction; held, that they were no further liable. Upon the liability of a surety when there has been payment in compromise, see *Martin v. Ellerbe's Adm'r*, 70 Ala. 326; *Simmons v. Goodrich*, 67 Ga. 750.

## CHAPTER XIV.

### OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY GIVING TIME.

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| § 376. Giving time to the principal discharges the surety—General rule.  | § 387. When payment of part of debt sufficient consideration for giving of time.   |
| 377. Guarantor discharged by time given the principal from liability for future defaults of principal.                           | 388. Whether agreement to pay interest for a definite time is sufficient consideration for extension for that period.  |
| 378. Surety not discharged unless time extended for a definite period.   | 389. Special instances of sufficient consideration for extending time.   |
| 379. If surety consent to extension before or at the time it is given he is not discharged thereby.                              | 390. When payment of usury sufficient consideration for extension of time—Agreement not to pay usury not sufficient.   |
| 380. Same continued.   | 391. Special instances of consideration for giving time held not sufficient.   |
| 381. When surety not discharged if he promise to pay the debt after time is given.   | 392. Cases holding payment of usury not sufficient consideration for extension.  |
| 382. Surety discharged by valid agreement to give time, even though remedy of creditor not suspended thereby.                    | 393. How far surety discharged by time given by one of several creditors—Surety who becomes such without knowledge of principal discharged by giving of time—Extension as to part of severable contract. |
| 383. Surety who is fully indemnified is not discharged by the giving of time.  | 394. Surety discharged if time is given after debt is due—Other cases holding surety discharged by extension of time.  |
| 384. How liability of principal affected by time given a surety, and of surety by time given another surety.                     | 395. Miscellaneous cases holding surety discharged by extension of time.   |
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401. The same, continued—Sureties released by taking new note.
402. When surety not discharged if creditor take principal's note for extended period.
403. Surety not discharged by creditors taking collateral security for extended time.
404. When surety not discharged if creditor take from principal mortgage for extended time as collateral security for the debt.
405. When surety not discharged by extension for less period than that in which judgment could be recovered—Injunction obtained by principal.
- § 406. If creditor continue case against principal, surety discharged—Other cases holding surety discharged by extension of time.
407. Agreement for extension must be made by party having authority—Conditional agreement for extension.
408. How surety of collector of taxes affected by extension of time—Other cases.
409. When surety discharged by extension of time after judgment.
410. Miscellaneous cases holding surety discharged by extension of time after judgment.
411. Whether surety on specialty discharged by parol agreement for extension.
412. When surety discharged by extension of time if fact of suretyship does not appear from the obligation.
413. Giving time to principal does not discharge surety if remedies against surety reserved.
414. The same, continued—Surety not released where remedies reserved.
415. Pleading extension of time—Variance—Evidence—Equitable proceedings.

**§ 376. Giving time to the principal discharges the surety—General rule.**—When the obligation of the surety is for the debt of the principal, if the time of payment is without the consent of the surety, by a binding agreement between the creditor and the principal,<sup>28</sup> extended for a definite time, the

<sup>28</sup> In *French v. Bates*, 149 Mass. 73, 21 N. E. Rep. 237, defendants guaranteed punctual payment of the interest on a first and a second mortgage given by a church. After both mortgages were over-

surety is discharged. The reason is that the surety is bound only by the terms of his written contract, and if those are varied without his consent it is no longer his contract and he is not bound by it.<sup>29</sup> It therefore follows that the fact that the principal is insolvent<sup>30</sup> or that the extension would be a benefit

due, French, the holder of the second mortgage, made a written agreement with King, holder of the first mortgage, by which French was to pay all interest on the first mortgage to a specified date in the future, and King, in consideration thereof, agreed not to foreclose the first mortgage before that date. It was held that this arrangement did not affect the liability of the guarantors of the first mortgage "because \* \* the principal debtor is not a party to the agreement \* \* and neither the principal debtor nor the guarantors could require the performance by King [the first mortgagee] of any of his covenants contained in this agreement." Citing to the last point: *Frazer v. Jordan*, 8 El. & Bl. 303, 312, and *Greely v. Dow*, 2 Met. (Mass.) 176. In *Berton v. Anderson*, 56 Ark. 470, 20 S. W. Rep. 250, it was held upon the same principle that the surety on a guardian's official bond was not released by the court's extension of the time within which the guardian must account for the ward's money. The court did not occupy the position of the creditor. Compare *Reese v. United States*, 9 Wall (U. S.) 13. In *Antisdel v. Williamson*, 165 N. Y. 372, 59 N. E. Rep. 207, a mortgagor sold the mortgaged property to a purchaser who did not assume the mortgage debt. Thereafter the mortgagee agreed with the purchaser, for good consideration, to extend the mort-

gage three years. That agreement was made without the consent of the mortgagor or of defendant, who had guaranteed payment of the mortgage. Held, that the guarantor was discharged.

<sup>29</sup> The same rule has been held to apply by analogy to a criminal recognisance: *Reese v. United States*, 9 Wall (U. S.) 13, where it was held that a stipulation postponing trial until after the determination of other cases released the surety who had no knowledge thereof, and did not consent thereto.

<sup>30</sup> Extension of time to principal without the surety's consent discharges the surety, even though the principal is insolvent and the surety suffers no loss by the extension. *Clark Adm'x v. Dane*, 128 Ala. 122, 28 So. Rep. 960. In this interesting case three of five joint makers of a \$5,000 note, Carney, Dane and Gaylord B. Clark, paid their respective shares of it, and two of them, Carney and Dane, paid \$1,000 more, the entire share of Francis B. Clark, a delinquent maker, upon his giving them his notes payable in a year secured by collateral and a mortgage. One of these two, Dane, brought suit against Gaylord B. Clark, one of the three paying makers of the note, who had not consented to such extension, to compel him to pay his proportionate share of that part of the delinquent maker's share that plaintiff had so paid for the delinquent maker, and it was held

to the surety if he remained bound makes no difference in the rule. Moreover, the surety has a right when the debt is due, according to the original contract, to pay it, and immediately proceed against the principal for indemnity, and he is deprived of this right by such an extension of the time of payment. As to this rule there is no conflict of authority among well-considered cases.<sup>31</sup> The agreement to give time in order to have

that the extension of time precluded a recovery. "As between them [the makers] and McIntosh, the payee," said the court (page 126), "they were all principals, of course, and bound severally and jointly for the full amount of the paper. But, as among themselves, each was principal to the extent of \$1,000, his share of the joint and several debt and the others were, as to such share, sureties each to the extent of one-third thereof. Therefore, when Carney and Dane, after they and Gaylord B. Clark had each paid their shares, \$1,000 respectively, were coerced further to pay the \$1,000 share of Francis B. Clark, the latter was their principal debtor to the amount of said \$1,000 and Gaylord B. Clark was surety upon Francis B. Clark's indebtedness to Carney and Dane to the extent of \$333.33 1-3. They had a right of action, in other words, against Francis B., as principal, for the sum of \$1,000 and against Gaylord B. for one-third of that sum as surety for Francis B. \* \* They did not, however, prosecute their demand against him to a return of 'no property' or at all; but instead extended two-thirds of the debt for twelve months upon valuable consideration and, in effect, so far as they and he were concerned, released the remaining one-third, intending to look to Gaylord B. for the payment of it; and this suit is by Dane against Gay-

lord B. for the former's moiety of that one-third. \* \* Gaylord B. Clark never assented to \* \* this transaction, but to the contrary, expressly rejected it. Dane and Carney by this arrangement disabled themselves to ever proceed against Francis B. Clark except for that part of his debt evidenced by his notes to them respectively, and as to that part they disabled themselves to go upon him for a year, extending that part of his debt on valuable consideration for that length of time. On all the authorities this release of their demand against the principal, Francis B. Clark, in part, coupled with the extension of time for payment of the residue without the assent of Gaylord B. Clark, the surety to them of Francis B., as to a part of their claim, discharged Gaylord B. from all liability to them whether Francis B. was insolvent or not, and though the former because of the latter's insolvency or for other cause may not in fact have been injured by such release as to a part, and extension of payment as to the rest, of the debt owed by Francis B. Clark to them." Citing *Cox v. Mobile, etc., R. R. Co.*, 37 Ala. 320. *Mobile etc. Ry. Co. v. Brewer*, 76 Ala. 135; *Howle v. Edwards*, 97 Ala. 649, 11 Southern Rep. 748.

<sup>31</sup> *Ide v. Churchill*, 14 Ohio St. 372; *Bank of Albion v. Burns*, 46 N. Y. 170; *Deal v. Cochran*, 66 N.

the effect of discharging the surety must be supported by a sufficient consideration.<sup>32</sup> Otherwise the creditor is not bound

C. 269; *Pipkin v. Bond*, 5 Ired. Eq. (N. C.) 91; *Haynes v. Covington*, 9 Smedes & Mar. (Miss.) 470; *Wadlington v. Gary*, 7 Smedes & Mar. (Miss.) 522; *Miller v. McCann*, 7 Paige, Ch. 451; *Sailly v. Elmore*, 2 Paige, Ch. 497; *Huffman v. Hulbert*, 13 Wend. 375; *Haden v. Brown*, 18 Ala. 641; *King v. State Bank*, 9 Ark. (4 Eng.) 185; *Combe v. Woolf*, 8 Bing. 156; *Id.*, 1 Moore & Scott 241; *Caldwell's Ex'r v. McVickar*, 9 Ark. (4 Eng.) 418; *Heath v. Key*, 1 Younge & Jer. 434; *Ferguson v. State Bank*, 8 Ark. (3 Eng.) 416; *Branch Bank at Mobile v. James*, 9 Ala. 949; *Thomas v. Stetson*, 59 Me. 229; *Calliham v. Tanner*, 3 Rob. (La.) 299; *Edwards v. Coleman*, 6 T. B. Mon. (Ky.) 567; *Fuller v. Milford*, 2 McLean 74; *Apperson v. Cross*, 5 Heisk (Tenn.) 481; *Hill v. Bull*, 1 Gilmer (Va.) 149; *Hunter's Adm'rs v. Jett*, 4 Rand. (Va.) 104; *Kennebec Bank v. Tuckerman*, 5 Greenl. (Me.) 130; *Thomas v. Dow*, 33 Me. 390; *Henderson's Adm'r v. Ardery's Adm'r*, 36 Pa. St. 449; *McGuire v. Wooldridge*, 6 Rob. (La.) 47; *Lewis v. Harbin*, 5 B. Mon. (Ky.) 564; *Sparks v. Hall*, 4 J. J. Marsh. (Ky.) 35; *Farmer's & Traders' Bank v. Lucas*, 26 Ohio St. 385; *Baskin v. Godbe*, 1 Utah 28; *Reid v. Watts*, 4 J. J. Marsh. (Ky.) 440; *Roberts v. Richardson*, 39 Iowa 290; *Dillon v. Russell*, 5 Neb. 484; *Crofts v. Johnson*, 1 Marsh. 59; *Isaac v. Daniel*, 8 Adol. & Ell. (N. S.) 500; *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *Taylor v. Burgess*, 5 Hurl. & Nor. 1; *Allison v. Thomas*, 29 La. Ann. 732; *Todd v. Greenwood School Dist.*, 40 Mich. 294; *Yeary v. Smith*, 45 Tex. 56;

*Thompson v. Bowne*, 39 N. J. Law (10 Vroom) 2; *Stillwell v. Aaron*, 69 Mo. 539; *Insurance Co. v. Hancock*, 83 Mo. 21; *Mobile & Montgomery Ry. Co. v. Brewer*, 76 Ala. 135; *First Nat. Bank v. Pierce*, 99 Ill. 272; *Price v. Dime Savings Bank*, 124 Ill. 317; *Dodgson v. Henderson*, 113 Ill. 360; *Meggett v. Baum*, 57 Miss. 22; *St. Stephens Bank v. Bonness*, 32 New Brunsw. Rep. 486 at 488; *Brannon v. Irons*, 19 Ind. App. 305, 49 N. E. Rep. 469; *Omaha National Bank v. Johnson*, 111 Wisc. 372, 87 N. W. Rep. 237; *Rushton v. Dierks Lumber Co.*, Neb., Mch., 1902, 89 N. W. Rep. 616; *Nelson v. First National Bank Minn.*, 69 Fed. Rep. 798, 16 C. C. A. 425; *Buck v. Bank of Georgia*, 104 Ga. 660, 30 S. E. Rep. 872. But see *David v. Malone*, 48 Ala. 428. An oral agreement for an extension of time which is not binding will not discharge a surety. *Berry v. Pullen*, 69 Me. 101; *Turner v. Williams*, 73 Me. 466. There must be a valid common-law agreement. *Pfeiffer v. Knapp*, 17 Fla. 144. An unexecuted or void agreement to extend is not binding. *Jaffray v. Crane*, 50 Wis. 349. The agreement must be such an one that can be enforced. *Boardman v. Larabee*, 51 Conn. 39. The controlling question is, was the extension of such a character as to bind the creditor and thereby preclude him from pursuing his remedy against the principal? *Byers v. Hussey*, 4 Col. 515; *Grabfelder v. Willis*, 10 Bradw. (Ill. App.) 330; *Continental Life Ins. Co. v. Barber*, 50 Conn. 567.

<sup>32</sup> *Olmstead v. Latimer*, 158 N.



by his agreement and may at any time enforce the collection of the debt, and the surety may at any time pay the debt and proceed against the principal. And the rule is the same if the creditor actually forbears for the length of time which he has agreed without consideration to forbear.<sup>33</sup> It is also well set-

Y. 313, 53 N. E. Rep. 5, reviewing the following cases as to consideration: Kellogg v. Olmstead, 25 N. Y. 189; Lawman v. Yates, 37 N. Y. 601; Parmelee v. Thompson, 45 N. Y. 58; Powers v. Silberstein, 108 N. Y. 169, 15 N. E. Rep. 185; Manchester v. Van Brunt (City Ct. N. Y.), 19 N. Y. Supp. 685, and Babcock v. Kuntzch, 85 Hun N. Y. 615, 32 N. Y. Supp. 663. The agreement to give time to be availed of must be pleaded and proved to have been made for a consideration and the facts showing the consideration must be set up. Smith v. Stubbs, 2 Colo. Decisions 603, 16 Colo. App. 130, 63 Pac. Rep. 955, was an action on a forthcoming bond given by defendant in a replevin suit. The sureties' plea set up that the obligee, without consent of the sureties, by a "valid agreement" with the principal obligor, delayed their suit on the bond and continued their action on the bond "for long and definite periods of time" until the principal obligor who was solvent "for a sufficient time for the recovery of judgment" had become insolvent, and until the property for which the bond was given was wasted and lost. Held, that the plea was bad because it did not aver that any order of court was entered granting such continuances, or that the obligee was not at liberty to push his suit on the bond at any time and did not aver that the agreement for such continuances was

for a valid consideration. "To make the agreement binding upon the plaintiffs," said the court, "it must have been supported by a sufficient consideration; but no consideration whatever is alleged. It is averred that the agreement was valid; but that statement might as well not have been made. It is the statement of an unmixed legal conclusion and must be disregarded. In Winne v. Colorado Springs Co., 3 Colo. 155, the plea of the sureties was that the appellee, without their consent, gave the principal maker of the note further time for its payment for a good and valuable consideration. Chief Justice Thatcher held the plea bad for the reason that the averment of a good and sufficient consideration was simply the statement of a conclusion of law, saying further that the facts should have been disclosed."

<sup>33</sup> Fair v. Pengelly, 34 Up. Can. (Q. B.) 611; Ford v. Beard, 31 Mo. 459; Tucker v. Laing, 2 Kay & Johns. 745; Brinagar's Adm'r v. Phillips, 1 B. Mon. (Ky.) 283; Zane v. Kennedy, 73 Pa. St. 182; Joslyn v. Smith, 13 Vt. 353; McLemore v. Powell, 12 Wheat. 554; Sullivan v. Hugely, 48 Ga. 486; Goodwyn v. Hightower, 30 Ga. 249; De Witt v. Bigelow, 11 Ala. 480; Montgomery v. Dillingham, 3 Smedes & Mar. (Miss.) 647; Draper v. Romeyn, 18 Barb. (N. Y.) 166; Roberts v. Stewart, 31 Miss. 664; McDowell v. Bank of Wilmington & Brandywine, 2 Del. Ch. 1; M. & M. Bank

tled, as a general rule, that the mere passive delay of the creditor in proceeding against the principal, however long continued and however injurious it may be to the surety, will not discharge the surety.<sup>34</sup> In such case the contract is not changed and the surety may at any time pay the debt and proceed against the principal.<sup>35</sup> Such forbearance by the creditor, even if continued until the debt is barred as against the principal by the statute of limitations,<sup>36</sup> or if continued for twenty-four years, does not discharge the surety.<sup>37</sup> The doctrine that an extension of time to the principal without the surety's consent discharges the latter is as applicable to penal bonds<sup>38</sup> and judgments<sup>39</sup> as to any other contract. Where the holder of a note agreed with the maker to extend the time of payment, provided the latter would get a certain person as surety, and such person was procured, it was held that a surety, without whose consent the arrangement was made, was discharged.<sup>40</sup> If, for any reason, the agreement for the extension of time is not binding on the principal and the creditor the surety is not released.<sup>41</sup>

of *Wheeling v. Evans*, 9 W. Va. 373; *Brown v. Kirk*, 20 Mo. App. 524; *Hall v. Capital Bank*, 71 Ga. 715; *Henderson v. Dodgson*, 9 Bradw. (Ill. App.) 80; *Hurd v. Marple*, 2 Bradw. (Ill. App.) 402; *First National Bank v. Lineberger*, 83 N. C. 454; *Byers v. Harris*, 67 Iowa 685. That the surety on a note is not released by mere delay until it is barred by the statute of limitations, there being no agreement for such delay: *Nelson v. First National Bank* (Minn.), 69 Fed. Rep. 798, 16 C. C. A. 425, 32 U. S. App. 554.

<sup>34</sup> But see note 16, § 274. Also § 219.

<sup>35</sup> *Fulton v. Matthews*, 15 Johns. 433; *Belfast Banking Co. v. Stanley*, Irish, 1 Com. Law 693; *Warfield v. Ludewig*, 9 Rob. (La.) 240; *Moore v. Broussard*, 20 Mart. (La.) 8 N. S. 277; *Force v. Craig*, 2 Hals. (N. J.) 272; *Jordan v. Trumbo*, 6 Gill & Johns. (Md.) 103; *United*

*States v. Simpson*, 3 Pen. & Watts (Pa.) 437; *Buchanan v. Bordley*, 4 Harr. & McHen. (Md.) 41; *Cope v. Smith's Ex'rs*, 8 Serg. & Rawle (Pa.) 110; *Butler v. Hamilton*, 2 Des. Eq. (S. C.) 226; *Johnson v. Searcy*, 4 Yerg. (Tenn.) 182; *Creath's Adm'r v. Sims*, 5 How. (U. S.) 192; *Perfect v. Musgrave*, 6 Price 111; *Strong v. Foster*, 17 C. B. (8 J. Scott) 201; *King v. State Bank*, 9 Ark. (4 Eng.) 185; *Humphreys v. Crane*, 5 Cal. 173; *White's Adm'r v. Life Association of America*, 63 Ala. 419.

<sup>36</sup> *Reid v. Flippen*, 47 Ga. 273; *Whiting v. Clark*, 17 Cal. 407.

<sup>37</sup> *Roberts v. Colvin*, 3 Gratt. (Va.) 358; *Hunt v. Bridgham*, 2 Pick. 581.

<sup>38</sup> *Lindeman v. Rosenfield*, 67 Ind. 246.

<sup>39</sup> *Boling v. Young*, 38 Ohio St. 135.

<sup>40</sup> *Williams v. Jensen*, 75 Mo. 681.

<sup>41</sup> In *Woolworth v. Brinker*, 11

**§ 377. Guarantor discharged by time given the principal from liability for future defaults of principal.**—The rule with reference to the discharge of a surety by the giving of time is equally applicable to the guarantor of a debt of another.<sup>42</sup> “That a guarantor and an ordinary surety are alike affected by such extension of the time of payment seems to be required by sound principles of law, and has often been held.”<sup>43</sup> Where a party drew an order on a merchant, directing him to fur-

Ohio St. 593, the creditor before entering judgment against the debtor agreed with the debtor that execution should be stayed for sixty days but no entry of that agreement was made of record. Held, that the surety, who had no knowledge of the agreement, was not released by it because the creditor could have issued execution at any time; the legal effect of the judgment could not be varied by proof outside of the record of facts transpiring prior to its rendition. See, also, *Buffington v. Bronson*, 61 Ohio St. 231, 56 N. E. Rep. 762, in which case it was held, by a divided court, that an entry of record that “by agreement of the parties execution is stayed sixty days,” did not operate to release the sureties on an indemnity bond given to the sureties of a defaulting executor against whom the judgment has been obtained by a beneficiary under the will. The court said that the sureties on the executor’s bond might, notwithstanding the stay, pay the judgment at any time and proceed against the obligors on the indemnity bond or against their principal for reimbursement. *Way v. Hearn*, 106 Eng. Com. Law Rep. (13 C. B., N. S.) 292, was referred to as closely analogous in principle. “There the bank was creditor, Read principal debtor, Way his surety, and Hearn agreed to

pay the surety half of any loss he might sustain in the transaction. After the maturity of the debt, by agreement between the creditor, principal and surety, without Hearn’s knowledge, the time of payment was extended by renewal of the obligation. Way was compelled to pay the debt on maturity of the renewal, and then sued Hearn on his indemnity agreement, for half the amount. Hearn answered that he was released by the extension. The court held that he was not. \* \* \*” Note 45, § 384.

<sup>42</sup> *Campbell v. Baker*, 46 Pa. St. 243; *Fithian v. Corwin*, 17 Ohio St. 118; *Hurd v. Marple*, 10 Bradw. (Ill. App.) 418. Holding that a guarantor is not discharged by time given, unless injured, see *Follmer v. Dale*, 9 Pa. St. 83. In *Chicago Trust & Savings Bank v. Black*, 72 Ill. App. 147, 150, the court said: “It is immaterial whether a guarantor is actually injured by extension of time of payment of a note for the benefit of the maker. The rule as to a guarantor is the same as a surety in this regard.” In that case the payee of a note who had endorsed and guaranteed it was held to have been released by two extensions of 10 days made at the maker’s request without his knowledge or consent.

<sup>43</sup> Per Dewey, J., in *Chase v. Brooks*, 5 Cush. 43.

nish goods out of his store to a third person to a certain amount, engaging to be accountable for such sum, and requesting the amount of the bill to be sent to him, and the merchant furnished goods to such third person to a greater amount, and took his note at thirty days for the debt, it was held that no action accrued under the guaranty. The guaranty was an undertaking to pay for the goods as soon as they were sold, and the giving of time prevented a liability from attaching thereunder.<sup>44</sup> A wrote to B a guaranty for goods to be purchased by C as follows: "We engage to guaranty to you the payment of any goods you may supply \* \* (C) between 2d of April, 1814, and 2d of April, 1815." B supplied C goods on the usual credit, and took commercial paper for them, and when the paper became due took for it new paper of C for extended periods. Held, the guaranty was only intended to cover goods sold on the usual time, and that extending the time discharged A, even if it was to his benefit. The court said: "It cannot be supposed that the plaintiff (A) meant he was to continue liable after the 2d of April, 1815, so long as the defendant (B) might choose to renew the bills of the principal debtor. \* \* The creditor has no right—it is against the faith of his contract—to give time to the principal, even though manifestly for the benefit of the surety, without the consent of the surety."<sup>45</sup> It has been held that an extension of time without the guarantor's consent would not release the guarantor from liability for what had been done before the extension, however it might be as to what was done afterwards." This with reference to a railroad company's guaranty that a construction company building its line would pay for work and materials.<sup>46</sup>

**§ 378. Surety not discharged unless time extended for a definite period.**—In order that an agreement between the creditor and principal extending the time of payment shall have the effect of discharging the surety or guarantor, the extension must be for a definite time. It makes no difference for how short a period the time is extended, but that period must be

<sup>44</sup> Hunt v. Smith, 17 Wend. 179. & W. R. R. Co. v. Burkhard, 36

<sup>45</sup> Samuell v. Howarth, 3 Merivale 272, per Lord Eldon. For a case bearing some resemblance to this one, see Delaware, Lackawanna & O'Brien v. Champlain Construction Co. (C. C., Vt.), 107 Fed. Rep. 338.

fixed, otherwise the hands of the creditor are not tied, and he may proceed at any time.<sup>1</sup> Thus the surety is not discharged by an agreement by the creditor to wait "awhile longer." How long is awhile longer? "It may be a moment, an hour, a day or a year. Who can determine it, and on what evidence can it be determined? \* \* If such a contract were valid in other respects it must be void, because no man can tell from the proof what it is, and it cannot therefore be enforced."<sup>2</sup> So an agreement "to give time for payment beyond the day of maturity of the notes" does not discharge the surety. "Such a stipulation is void for uncertainty; it amounts to nothing more than a general promise of indulgence, and can tie up the hands of no one."<sup>3</sup> But where the holder of a bill after its maturity agreed with the maker to wait till the drawer could be heard from, it was held that the time of indulgence was sufficiently definite to discharge the indorser.<sup>4</sup> It has been held that an agreement to extend the time of payment "to the summer" of a given year means until the 1st day of June of that year," and, "until the fall," means until the 1st day of September, and is sufficiently certain to discharge a surety.<sup>5</sup> But it has also been held that an agreement to extend

<sup>1</sup> *Freeland v. Compton*, 30 Miss. 424; *Menifee v. Clark*, 35 Ind. 304; *Board of Police of Clark Co. v. Covington*, 26 Miss. 470; *Gardner v. Watson*, 13 Ill. 347; *Thornton v. Dabney*, 23 Miss. 559; *Alcock v. Hill*, 4 Leigh (Va.) 622; *McGee v. Metcalf*, 12 Smedes & Mar. (Miss.) 535; *Hayes v. Wells*, 34 Md. 512; *Parnell v. Price*, 3 Rich. Law (S. C.) 121; *Woolfolk v. Plant*, 46 Ga. 422; *Bucklen v. Huff*, 53 Ind. 474; *Cherry v. Miller*, 7 B. J. Lea (Tenn.) 305; *Thompson v. Robinson*, 34 Ark. 44; *King v. Haynes*, 35 Ark. 463; *Brooks v. Allen*, 62 Ind. 401; *Beach v. Zimmerman*, 106 Ind. 495; *Vary v. Norton*, 6 Fed. Rep. 808; *Cates v. Thayer*, 93 Ind. 156; *Winne v. Col. Springs Co.*, 3 Col. 155; *Morgan v. Thompson*, 60 Iowa 280. To a contrary effect, see *Cox v. Mobile & Girard R. R.*

*Co.*, 37 Ala. 320; *Tracy v. Quillen*, 65 Ind. 249; *Miller v. Arnold*, 65 Ind. 488; *Bunn v. Commercial Bank*, 98 Ga. 647, 26 S. E. Rep. 63; *Greenway v. William D. Orthwein Grain Co.*, 85 Fed. Rep. 536, 29 C. C. A. 330, 56 U. S. App. 523.

<sup>2</sup> *Jenkins v. Clarkson*, 7 Ohio 72, per Wood, J.

<sup>3</sup> *Ward v. Wick Bros.*, 17 Ohio St. 159, per Scott, J.

<sup>4</sup> *Rupert v. Grant*, 6 Smedes & Mar. (Miss.) 433. Overruling another point decided in this case, see *Roberts v. Stewart*, 31 Miss. 664. An agreement to extend time of payment of a note past due "for twenty or thirty days" is held to be a good agreement to extend for at least twenty days. *Hamilton v. Prouty*, 50 Wis. 592.

<sup>5</sup> *Abel v. Alexander*, 45 Ind. 523. So an agreement to extend time of

the time of payment till "some time in the summer" is not sufficiently definite.<sup>6</sup> Under certain circumstances a guarantor will be discharged by time given, though no term of credit is stipulated in the guaranty. Thus, the defendant guaranteed the payment for porter to be delivered by the plaintiff to J, but the guaranty contained no stipulation as to the credit to be given. The plaintiff's custom was to give six months' credit, and then, sometimes, to take a bill at two months. The plaintiff sold the porter and waited nine months, and then took a bill at two months for the price, thus giving eleven months' credit. Held, the guarantor was discharged. The court said: "In the present case, though no specific time of payment is fixed by the guaranty, yet it must be implied that the guaranty was given on the supposition that the debtor would not have more than the usual credit."<sup>7</sup>

**§ 379. If surety consent to extension before or at the time it is given he is not discharged thereby.**—The surety who, at the time of or before an extension is granted to the principal, consents to the same is not discharged thereby.<sup>8</sup> The fact

payment "until after threshing" is sufficiently definite to discharge a non-asserting surety. *Moulton v. Posten*, 52 Wis. 169; *Revell v. Thrash*, N. C., June, 1903, 44 S. E. Rep. 596; *Scott v. Fisher*, 110 N. C. 311, 14 S. E. Rep. 799, 28 Am. St. Rep. 688.

<sup>6</sup> *Miller v. Stein*, 2 Pa. St. 286. And an extension until after harvest is held indefinite and uncertain. *Findley v. Hill*, 8 Oreg. 247.

<sup>7</sup> Per *Tindal*, C. J., in *Combe v. Woolf*, 8 Bing. 156; *Id.*, 1 Moore & Scott 241.

<sup>8</sup> *Treat v. Smith*, 54 Me. 112; *Wolf v. Finks*, 1 Pa. St. 435; *Hunter's Adm'r v. Jett*, 4 Rand. (Va.) 104; *Wright v. Storrs*, 6 Bosw. (N. Y.) 600; *Baldwin v. Western Reserve Bank*, 5 Ohio 273; *Osgood v. Miller*, 67 Me. 174; *Hutchinson v. Wright*, 61 N. H. 108. Where the surety stipulates that he shall not be released by an extension of time

he is of course bound by such stipulation. *Mankedick v. Consolidated Coal and Lime Co.*, 25 Ind. App. 135, 57 N. E. Rep. 256; *Greenwood v. Francis*, 1 L. R., Q. B. (1899) 312. In *Ayler v. McMurray*, 7 Ind. App. 645, 34 N. E. Rep. 1004, defendant, indorsing a non-negotiable note payable to the order of plaintiff, in terms waived "all defenses on the ground of any extension of time of its payment that may be given by the holder or holders." Time was extended twice. Held, that the language quoted did not prevent the second extension from operating to release defendant. The court said that the term "any extension" is used in the singular sense. It was not intended for an indefinite number of extensions. Citing to this point: *Rochester Savings Bank v. Chick*, 64 N. H. 410, 13 Atl. Rep. 872; *Rogers v. Warner*, 8 Johns. 92;



that a surety has consented to one extension will not authorize any other extension. He has a right to stand upon the terms of his contract as altered by his consent, and any other extension will discharge him the same as if he had never consented to any.<sup>9</sup> But where a surety in a replevin bond wrote to the plaintiff, giving his consent to a stay of execution till April 1st, following, and longer if the principal asked it, and the principal continued from time to time to ask and receive indulgence from April 1, 1860, to May, 1864, when execution was

*White v. Reed*, 15 Conn. 457; *Schwartz v. Hyman*, 187 N. Y. 562, 14 N. E. Rep. 447. When the word "any" is used in a plural sense a different rule applies, as in *Heaton v. Wright*, 10 How. Pr. 79 at 83; *Livermore v. Swasey*, 7 Mass. 213, 227; *Tillon v. Britton*, 9 N. J. Law. 120, 128. To the same effect as *Oyler v. McMurray*, supra, see *Hodge v. Farmers' Bank*, 7 Ind. App. 94, 34 N. E. Rep. 123. In *Board of Trustees v. King*, 85 Ill. App. 220, the sureties on a note stipulated that "no extension of time of payment, with or without knowledge, by the receipt of interest or otherwise, shall release" them. After the statute of limitations had run the surety was sued on the note. And the holder replied to the surety's plea of the statute that the note had been extended but no extension was shown to have been made for a valuable consideration. Held, that the surety was not liable. The only kind of extension that he had consented to was one that was binding on the parties thereto. See, also, *McGavock v. Omaha National Bank*, Neb., Apl., 1902, 90 N. W. Rep. 230. In *Winnebago County State Bank v. Hustel*, Iowa, Jany., 1903, 93 N. W. Rep. 70, a note signed by defendant as surety contained a stipulation that "the

drawers and indorsers severally waive \* \* all defenses on the ground of any extension of the time of payment that may be given by the holder or holders to them or either of them." Held, that the word drawer meant maker and that defendant waived any number of extensions that might be made; distinguishing *Rochester Savings Bank v. Chick*, 64 N. H. 410, 13 Atl. Rep. 872, where it was held that only one extension was waived by a stipulation that "all the signers agree to be holden should the time of payment be extended." In *Benneson v. Savage*, 130 Ill. 352, 22 N. E. Rep. 838, it was held that the extension of mortgage notes did not have the effect of releasing the mortgaged property of a third party, by which they were secured, since the mortgage contained a provision that such extension might be made. A stipulation that giving time shall not release the surety does not bar the running of the statute of limitations as to the surety: *Rochester Savings Bank v. Chick*, 64 N. H. 410, 13 Atl. Rep. 872; *Oyler v. McMurray*, 7 Ind. App. 645, 34 N. E. Rep. 1004, supra.

<sup>9</sup> *Lime Rock Bank v. Mallett*, 34 Me. 547; *Merrimack County Bank v. Brown*, 12 N. H. 320; *Gray's Ex'rs v. Brown*, 22 Ala. 262.



issued, which was enjoined by the surety, it was held that the letter of the surety authorized the extensions, and the surety was not discharged.<sup>10</sup> If the surety knows of the extension at the time it is given, it is not necessary that he should object thereto in order to entitle him to his discharge.<sup>11</sup> And even if he signs the agreement for extension as a witness, that fact will not prevent his discharge by such extension.<sup>12</sup> The court said that if his intention had been to consent to the extension, he would have signed it as a maker and not as witness. The fact that he signed as a witness went to show that it was thought he was a disinterested party. If he is bound at all, his "concurrence must bind him by the terms of the new (contract). It is not enough to bind him that he is informed and is passive; he is not required to object or protest; he must actively concur and consent to be bound by the terms of the new agreement." The assent of a surety to an extension of time may be proved, like other facts, by circumstantial evidence, and it has been held that a "regular usage of a bank to receive payment by instalments, or checks at sixty or ninety days, or whatever length of time such regular rule prescribes, with interest on the balance in advance, furnishes presumptive evidence of the assent of those who become parties to notes payable to the bank that the payment may be delayed and received in instalments according to such usage until the contrary is shown." But the usage must be so general and uniform as to be presumptively known to those who deal with the bank.<sup>13</sup> Where from the circum-

<sup>10</sup> *Furber v. Bassett*, 2 Duvall (Ky.) 433.

<sup>11</sup> *Stewart v. Parker*, 55 Ga. 656; *Ex'rs of Riggins v. Brown*, 12 Ga. 271. Though see *Lambert v. Shetler*, 71 Iowa 463, where it was held that mere knowledge of an extension was not equivalent to a consent.

<sup>12</sup> *Edwards v. Coleman*, 6 T. B. Mon. (Ky.) 567, per Bibb, C.

<sup>13</sup> Per *Parker, C. J.*, in *Crosby v. Wyatt*, 10 N. H. 318. To the same effect, where the surety had been a director, and known the usage of the bank, see *Stafford Bank v.*

*Crosby*, 8 Greenl. (Me.) 191. The maker of a note is competent to testify as to talk with deceased payee as to extension of time in a suit in equity by the surety to enjoin the legal holder from proceeding against the surety. Equity takes jurisdiction because the surety is deprived of a defense at law: *English v. Landon*, 181 Ill. 314, 618, following *Dodgson v. Henderson*, 113 Ill. 360, and *Bradshaw v. Combs*, 102 Ill. 428. That the surety's consent may be given by his authorized agent, see, *First National Bank of Monmouth v. Whit-*

stances of the case there is no probability that the surety knew of the usage, the court held that he was not bound by it and was discharged by time given the principal.<sup>14</sup> If one of two sureties consent to the giving of time and the other does not, the latter is discharged and the former cannot recover contribution from him.<sup>15</sup> Where the indorser of a note due April 2d had been duly notified of the default of the principal, and afterwards agreed in writing on the back of the note to be holden as indorser until April 5th, it was held that the second indorsement did not discharge the liability under the first, and that the indorser was liable on both indorsements.<sup>16</sup> If the principal obtains from the creditor an extension of time upon the false representation that the surety has authorized him to do so, and the surety afterwards refuses to consent to such extension, it has been held that the creditor may repudiate the agreement, in which case the surety will not be discharged unless the creditor proceeds to act under the agreement after notice that the surety had not assented thereto.<sup>17</sup>

**§ 380. Same continued.**—Where a debtor wrote to his guarantor that if he would make a payment on the debt the creditor would extend the time of payment, and the guarantor did so and the time was extended, it was held that he could not set up as a defense that the extension was without his consent.<sup>18</sup> A stipulation in a promissory note that “all the signers agree to be holden should the time of payment be extended”

man, 66 Ill. 331. That it may be shown by circumstances, see *Johnson v. Paltzer*, 100 Ill. App. 171. In *Williams v. Gooch*, 73 Ill. App. 557, the payee of a note sued the maker and was asked by the surety on the note to discontinue the suit. Whereupon he dismissed the suit and, without the sureties' knowledge or consent, extended the time until June 1st next. Held, that the surety was not released by such extension. “The rule of law,” said the court, “which relieves from liability a surety on a promissory note where an extension of time for payment has been granted

the principal was destined to protect a surety ignorant and innocent of any purpose to extend his liability beyond the time fixed in the note. It was never intended to relieve from liability a surety who had induced the extension or had connived at it, and such seems to have been the attitude of appellant.”

<sup>14</sup> *New Hampshire Savings Bank v. Ela.*, 11 N. H. 335.

<sup>15</sup> *Crosby v. Wyatt*, 10 N. H. 318.

<sup>16</sup> *Smith v. Hawkins*, 6 Conn. 444.

<sup>17</sup> *Bangs v. Strong*, 10 Paige, Ch. 11.

<sup>18</sup> *Briggs v. Norris*, 67 Mich. 325.

is held not to bind a surety to an indefinite extension.<sup>19</sup> Where a surety to a note agreed to the following clause contained therein, "and it is understood that the liability of neither of us is to be affected by further time being given for payment," it was held that the sureties' right to a release by reason of an extension was waived.<sup>20</sup> Where contractors for the construction of a road-bed for a railroad company asked for an extension of time for completing the road, and the company granted such extension upon condition that the guarantors for the payment of monthly estimates of the cost of the road consent thereto, and they do so assent, it was held that they would not thereby be discharged from their liability for the payment of such monthly estimates.<sup>21</sup> Where a surety to a note, at the time he became such, had knowledge of an agreement for an extension of time to be accorded, he will be held liable thereon, although he may not know of the terms of the agreement.<sup>22</sup> A surety agreed that if the principal would secure the creditor a portion of the debt within ten days the creditor might look to him for the remainder and discharge the principal from the debt. The principal assented thereto but failed to give the securities within the ten days. Held, that time was of the essence of the contract and the surety was discharged.<sup>23</sup> It may be shown that the surety was insane at the time he is alleged to have consented to an extension of time.<sup>24</sup>

**§ 381. When surety not discharged if he promise to pay the debt after time is given.**—If after time has been given the principal, such as would entitle the surety to his discharge,

<sup>19</sup> Rochester Savings Bank v. Chick, 64 N. H. 410.

<sup>20</sup> Miller v. Spain, 41 Ohio St. 773.

<sup>21</sup> Rutherford v. Brachman, 40 Ohio St. 604.

<sup>22</sup> McHard v. Ives, 5 Bradw. (Ill. App.) 400.

<sup>23</sup> Cartenel v. Newton, 79 Ind. 1.

<sup>24</sup> In Gaar, Scott & Co. v. Hulse, 90 Ill. App. 548, the court said, p. 550: "The only defense was mental incapacity in Myron N. Hulse when he signed said note of June 13, 1896, as surety for Charles B.

Hulse and J. W. Stoughton. The new note so signed extended the time of payment of the debt for which the three notes were given from June 13, 1896, when they were due, to May 1, 1898, when the new note became due. This extension of payment released the surety on the three notes, unless assented to by him. If he was incapable of transacting business, as claimed by the defense, he was incapable of assenting to this extension of payment." The surety was therefore held released.

the surety, with a full knowledge of the facts, but without any new consideration, promise to pay the debt, he will remain liable therefor.<sup>25</sup> The action in such case is upon the original obligation, and not upon the new promise. "The promise is valid, not as the constitution of a new but the revival of an old debt."<sup>26</sup> It has been said that "the right of discharge in such case from the mere fact of the extension of time is a personal privilege of the surety, which he may waive, and he does so emphatically, if, with knowledge of the fact, he notwithstanding renews his promise."<sup>27</sup> If the surety does not know that time has been given, and makes a new promise without consideration to pay the debt, he is not bound thereby, and he will be discharged, notwithstanding such promise.<sup>28</sup> But if a surety has been discharged by the giving of time, and afterwards, without a knowledge of the facts, but on a new and independent consideration, agrees to remain bound, he will be held. "It is not like a case of a new promise or acknowledgment of liability, without any consideration. \* \* Before he enters into a new agreement upon a new consideration, he should inquire, at the peril of being held thereby to

<sup>25</sup> In *Bishop v. Eaton*, 161 Mass. 496, 37 N. E. Rep. 665, the court said that the guarantor was discharged from liability by an extension of time, "unless he subsequently assented to the extension and ratified it." Citing: *Chace v. Brooks*, 5 Cush. 43; *Carkin v. Savory*, 14 Gray 528.

<sup>26</sup> *Smith v. Winter*, 4 Mees. & Wels. 454; *Porter v. Hodenpuyl*, 9 Mich. 11; *Ellis v. Bibb*, 2 Stew. (Ala.) 63; *First National Bank of Monmouth v. Whitman*, 66 Ill. 331; *Bramble v. Ward*, 40 Ohio St. 267; *Rockville Nat. Bank v. Holt*, 58 Conn. 526; *Williams v. Boyd*, 75 Ind. 286. Contra, *Walters v. Swallow*, 6 Whart. (Pa.) 446. And see *Warren v. Fant's Trustee*, 79 Ky. 1, wherein it was held that where a surety had been discharged from liability by the alteration of the obligation, a subsequent promise by

him to pay was not binding unless made upon a new consideration.

<sup>27</sup> Per Parker, C. J., in *Fowler v. Brooks*, 13 N. H. 240; *Rindskopf v. Doman*, 28 Ohio St. 516.

<sup>28</sup> *Merrimack County Bank v. Brown*, 12 N. H. 320; *Montgomery v. Hamilton*, 43 Ind. 451; *Kerr v. Cameron*, 19 Up. Can. (Q. B.) 366.

A promise to pay a note by a surety who has no knowledge of extensions, whereby he is discharged from liability, is without consideration and unenforceable. *Rochester Savings Bank v. Chick*, 64 N. H. 410. So admissions by a surety of his liability upon a note, made in ignorance of the fact that the holder had granted an extension of the time of payment, cannot estop him from asserting his release by reason of such extension. *Fay v. Tower*, 58 Wis. 288.

have waived his right, to insist upon the discharge if he neglects the inquiry.”<sup>29</sup> Where a surety on a bond gave a creditor an agreement “to take, no advantage of any indulgence which \* \* (the creditor) may have given heretofore, or may hereafter give to \* \* (the principal) on said bond,” it was held that such agreement was a waiver of a defense on account of time given on a valuable consideration, as well as on account of time given without consideration.<sup>30</sup> It has been held that the consent of a surety to a prolongation of time given to the principal will not be inferred from the fact that the surety told the creditor, when called upon for payment, that she could not pay it then, but that she would agree to any arrangement for her made by the principal, unless it be proved that the principal, in making the agreement for extension, acted as the agent of the surety.<sup>31</sup> It has been said that “the fact that the surety takes security from the principal to indemnify him against his liability \* \* (for the debt), without any communication with the creditor, is not a renewal of his promise. It is perfectly consistent with a determination to avail himself of his right to a discharge. It may well be but a wise precaution against the contingency that he may not be able to substantiate his claim to be exonerated from the payment of the debt.”<sup>32</sup>

**§ 382. Surety discharged by valid agreement to give time, even though remedy of creditor not suspended thereby.**—An agreement upon valid consideration by a creditor not to sue the principal for a stated time discharges the surety, even though such agreement cannot be specifically enforced. With reference to this it has been said: “It must be admitted that a valid agreement not to sue for a debt for a limited time cannot be pleaded in bar of an action brought for the debt within the time. \* \* But still the law is well settled that such an agreement by a creditor with his principal debtor discharges the surety. It is said that such agreement ties up the hands of the creditor, because, if he breaks it, he may be sued

<sup>29</sup> New Hampshire Savings Bank v. Colcord, 15 N. H. 119.

<sup>31</sup> Denil v. Martel, 10 La. Ann. 643.

<sup>30</sup> Crutcher v. Trabue, 5 Dana (Ky.) 80.

<sup>32</sup> Per Parker, C. J., in Fowler v. Brooks, 13 N. H. 240.

for damages.”<sup>33</sup> It has also been said that: “It is sufficient if the contract between the creditor and the principal for the extension of time be such as to give the principal a legal remedy upon it. The doctrine, which is derived from chancery, is founded on the obligation which the contract for delay imposes upon the conscience of the creditor to perform it.”<sup>34</sup> If the holder of a note payable on demand makes a valid agreement with the principal to receive payments by yearly instalments, he thereby discharges the surety. In such a case it was argued that the note might be sued, notwithstanding the agreement, and the only remedy of the principal would be a suit for damages for the breach of the agreement. But the court said: “That argument ought not to prevail, for it would be founded upon a presumption of the creditors’ own wrong. It is not to be presumed that the agreement will be violated on the part of the creditors.”<sup>35</sup>

**§ 383. Surety who is fully indemnified is not discharged by the giving of time.**—If the surety is fully indemnified by property of the principal placed in his hands or mortgaged to him for that purpose, he is not discharged from liability by an extension afterwards granted to the principal.<sup>36</sup> In one case this was put upon the ground that the surety, under such circumstances, became the principal when he received the indemnity.<sup>37</sup> In another case it was said that: “The taking by the sureties of a deed of trust or mortgage from the principal debtor, to secure them against liability, and ample for that

<sup>33</sup> Per Blackford, J., in *Harbert v. Dumont*, 3 Ind. 346. To same effect, see *Greely v. Dow*, 2 Met. (Mass.) 176; *Dickerson v. Comm’rs Ripley Co.*, 6 Ind. 128. But see cases cited in note 14, § 376, *supra*. Payment of interest already due does not constitute consideration. *Heenan v. Howard*, 81 Ill. App. 629. Likewise promise to pay interest which promisor is already bound to pay: *Hatum v. Morgan*, 108 Ga. 336, 33 S. E. Rep. 940. See also, *Voris v. Shotts*, 20 Ind. App. 220, 50 N. E. Rep. 484; *Lake v. Thomas*, 84 Md. 608, 36 Atl. Rep. 437; *Orson v. Chism*, 21 Ind. App.

40, 51 N. E. Rep. 373; *Howle v. Edwards*, 97 Ala. 649, 655, 11 So. Rep. 748, following *Cox v. Mo. & Girard R. R. Co.*, 37 Ala. 320.

<sup>34</sup> Per Hall, J., in *Austin v. Dorwin*, 21 Vt. 38.

<sup>35</sup> *Gifford v. Allen*, 3 Met. (Mass.) 255, per Putnam, J.

<sup>36</sup> *Kleinhaus v. Generous*, 25 Ohio St. 667. But if a mortgage given to indemnify the surety proves worthless he is discharged by the giving of time. *Fay v. Tower*, 58 Wis. 286; *Jones v. Ward*, 71 Wis. 152.

<sup>37</sup> *Smith v. Steele*, 25 Vt. 427.

purpose, is in effect an appropriation by them of that portion of the effects of the principal to the payment of this debt.<sup>38</sup> But where a surety, after his release, by an extension of time given the principal, received from the principal an indemnity against liability, without the knowledge of the creditor, and subsequently surrendered the same to the principal, it was held that he might still avail himself of his release by the time given. The court said that taking the indemnity did not amount to a new promise but was a precaution against the contingency that he might not be able to substantiate his defense.<sup>39</sup> W signed a note with, and as surety for, two others, and received from the payee the money for which the note was given, and retained it until one of the principals gave him a note against a third person for his indemnity and he then paid the money over to the principals. Afterwards the time of payment of the note signed by W as surety was extended. Held, that neither the circumstance of his receiving the money, nor his holding the indemnifying note, precluded him from availing himself of the extension of time as a discharge. The court said that while he held the money he could not claim the privileges of a surety, but when he paid it over it was the same as if he had never held it.<sup>40</sup>

**§ 384. How liability of principal affected by time given a surety, and of surety by time given another surety.**—An agreement between the creditor and principal that the surety shall not be sued before a certain time after the debt becomes due does not entitle the surety to his discharge. It does not prevent the creditor from suing the principal, nor the surety from paying the debt and proceeding against the principal.<sup>41</sup> Where a surety gave the creditor his individual notes, under an agreement between them, which was known to the principal, that those notes, when paid, should be in full satisfaction of the original contract, and part only of the notes were paid, it was held that this did not discharge the principal, who might be sued on the original contract, and held for so much as the surety had not paid. The court said that giving time to surety

<sup>38</sup> Per Ormond, J., in *Chilton v. Robbins*, 4 Ala. 223.

<sup>39</sup> *Rittenhouse v. Kemp*, 37 Ind. 258.

<sup>40</sup> *Wilson v. Wheeler*, 29 Vt. 484.

<sup>41</sup> *Armstead v. Thomas*, 9 Ala. 586; *Wilson v. Bank of Orleans*, 9 Ala. 847.



or making a new contract with him did not discharge the principal.<sup>42</sup> Where the creditor gave time to one of two solidary co-sureties, it was held that the surety to whom time had not been given was discharged from one-half the debt. The court said that the surety to whom time had not been given would, upon paying the debt, have been entitled to subrogation to the creditor's right of action against the surety to whom time had been given; and as he was deprived of this right by the giving of time he was discharged to the extent of one-half the debt.<sup>43</sup> A, B and C were the makers of a note which A assumed to pay, and D became responsible to B and C that A would do so. E guarantied that D would perform his contract. The holder of the note granted D an extension for one year. Held, E was not discharged. The court said the giving of time did not release B and C, and D was bound to indemnify them, and had not done so, and therefore E was liable for this default of D.<sup>44</sup> In another case, A, at the request of B, and on his promise that he would share any loss or liability he might thereby incur, accepted a bill at three months for the accommodation of C. At the maturity of the bill, C being unable to meet it, it was agreed between the holders and A and C, but without the knowledge of B, that another bill should be drawn for the amount, as a substitute for the former acceptance, and this was done. A having been obliged to pay the second bill, sued B for indemnity, and it was held that his liability on his undertaking to indemnify A was not discharged by the renewal of the bill.<sup>45</sup> A binding stipulation between the parties to an appealed suit to postpone the time of trial may release the surety on the appeal bond, if he does not consent thereto. In one case A had entered into a contract with B for the sale of land to B and had declared the contract forfeited and brought suit before a justice of the peace for possession. B appealed from the judgment of the justice, and when the case was reached for trial, A, for a money consideration paid by B, agreed on four occasions to postpone the trial.

<sup>42</sup> *Emery v. Richardson*, 61 Me. 99. To similar effect, see *Whiting v. Western Stage Co.*, 20 Iowa 554.

<sup>43</sup> *Gosserand v. Lacour*, 8 La. Ann. 75. Contra, see *Draper v. Weld*, 13 Grav. 580.

<sup>44</sup> *Kennedy v. Goss*, 38 N. Y. 330.

<sup>45</sup> *Way v. Hearn*, 11 J. Scott (N. S.) 774; *Id.*, 13 J. Scott (N. S.) 292, and 103 Eng. Com. Law Rep. 774, per Erle, J., in which case it was held that one who has agreed

It was held that the sureties were thereby released.<sup>46</sup> But not every stipulation involving delay, in the ordinary conduct of a case, has the effect of releasing the sureties on the appeal bond.<sup>47</sup>

**§ 385. Agreement to give time need not be express, nor proved by direct evidence—Special instances of what amounts to giving time.**—The agreement by a creditor to give time to the principal need not be in express words in order to discharge the surety. It is sufficient, in that regard, if a mutual understanding and intention to that effect are proved.<sup>1</sup> If the parties act upon the terms of an implied agreement to that effect, it will be sufficient.<sup>2</sup> The holder of a note made upon it several successive indorsements of the words, "Received, Renewed." To each of these indorsements a date, subsequent to the maturity of the note, was affixed. Held, that each of the indorsements was equivalent to the words "received the interest for a renewal," and that the word "renewed" might be properly regarded as an agreement to consider the note to be the same as if made in the same terms anew from that date.<sup>3</sup> The following indorsement, made by the holder of a note, due

to indemnify the surety on a bond is not discharged by an agreement without his knowledge or consent between the principal on the bond and the obligee extending the time within which the principal may perform his obligation. The reason given is that such an extension is manifestly for the benefit of the indemnitor for it gives the principal a chance of meeting the claim and so exonerating both the surety and the indemnitor from responsibility in respect of it. Cited and followed in *Buffington v. Bronson*, 61 Ohio St. 231, 56 N. E. Rep. 762.

<sup>46</sup> *Walker v. Archer*, 128 Mich. 603, 87 N. W. Rep. 754. In *Ducker v. Rapp*, 67 N. Y. 464, the guarantor of a lease was held to be released by a stipulation entered of record staying execution of judgments that had been entered up against the tenant for instalments

of rent to a day certain in the future.

<sup>47</sup> *Dudley v. Conely*, 125 Mich. 300, 84 N. W. Rep. 286.

<sup>1</sup> *Brooks v. Wright*, 13 Allen 72; *Lambert v. Shitler*, 62 Iowa 72; *Revell v. Thrash*, N. C., June, 1903, 44 S. E. Rep. 596; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. Rep. 989; *Chemical Co. v. Pegram*, 112 N. C. 614, 17 S. E. Rep. 298.

<sup>2</sup> *Union Bank v. McClung*, 9 Humph. (Tenn.) 98. And to like effect, see *Osborn v. Low*, 40 Ohio St. 347. Also, as to what amounts to a giving of time, see *Ducker v. Rapp*, 67 N. Y. 464.

<sup>3</sup> *Lime Rock Bank v. Mallett*, 34 Me. 547; *Lime Rock Bank v. Mallet*, 42 Me. 349. The taking of a renewal note and receiving interest upon it from its date to its maturity is, unless rebutted, held to be conclusive evidence of a con-

July 5, 1852, viz.: "Six months further time is given on the within note, and interest paid to January 3, 1853," is sufficient evidence of a contract between the holder and the principal for a delay in the payment of the note, and that a prepayment of interest was the consideration therefor.<sup>4</sup> Where the principal in a note requests an extension of time by a letter, accompanied by an inclosure of a sum of money as a consideration for the extension, which extension is not agreed to by the creditor, though he keeps the money and applies it on the debt without notifying the principal that he will not give the time, these facts do not alone establish a giving of time and release the surety, where there are other facts which show that time was not given.<sup>5</sup> The principal in a note, before its maturity, sent the holder a letter containing a draft, and stating that he hoped to be able to pay the note soon, in which case the amount of the draft was to be applied in part payment, but that if he could not do so the holder should take that sum as interest in advance for three months after the maturity of the note. The holder made no reply to this letter, but procured the draft to be cashed, and held the proceeds without making any application thereof upon the note till the expiration of three months after the maturity of the note, when he indorsed it as three months' interest thereon. Held, these facts did not import a binding contract for extension of the time of payment of the note and the surety was not discharged.<sup>6</sup> A contract to stay execution is held not such an agreement to give time for the payment of a judgment as will discharge a surety's undertaking given to prevent the levy of an attachment.<sup>7</sup> Proof that, after the maturity of a note, the maker paid interest in advance to the holder for a definite time, was held not to establish a binding agreement for the extension of the time of payment of such note.<sup>8</sup> A stipulation between the

tract for extension of the original note and will discharge a surety therein. *First Nat. Bank v. Leavitt*, 65 Mo. 562.

<sup>4</sup> *Dubuisson v. Folkes*, 30 Miss. 432.

<sup>5</sup> *Garton v. Union City Bank*, 34 Mich. 279.

<sup>6</sup> *Bank of Middlebury v.ingham*, 33 Vt. 621; *Parker v. Taylor*,

Neb., July, 1902, 91 N. W. Rep. 537.

<sup>7</sup> *Duer v. Morrill*, 20 Bradw. (Ill. App.) 355.

<sup>8</sup> *Citizens' Bank of Bowling Green v. Moorman*, 38 Mo. App. 484. But the taking of interest in advance, coupled with other acts, declarations and circumstances which tend to show an understanding that the

creditor and principal debtor that the latter might redeem certain property within a certain time was held not a contract for an extension of time, but merely an agreement for the privilege of redemption.<sup>9</sup>

**§ 386. When surety discharged by payment of interest in advance.**—The payment of legal interest on a debt in advance is a sufficient consideration to support an agreement for an extension of the time of payment thereof.<sup>10</sup> The decided

creditor would not sue the debtor until the expiration of the time to which advance interest had been paid, was held properly submitted to the jury upon the issue as to whether the surety was discharged. *Russell v. Brown*, 21 Mo. App. 51.

<sup>9</sup> *Marshall v. Dixon*, 82 Ga. 435.

<sup>10</sup> *Rose v. Williams*, 5 Kan. 483; *Christner v. Brown*, 16 Iowa 130; *People's Bank v. Pearsons*, 30 Vt. 711; *Warner v. Campbell*, 26 Ill. 282; *Lime Rock Bank v. Mallett*, 34 Me. 547; *Flynn v. Mudd*, 27 Ill. 323; *Dubuisson v. Folkes*, 30 Miss. 432; *Wright v. Bartlett*, 43 N. H. 548; *Merchants' Ins. Co. v. Hauck*, 83 Mo. 21; *Maher v. Lanfrom*, 86 Ill. 513; *Hubbard v. Ogden*, 22 Kan. 363; *Kaler v. Hise*, 79 Ind. 301; *St. Joseph F. & M. Ins. Co. v. Hauck*, 71 Mo. 465; *Tanner v. Gude*, 100 Ga. 157, 27 S. E. Rep. 938. In *Scott v. Scruggs*, 60 Fed. Rep. 721, 9 C. C. A. 246, 23 U. S. App. 280, the holder of a note did not know that one of the two makers thereof was a mere surety until after the expiration of the period to which it had been extended with the surety's consent; and then without the knowledge or consent of the surety extended it six months longer in consideration of six months' interest paid in advance. Held, reversing the circuit court, that the surety was thereby discharged. Quoting Mr. Justice

Gray in *Union Mutual Life Insurance Co. v. Hanford*, 143 U. S. 187, 191, 12 Sup. Ct. Rep. 437, 36 L. Ed. 118, the court said: "The rule [that giving time to the principal discharges the surety] applies whenever the creditor gives time to the principal, knowing of the relation of principal and surety, although he did not know of that relation at the time of the original contract (*Edwin v. Lancaster*, 6 Best & S. 571; *Corporation v. Oravend*, 7 Ch. App. 142, and L. R. F. H. L. 348; *Wheat v. Kendall*, 6 N. H. 504; *Guild v. Butler*, 127 Mass. 386), or even if that relation has been created since that time (*Oakley v. Pasheller*, 4 Clark & F. 207, 233, 10 Bligh. N. S. 548, 590; *Colgrove v. Tallman*, 67 N. Y. 95; *Smith v. Sheldon*, 35 Mich. 42).'" In *Beardsley v. Hawes*, 71 Conn. 40, 40 Atl. Rep. 1043, defendants guaranteed the payment of a note dated Jany. 6, 1896, for \$2,000, payable on demand \* \* \* with interest payable semi-annually in advance on the 1st day of July and January in each year at the rate of six per cent per annum.'" A statute of that state makes a note payable on demand due four months after its date. Held, that the payee in order to charge the guarantors was not bound to demand payment at the end of four months and that the acceptance of interest in ad-

weight of authority, and it seems the better reason, is that the payment in advance of interest on the debt by the principal to the creditor is of itself without more sufficient prima facie evidence of an agreement to extend the time of payment for the period for which the interest is paid, and works the discharge of the surety.<sup>11</sup> With reference to this matter it has

vance was not an alteration of the contract by which the guarantors were discharged. In *Knight v. Hawkins*, 93 Ga. 707 at 711, 20 S. E. Rep. 266, it was held that an extension of time given by the creditor to the principal, upon his paying usurious interest in advance, discharged the surety. Citing and following *Scott v. Saffold*, 37 Ga. 384, and *Randolph v. Fleming*, 59 Ga. 776, in which case after the note became due interest was accepted by the payee from the makers for a short period in advance. It was held that in the absence of any express stipulation a contract for indulgence arose by implication and the indorser was thus discharged. *English v. Landon*, 181 Ill. 614, 54 N. E. Rep. 911, was a bill by sureties on a note, the payee of which was dead, to restrain collection thereof from them on the ground that they had been discharged by the payee's extending the time without their consent. The maker testified that the payee extended the time from year to year upon the maker's paying the interest and said: "I think every time I paid Cooper (the payee) himself, I paid the interest before it was due." It was held, reversing *Landon v. English*, 75 Ill. App. 483, that the maker's evidence did not show such an extension as would release the sureties. "It does not appear," said the court (p. 621), "there was ever a payment of in-

terest in advance made as a consideration for the extension of time to a specified date, nor is there any evidence showing the principal debtor at any time bound himself to keep the money and pay interest for a specified time." To like effect see *Hughes v. Southern Warehouse Co.*, 94 Ala. 613, 10 So. Rep. 133.

<sup>11</sup> *Woodburn v. Carter*, 50 Ind. 376; *Preston v. Henning*, 6 Bush (Ky.) 556; *Warner v. Campbell*, 26 Ill. 282; *People's Bank v. Pearsons*, 30 Vt. 711; *Crosby v. Wyatt*, 10 N. H. 318; *Hamilton v. Winterrowd*, 43 Ind. 393; *New Hampshire Savings Bank v. Ela*, 11 N. H. 335; *Jarvis v. Hyatt*, 43 Ind. 163; *Union Bank v. McClung*, 9 Humph. (Tenn.) 98; *Wakefield Bank v. Truesdell*, 55 Barb. (N. Y.) 602; *Starret v. Burkhalter*, 86 Ind. 439. Contra, see *Freeman's Bank v. Rollins*, 13 Me. 202, overruling *Kennebec Bank v. Tuckerman*, 5 Greenl. (Me.) 130; *Mariner's Bank v. Abbott*, 28 Me. 280; *Hosea v. Rowley*, 57 Mo. 357; *Coster v. Mesner*, 58 Mo. 549; *Agricultural Bank v. Bishop*, 6 Gray 317; *Oxford Bank v. Lewis*, 8 Pick. 458; *Blackstone Bank v. Hill*, 10 Pick. 129; *Haydenville Savings Bank v. Parsons*, 138 Mass. 53; *Williams v. Smith*, 48 Me. 135; *Crosby v. Wyatt*, 23 Me. 156. For special case on this subject, see *Tansberger's Adm'r v. Kinney*, 13 Gratt. (Va.) 511; *Schieber v. Traudt*, 19 Ind. App. 349, 49 N. E. Rep. 605.

been said that "the very idea of payment of interest in advance presupposes that delay of the payment of the principal is to be given for that time. The payment of the interest is the consideration for an agreement implied from the transaction itself, if not distinctly expressed, to give time on the principal. The general rule is that the reception of interest in advance upon a note is *prima facie* evidence of a binding contract to forbear and delay the time of payment, and no suit can be maintained against the maker during the period for which the interest has been paid, unless the right to sue be reserved by the agreement of the parties. The payment of the interest in advance is not of itself a contract to delay, but is evidence of such contract, and while this evidence may be rebutted, yet in the absence of any rebutting evidence it becomes conclusive."<sup>12</sup> Where a bond creditor, by agreement with the principal, received interest in advance on the bond, it was held that equity would restrain an action on the bond during the period for which interest was paid, and would discharge the surety. The court said: "If in such a case the time for payment of the interest could be explained consistently with the action, that would alter the case; but if it appeared simply that the six months' interest had been given, what could the imagination suggest but a contract *ipsissimis verbis* that the creditor should not sue for that time. Besides, the interest being paid, would a court of equity endure that the creditor should put that interest into his pocket and the next day sue for the principal?"<sup>13</sup> Where the fact of payment of interest in advance, and an agreement to extend the time of payment, are indorsed on the back of a note, but it does not appear by whom the interest was paid, this is not sufficient evidence to discharge the surety, for the interest may have been paid by him.<sup>14</sup> A indorsed a note for the accommodation of a prior indorser, B. When the note became due, C, the holder, called on B, who asked for time, and gave

<sup>12</sup> *Scott v. Saffold*, 37 Ga. 384; *Revell v. Thrash*, N. C., June, 1903, 44 S. E. Rep. 596; *Sutton v. Walters*, 118 N. C. 495, 24 S. E. Rep. 357; *Hollingsworth v. Tomlinson*, 108 N. C. 245, 12 S. E. Rep. 989; *Shepherd, J.*

<sup>13</sup> *Blake v. White*, 1 *Younge & Coll. (Exch.)* 420. And see, also, to like effect, *Gardner v. Gardner*, 23 S. C. 588.

<sup>14</sup> *Cheek v. Glass*, 3 Ind. 286.



his note to C for the legal interest on the note for thirty days, which C accepted but did not expressly agree to wait. Held, A was discharged. The court said that accepting the note for the interest amounted to an agreement to give time, and was as strong an evidence of it as was possible to be given. The consideration was sufficient, because the interest note when it became due would itself bear interest, which would not have been so if the interest had not thus been converted into principal.<sup>15</sup> If the agreement to pay interest for the extended period is for any reason void, the agreement for extension is not binding and the surety is not discharged.<sup>16</sup> If a surety on a note upon which interest has been paid from time to time in advance, and so indorsed upon the note, enter into a new contract by which, for a valuable consideration, he agrees to be holden for the next six years, a copy of the note being inserted in the new contract, he is not discharged by the reception of interest in advance in a similar manner from time to time during said six years. It must be inferred that there was no objection by the surety to such payments in advance, and it is not reasonable to presume that the creditor would be willing to receive no interest for six years.<sup>17</sup>

**§ 387. When payment of part of debt sufficient consideration for giving of time.**—The payment of part of a debt by the principal, at the time or after it becomes due, is not a sufficient consideration to support an agreement for forbearance, and an agreement for forbearance founded upon such consideration, even though carried out by the creditor, will not discharge the surety. In such case, “no benefit is received by the creditor but what he was entitled to under the original contract, and the debtor has parted with nothing but what he was already bound to pay.”<sup>18</sup> For the same reason, a payment by the prin-

<sup>15</sup> *Walters v. Swallow*, 6 Whart. (Pa.) 446.

<sup>16</sup> *Douglass v. The State*, 44 Ind. 67.

<sup>17</sup> *New Hampshire Savings Bank v. Gill*, 16 N. H. 578.

<sup>18</sup> *Roberts v. Stewart*, 31 Miss. 664, per Handy, J.; *Keirn v. Andrews*, 59 Miss. 39; *Sharp v. Fagan*, 3 Sneed (Tenn.) 541; *Halliday v.*

*Hart*, 30 N. Y. 474; *Jenkins v. Clarkson*, 7 Ohio 72; *Hall v. Constant*, 2 Hall (N. Y.) 205; *Mathewson v. Strafford Bank*, 45 N. H. 104; *Turnbull v. Brock*, 31 Ohio St. 649; *Petty v. Douglass*, 76 Mo. 70; *Halderman v. Woodward*, 22 Kan. 734; *Ingels v. Sutliff*, 36 Kan. 444; *Thompson v. Robinson*, 34 Ark. 44. Holding the same thing, when



principal debtor of interest which has already accrued is not sufficient consideration to support an agreement for forbearance.<sup>19</sup> Payment of part of a debt before it is due is a sufficient consideration to support an agreement for delay of payment of the remainder.<sup>20</sup> Where the creditor, in consideration of payment by the principal of a small portion of the debt one day before it was due, agreed to give one year's time for the payment of the remainder, it was held the surety was discharged. The court said: "Raising the money a single day in advance of the time fixed by the original bill may have been a great inconvenience to the debtor, and, at the same time, a corresponding advantage to the creditor. But the amount of inconvenience on the one side, and advantage on the other, are matters of no importance on a question of this kind. It is sufficient that the one or the other existed in any degree, however slight."<sup>21</sup> The plaintiff (who was payee of a note which was signed by C as principal, and the defendant as surety), being a partner of C, settled his partnership accounts with C before the note became due, and there was found to be \$50 due C on account of the partnership. It was then agreed between the plaintiff and C that this sum should remain in the hands of the plaintiff without interest until the note became due, and should then be applied as part payment of the note; and the plaintiff promised that he would never call upon the defendant for payment, and would wait upon C three or four years for the remainder. Held, the defendant was discharged, as the contract between the plaintiff and C amounted to a

partial payments are made after judgment has been obtained for the debt, see *Crawford v. Gaulden*, 33 Ga. 173. Holding the same thing, under peculiar circumstances, see *Hunt v. Knox*, 34 Miss. 655.

<sup>19</sup> *Johnston v. Thompson*, 4 Watts (Pa.) 446; *Dennis v. Piper*, 21 Ill. App. 169. But where the principal debtor paid part of the principal and all the interest on a note, and an agreement for forbearance was marked on the back of the note, it was held the surety was discharged. See *German Savings Ass'n v. Helm-*

*rick*, 57 Mo. 100; and the similar case of *Stillwell v. Aaron*, 69 Mo. 539.

<sup>20</sup> *Greely v. Dow*, 2 Met. (Mass.) 176; *Austin v. Dorwin*, 21 Vt. 38; *Neussam v. Finch*, 25 Barb. (N. Y.) 175. But it is held that a promise to pay instalments on a note, or interest at the rate specified therein, is not a valuable consideration for an agreement extending time of payment. *Hume v. Mazelin*, 84 Ind. 574.

<sup>21</sup> *Uhler v. Applegate*, 26 Pa. St. 140, per Lewis, C. J.

payment of \$50 on the note before it was due, and was a good consideration for giving time.<sup>22</sup>

§ 388. **Whether agreement to pay interest for a definite time is sufficient consideration for extension for that period.**—If, after a debt bearing interest becomes due, the creditor agrees to extend the time of payment for a definite period, and the principal agrees to pay the same rate of interest the debt would otherwise bear for that time, it seems the better opinion that the surety is thereby discharged.<sup>23</sup> The reasoning upon which this rule is founded has been thus well expressed: “It is a valuable right to have money placed at interest, and it is a valuable right to have the privilege at any time of getting rid of the payment of interest by discharging the principal. By this contract the right to interest is secured for a given period, and the right to pay off the principal and get rid of paying the interest is also relinquished for such period. Here then are all the elements of a binding contract.”<sup>24</sup> Notwithstanding this reasoning seems invincible, the contrary has been repeatedly held, the ground upon which these decisions is founded being that the promise of the principal to pay interest for the extended period creates no additional obligation upon him, as he would have been obliged to pay the interest without any new agreement if the time had been given.<sup>25</sup> This, however, ignores the fact that if there is no new agreement the debtor may at any time pay the debt and stop the interest.

<sup>22</sup> Whittle v. Skinner, 23 Vt. 531.

<sup>23</sup> Fowler v. Brooks, 13 N. H. 240; Chute v. Pattee, 37 Me. 102; Wood v. Newkirk, 15 Ohio St. 295; Davis v. Lane, 10 N. H. 156; Blazer v. Bundy, 15 Ohio St. 57; Robinson v. Miller, 2 Bush. (Ky.) 129; Wheat v. Kendall, 6 N. H. 504. In Stallings v. Johnson, 27 Ga. 564, it was held that a promise by the principal to pay the debt at the end of a year with 8 per cent usury was a good consideration for the promise of the creditor to wait a year, and discharged the surety. The court said that the

promise alone, without the usury, was sufficient consideration.

<sup>24</sup> Per Read, J., McComb v. Kittridge, 14 Ohio 348. And to same effect, see Fawcett v. Freshwater, 31 Ohio St. 637.

<sup>25</sup> Reynolds v. Ward, 5 Wend. 501. To same effect, Hale v. Forbis, 3 Mont. 395; Woolford v. Dow, 34 Ill. 424; Crossman v. Wohlleben, 90 Ill. 537; Abel v. Alexander, 45 Ind. 523, overruling Pierce v. Goldsberry, 31 Ind. 52; Lindeman v. Rosenfeld, 67 Ind. 246. But see Chrisman v. Tuttle, 59 Ind. 155.

A promise to pay interest on overdue interest is a sufficient consideration for an agreement to give time.<sup>26</sup>

**§ 389. Special instances of sufficient consideration for extending time.**—A binding agreement by the principal to pay an increased and lawful rate of interest is a sufficient consideration for an agreement to extend the time of payment of a note.<sup>27</sup> An agreement for extension made on Sunday, when the consideration is afterwards paid on a week day, is valid, and discharges the surety. The court said: “When that payment was made by the one party and accepted by the other on terms perfectly understood by both, it constituted a perfect contract upon a valid consideration, free from any objection arising from the previous conversation on Sunday.”<sup>28</sup> The surety in a debtor’s relief bond is discharged if the obligee, for a valuable consideration, extend the time for the principal to make his disclosure beyond the six months pre-

<sup>26</sup> In *Bugh v. Crum*, 26 Ind. App. 465, 59 N. E. Rep. 1076, defendant’s note being overdue and interest in arrears, defendant gave plaintiff his note bearing 8 per cent interest for the amount of interest due and agreed to pay the principal in one year, to which the plaintiff assented. Held, that the surety on the note was discharged. The court said that under the Indiana decisions, *Hume v. Mazelin*, 84 Ind. 574; *Starret v. Burkhalter*, 70 Ind. 285; *Hamilton v. Winterrow*, 43 Ind. 393; *Chrisman v. Tuttle*, 59 Ind. 155, and *Holmes v. Boyd*, 90 Ind. 332, neither a promise to pay overdue interest nor to pay interest for a definite period in the future constitutes a sufficient consideration for an agreement to extend the time of payment of an overdue obligation, but that a promise to pay interest on overdue interest is a sufficient consideration.

<sup>27</sup> *Huff v. Cole*, 45 Ind. 300; *Ma-her v. Lanfrom*, 86 Ill. 513. But

see *Dare v. Hull*, 70 Ind. 545, where it is held that the payment of interest already due on a note, or an agreement to continue payment of interest at the same rate as specified therein, or at a reduced rate, are neither of them a sufficient consideration for an extension of the time of payment. Upon this subject, see, also, *Halstead v. Brown*, 17 Ind. 202. That payment of interest already due on a note is an insufficient consideration for an agreement to extend the time of payment, see *Kerns, Adm’r v. Ryan*, 26 Ill. App. 177; *Truesdell v. Hunter*, 28 Ill. App. 292. So an agreement between the maker and holder of a note that interest paid on the same should be applied towards the extinguishment as a consideration for an extension of payment was held not binding on the holder and did not discharge a surety to the note. *Wilson v. Powers*, 130 Mass. 127.

<sup>28</sup> *Uhler v. Applegate*, 26 Pa. St. 140, per *Lewis, C. J.*

scribed in the bond. The time for the disclosure was continued at the request of the creditor, and it was held that the consent of the debtor to such continuance was a sufficient consideration for the agreement to continue.<sup>29</sup> A party sold another a mule, for the price of which the purchaser gave his note with surety. The seller warranted the mule to be sound, and when the note came due the purchaser claimed that the mule was unsound, and insisted upon returning it. The seller then agreed with the purchaser that, if he would keep the mule, the time of payment of the note should be extended to the next Christmas. Held, the agreement of the purchaser to keep the mule when he claimed the right to return it was a sufficient consideration to support the agreement of the creditor to extend the time.<sup>30</sup> Other like instances are stated in a note.<sup>31</sup>

<sup>29</sup> Phillips v. Rounds, 33 Me. 357. Upon the subject of what is a sufficient consideration for a giving of time, see Ducker v. Rapp, 37 N. Y. 464.

<sup>30</sup> Wortham v. Brewster, 30 Ga. 112.

<sup>31</sup> In Beuter v. Dillon, 63 Ill. App. 517, the maker of a note asked for an extension until he could get the money for some work he was doing and the payee replied: "You can have it for 6 months longer and by that time if you should want it for the year it will be all right," and receipted for \$20 on account of interest paid in advance. Held, that "his request for an extension implied an agreement to keep the money for the time granted and pay interest at the original rate which was a valid consideration for it," and that the administrator of the surety was entitled to a decree enjoining suit against his estate on the ground that there was a binding extension of time without the surety's consent. In Earnshaw v. Boyer (C. C., E. D., Pa.), 60 Fed. Rep. 528, plaintiff having bought the output of a mine for the year ending

March 1, 1891, sold one-third of it to McHose & Sons, agreeing to deliver the one-third in "as nearly equal monthly proportions as possible," but specifying no time of completion. Correspondence between the parties indicated that they understood the time of completion to be twelve months. The seller proposed to delay the last shipment one month. The buyer assented thereto. Held, that defendants who had guaranteed performance by the buyer were released. In Home National Bank v. Estate of Waterman, 134 Ill. 461, 29 N. E. Rep. 503, affirming 30 Ill. App. 535, seven stockholders in a harvester company, including Waterman, signed a writing dated August 10, 1882, by which they guaranteed plaintiff bank that, if it would deliver certain farmers' notes to the harvester company for collection, which notes the bank held as collateral security for a loan to the company, "such collaterals shall be replaced by others equally acceptable to you in character and amount during the month of February, or, if not, that you shall be paid, on or before March 1, 1883,

**§ 390. When payment of usury sufficient consideration for extension of time—Agreement not to pay usury not sufficient.**

—The actual payment in advance of usurious interest by the principal to the creditor is, where it cannot be recovered back, and has been sometimes held to be when it can be recovered back, a sufficient consideration for an agreement extending the time of payment of the debt.<sup>32</sup> The reason given for this

such proportion of our company's debt, or any extension thereof made in the meantime, in cash, as said farmers' notes are held to secure." Waterman died in 1883 and after his death the corporation's indebtedness, being wholly unpaid, was renewed by taking its new notes and surrendering the old ones. Held, that such extensions released Waterman's estate from liability. Mr. Justice Baker, speaking for the court, said: "Assuming the transaction of August 10, 1882, to have been a direct and original promise by Waterman and his associates to pay the debt, yet it does not follow that the makers of that promise were not securities for the harvester company, and were not released by the subsequent extensions of time given to that company. It is manifest that, notwithstanding the promise, the debt as between the company and the signers of the writing, continued to be the debt of the company, and that had such signers paid the debt to the bank, they would have had recourse for the amount so paid upon the company. \* \* It is also plain that the bank had full notice and knowledge of the relations which existed between said signers and the company, and that the company was the ultimate debtor. \* \* We understand the doctrine to be, that where two persons are bound for the same debt, and there is an obligation on the part of one to exonerate the other, in the

event of payment being enforced against such other, and this is known to the creditor, then the creditor cannot extend the time of payment to the party ultimately liable without discharging the other debtor, even though such other debtor occupies the position of a principal debtor to the creditor." Giving time to the mortgagor's grantee in consideration of his assuming the mortgage debt releases the mortgagor, who upon such assumption becomes surety, if he does not consent thereto: *Steele v. Johnson*, Mo. App., Aug., 1902, 69 S. W. Rep. 1065, following *Pratt v. Conway*, 148 Mo. 291, 71 Am. St. Rep. 602, and note at 608, 49 S. W. Rep. 1028; *Nelson v. Brown*, 140 Mo. 580, 62 Am. St. Rep. 755, and note at 763, 41 S. W. Rep. 960; *Wayman v. Jones*, 58 Mo. App. 313; *Union Mutual Life Insurance Co. v. Hanford*, 143 U. S. 187, 36 L. Ed. 118, 12 Sup. Ct. Rep. 437, explaining *Sheppard v. May*, 115 U. S. 505, 29 L. Ed. 456, 6 Sup. Ct. Rep. 119, and *Keller v. Ashford*, 133 U. S. 610, 33 L. Ed. 667, 10 Sup. Ct. Rep. 494. See also *Herd v. Tuohy*, 133 Calif. 55, 65 Pac. Rep. 139; *Tuohy v. Woods*, 122 Calif. 667, 55 Pac. Rep. 683; *Antisdel v. Williamson*, 165 N. Y. 372, 59 N. E. Rep. 207, note 28, § 376, *supra*, where the agreement was with a purchaser who did not assume.

<sup>32</sup> *Scott v. Safford*, 37 Ga. 384; *Montague v. Mitchell*, 28 Ill. 481;

in one case was that, even if the usurious agreement was void, no one but the party paying it could take advantage of it. The creditor who received the usury could not afterwards, on his own motion, repudiate the contract on which he received it.<sup>33</sup> In another case it was said that: "Between the parties to it, \* \* (the) contract (for extension) was like one between an adult and an infant, which, though voidable by the minor party, is nevertheless binding on the other party."<sup>34</sup> In another case it was said that, "Where both contracts are executed, the indulgence given and the consideration paid, it seems to me there is no ground left for the application of the rule belonging to the case of the executory agreement."<sup>35</sup> It is, however, well settled that a mere promise to pay usury, or giving a note for the same without an actual payment in advance of such usury, is not a sufficient consideration for an agreement to extend the time of payment, because such promise and note are utterly void.<sup>36</sup> And the actual payment of the usury promised, or for which the note was given, after the ex-

Harbert v. Dumont, 3 Ind. 346; Kennedy v. Evans, 31 Ill. 258; Cross v. Wood, 30 Ind. 378; Grafton Bank v. Woodward, 5 N. H. 99; Austin v. Dorwin, 21 Vt. 38; Vilas v. Jones, 10 Paige Ch. 76; White v. Whitney, 51 Ind. 124; Wittmer v. Ellison, 72 Ill. 301; Cox v. The Mobile & Girard R. R. Co., 44 Ala. 611; Danforth v. Semple, 7 Chic. Leg. News, 203; Myers v. First National Bank, 78 Ill. 257; Redman v. Deputy, 26 Ind. 338; Calvin v. Wiggam, 27 Ind. 489; Scott v. Harris, 76 N. C. 205; Glenn v. Morgan, 23 W. Va. 467; Stillwell v. Aaron, 69 Mo. 539; Osborn v. Low, 40 Ohio St. 347; Lemmon v. Whitman, 75 Ind. 318; Mann v. Brown, 71 Tex. 241; Vary v. Norton, 6 Fed. Rep. 808 (under Michigan statute).

<sup>33</sup> Turrill v. Boynton, 23 Vt. 142. And see Billington v. Wagoner, 33 N. Y. 31; Nat. Bank v. Place, 15 Hun (N. Y.) 564.

<sup>34</sup> Kenningham v. Bedford, 1 B.

Mon. (Ky.) 325, per Robertson, C. J.

<sup>35</sup> Armistead v. Ward, 2 Patton, Jr. & Heath (Va.) 504, per Thompson, J.

<sup>36</sup> Braman v. Hawk, 1 Blackf. (Ind.) 392; Wilson v. Langford, 5 Humph. (Tenn.) 320; Hunt v. Postlewait, 28 Iowa 427; Galbraith v. Fullerton, 53 Ill. 126; Anderson v. Mannon, 7 B. Mon. (Ky.) 217; Silmeyer v. Schaffer, 60 Ill. 479; Cox v. Mobile & Girard R. R. Co., 37 Ala. 320; Roberts v. Stewart, 31 Miss. 664; Kyle v. Bostick, 10 Ala. 589; Tudor v. Goodloe, 1 B. Mon. (Ky.) 322; Gilder v. Jeter, 11 Ala. 256; Pike's Adm'r v. Clark, 3 B. Mon. (Ky.) 262; Payne v. Powell, 14 Tex. 600; Scott v. Hall, 6 B. Mon. (Ky.) 285. Contra, Riley v. Gregg, 16 Wis. 666; Kelly v. Gillespie, 12 Iowa 55; Camp v. Howell, 37 Ga. 312; Corielle v. Allen, 13 Iowa 289; Fay v. Tower, 58 Wis. 286.



tended time has expired, will not make any difference in the rule, nor work the discharge of the surety.<sup>37</sup>

**§ 391. Special instances of consideration for giving time held not sufficient.**—An unexecuted promise by a principal to confess judgment as collateral security for the debt is not a sufficient consideration for an agreement to extend time.<sup>38</sup> A promise by the principal to pay the debt out of the proceeds of a particular judgment, or, if that fails, then out of a particular note, is not a sufficient consideration for an extension of time, as it amounts to no more than telling the creditor where the principal expects to get the money with which to pay.<sup>39</sup> After a debt is due, an agreement made between the principal and creditor that the same shall be paid by instalments at stated times in the future, even if one of such instalments is paid when due, is without sufficient consideration, and does not discharge the surety on the original obligation.<sup>40</sup> An agreement by a creditor to extend the time of payment, guarantied upon the debtor's paying money due on another matter, was held not based on a good consideration, and would not discharge the guarantor.<sup>41</sup> Where, after a note became due, the payee agreed to extend the time of payment upon the promise of the maker to give him \$5 for so doing, and it did not appear that the \$5 was ever paid, it was held there was no binding agreement for extension, and the surety on the note was not discharged.<sup>42</sup> Other instances of insufficient consideration are stated in a note.<sup>43</sup>

<sup>37</sup> *Burgess v. Dewey*, 33 Vt. 618; *Smith v. Hyde*, 36 Vt. 303; *Hartman v. Danner*, 74 Pa. St. 36, followed in *Calvert v. Good*, 95 Pa. St. 65, and distinguished in *Grayson's Appeal*, 108 Pa. St. 581; *Polkinghorne v. Hendricks*, 61 Miss. 366; *Howell v. Sevier*, 1 B. J. Lea (Tenn.) 360. But see *Brown v. Proffit*, 63 Miss. 649.

<sup>38</sup> *Hunt v. Knox*, 34 Miss. 655. But it is held that an execution by the principal to the creditor of a chattel mortgage is a sufficient consideration for an agreement to extend time of payment. *Gipson v. Ogden*, 100 Ind. 20.

<sup>39</sup> *Wadlington v. Gary*, 7 Smedes & Mar. (Miss.) 522. To same effect, see *Grover v. Hoppock*, 2 Dutcher (N. J.) 191.

<sup>40</sup> *Van Rensselaer v. Kirkpatrick*, 46 Barb. (N. Y.) 194. And see, also, to similar effect, that a promise to pay instalments on a note is not a valuable consideration for an agreement to extend time, *Hume v. Mazelin*, 84 Ind. 574.

<sup>41</sup> *Solary v. Stultz*, 22 Fla. 263.

<sup>42</sup> *Thayer v. King*, 31 Hun (N. Y.) 437.

<sup>43</sup> In *Hensler v. Watts*, 113 Iowa 741, 84 N. W. Rep. 666, the holder of a note payable on or before one



**§ 392. Cases holding payment of usury not sufficient consideration for extension.**—Where a statute declared “void all contracts infected with usury,” it was held that the actual payment of usurious interest in advance was not a sufficient consideration to support a contract for extension. The court said: “The contract for usury is equally void, whether the money is actually paid or only promised to be paid at a future day. The statute has made no distinction. \* \* Though the debtor parts with the money, it still belongs to him, and he may sue the next moment and recover it back. \* \* If he agrees to give more (than legal interest) the agreement is void, and though the agreement be executed by paying the money, it is still void, and the money may be recalled at pleasure.”<sup>44</sup> The same thing has been held, where the statute provided that any payment of usury should operate as a payment of so much on account of the principal, and the payment was made after the debt became due, and before the

year after date, at its maturity, January 25, 1897, endorsed it: “Time extended to January 25, 1898.” Held, that there was no implied promise to pay interest during the extension and that the extension was without consideration and the surety, therefore, not released. In *Board of Trustees v. King*, 85 Ill. App. 220, the sureties signed notes containing the provision “that no extension of time of payment with or without knowledge, by the receipt of interest or otherwise, shall release us or either of us from the obligation of payment.” The notes were dated March 2, 1885, payable in one year, with interest at 7 per cent. annually in advance. The principal paid the interest until 1897 and when the sureties were sued in 1899 they pleaded the 10-years’ statute of limitations, to which plaintiff replied alleging that the promises were made within 10 years before commencement of the suit. The court found that for more than 10 years prior to the suit the plain-

tiff had merely accepted the interest as it fell due and let the notes run, that there was no consideration for any extension and that suit might have been begun on the notes at any time within more than 10 years before the present suit, and held that such dealing did not constitute an “extension” within the meaning of the clause quoted and that the sureties could not be holden. The only extension they had agreed to waive was one that was binding in law. *Crabtree, J.*

<sup>44</sup> *Vilas v. Jones*, 1 N. Y. 274, per *Brownson, J.* To same effect, see *Denick v. Hubbard*, 27 Hun (N. Y.) 347; *Meiswinkle v. Jung*, 30 Wis. 361; *St. Maries v. Polleys*, 47 Wis. 67; *Irvine v. Adams*, 48 Wis. 468; though see *Hamilton v. Prouty*, 50 Wis. 592. The case of *Farmers’ & Traders’ Bank v. Harrison*, 57 Mo. 503, also sustains the doctrine of the text, though it is not followed in *Stillwell v. Aaron*, 69 Mo. 539, and *Wild v. Howe*, 74 Mo. 551.

time of extension expired.<sup>45</sup> So, where the statute provided that where usurious interest was paid by the debtor, he might sue the creditor and recover it back, it was held that the actual payment of usury was not a sufficient consideration for extension. The court said: "Here the reception or reservation of usurious interest is an illegal act, and so far from being binding, it is inoperative, for the reason that it is expressly provided by statute that such interest may be recovered by the person, etc., who may have paid it, with damages."<sup>46</sup>

**§ 393. How far surety discharged by time given by one of several creditors—Surety who becomes such without knowledge of principal discharged by giving of time—Extension as to part of severable contract.**—If one of two joint obligees makes such an arrangement with the principal for time as is sufficient to discharge the surety, the surety is entirely discharged, for the act of one of several joint obligees is the act of all.<sup>47</sup> But if two separate parties, who are not partners nor in any way connected, are equitable owners of an execution, and one of them consents to a stay of execution, and does such acts as will discharge the surety, that fact will not discharge the surety as to the part of the execution owned by the other party.<sup>48</sup> A surety who becomes such without the request of the principal, and after the principal has become bound, is, at least as between himself and the creditor, a surety, and is discharged by the giving of time to the principal.<sup>49</sup> The same thing was held where a surety became such without the knowledge of the principal. The court said that although in such a case the principal was not bound to the surety, yet the surety was to all intents and purposes a surety, and entitled to subrogation upon payment of the debt, as the right to subrogation did not depend upon contract, but on the elementary principles of equity.<sup>50</sup> In such a case, where

<sup>45</sup> *Cornwell v. Holly*, 5 Rich. Law (S. C.) 47; *Jenness v. Cutler*, 12 Kan. 500; *Brather v. Gammon*, 25 Kan. 397. To similar effect, see *Wiley v. Hight*, 39 Mo. 130; though see this case reviewed and in effect overruled in *Wild v. Howe*, 74 Mo. 551, and *Stillwell v. Aaron*, 69 Mo. 539.

<sup>46</sup> *Shaw v. Binkard*, 10 Ind. 227,

per *Hanna, J.* To same effect, see *Goodhue v. Palmer*, 13 Ind. 457.

<sup>47</sup> *Clark v. Patton*, 4 J. J. Marsh. (Ky.) 33.

<sup>48</sup> *Givens v. Briscoe*, 3 J. J. Marsh. (Ky.) 529.

<sup>49</sup> *Talmage v. Burlingame*, 9 Pa. St. 21.

<sup>50</sup> *Peake v. Estate of Dorwin*, 25

it was claimed that the addition of the name of the surety was an alteration of the note which made it void, the court said the note was not void in any event, unless the principal chose to avoid it, and it was held that the surety was discharged by time given the principal.<sup>51</sup> It has been held that where time has been given as to part of the principal's contract and such part is severable from the rest of the contract, the surety is released only as to the part extended and remains bound as to the remaining obligations of the principal.<sup>52</sup>

**§ 394. Surety discharged if time is given after debt is due—Other cases holding surety discharged by extension of time.**—If the agreement for extension is not made till after the debt is due, it will have the same effect to discharge the surety as if made before.<sup>1</sup> Giving time to the maker discharges the indorser of a note.<sup>2</sup> Granting an extension to the drawer of a bill of exchange discharges the accommodation acceptor thereof, who is at the time known by the holder to be such.<sup>3</sup> The surety is not deprived of his rights as such by the fact that, nineteen days after the maturity of the note for which he is bound, he gives a mortgage to secure the debt, which is stated in terms to be an additional security for the payment of the note.<sup>4</sup> Giving time to the principal in a forth-

<sup>51</sup> Howard v. Clark, 36 Iowa 114.

<sup>52</sup> McLaughlin Carriage Co. v. Oland, 34 Nova Scotia Rep. 193, action on the bond of a selling agent who agreed to guaranty notes of purchasers. Held, that the employer by extending the time as to one of such notes did not release the surety on the bond from liability as to other defaults of the agent. Citing Croydon Commercial Gas Co. v. Dickenson (1876), 2 C. P. D. 46. See also § 406.

<sup>1</sup> Turrill v. Boynton, 23 Vt. 142; Stowell v. Goodenow, 31 Me. 538; Carlin v. Savory, 14 Gray 528; Veazie v. Carr, 3 Allen 14; Wheaton v. Wheeler, 27 Minn. 464; Allis v. Ware, 28 Minn. 166. But see Mobile & Montgomery Ry. Co. v. Brewer, 76 Ala. 135. Where a creditor

agreed to accept time drafts from the maker as security for an overdue note, and wait until their maturity, it was held to be such an extension of time as operated to discharge a surety on the note. Pomeroy v. Tanner, 70 N. Y. 547. That the surety is released by a binding agreement between principal obligor and the obligee by which "proceedings against the principal are delayed for a definite time" without the surety's consent, see Smith v. Stubbs, Colo. App., Feb., '01, 2 Colo. Dec. 603, 63 Pac. Rep. 955.

<sup>2</sup> McGuire v. Woodbridge, 6 Rob. (Ia.) 47; Veazie v. Carr, 3 Allen 14.

<sup>3</sup> Davies v. Stainbank, 6 De G., M. & G. 679.

<sup>4</sup> Cumming v. Bank of Montreal, 15 Grant's Ch. 686.

coming bond discharges the surety therein.<sup>5</sup> The surety in an arbitration bond is discharged if the time for making the award is extended beyond the time limited in the bond.<sup>6</sup> If a party having a claim against an estate give the administrator time for payment beyond that prescribed by law, the sureties on the administrator's bond are discharged from all liability for the payment of such debt.<sup>7</sup> Where a guardian made a surrender of his property, and his wards, in whose favor the bond was given, consented to and voted for a sale of the property on terms of credit, when credit could not have been given without such consent, it was held that such consent was a giving of time, and discharged the surety on the guardian's bond.<sup>8</sup> Where a promissory note was payable on demand, and the creditor, for a valuable consideration, agreed by parol to give time of payment to the principal for sixty days, it was held the surety was discharged.<sup>9</sup> A rule and usage of a bank, which was well known to a surety, was to take all accommodation notes with all the parties as joint and several promisors, and regard all the promisors as principals, so far as the bank was concerned. A party signed a joint and several note to the bank, being, in fact, a surety, and known to be such by the bank, but the fact of suretyship did not appear from the note. Held, he was discharged by an extension of time given the principal. The court said that, as long as the creditor did nothing to change the contract, the surety was bound as principal. "Allowing the bank to deal with sureties on the note as principals, and to treat them accordingly, confers the power to do so in that contract to the fullest extent, but gives no right to make them parties to another contract which increases their liability. Such construction would admit the bank to hold sureties perpetually liable, and at the same time deprive them of the right to pay the debt and resort to their principal."<sup>10</sup>

<sup>5</sup> Steele v. Boyd, 6 Leigh (Va.) 547.

<sup>8</sup> Brown v. Roberts, 14 La. Ann. 256.

<sup>6</sup> Brookins v. Shumway, 18 Wis. 98.

<sup>9</sup> Grafton Bank v. Woodward, 5 N. H. 99.

<sup>7</sup> Pyke v. Searcy, 4 Porter (Ala.) 52. Contra, Gillett v. Rachel, 9 Rob. (La.) 276.

<sup>10</sup> Lime Rock Bank v. Mallett, 42 Me. 349, per Tenney, C. J.

§ 395. **Miscellaneous cases holding surety discharged by extension of time.**—A composition deed by which the creditor agrees to receive a certain per cent. of all debts due from the makers of a note in full discharge of the same, to be paid at a time beyond the maturity of the note, operates as an extension of the time of payment and discharges the surety.<sup>11</sup> Extending the time of payment of a note, by an agreement written on a separate piece of paper, discharges the surety on the note.<sup>12</sup> Principal and sureties executed a bond, conditioned that the principal should collect debts due the obligee, and account faithfully for his transactions as often as required, and at least on the 1st day of September of each year. The principal collected money, for which he rendered an account to the obligee, who thereupon gave the principal time, upon his executing a trust deed of his property to secure the amount collected. Held, the sureties were discharged. The court said it made no difference that the principal might collect further sums under his agency, and proceeded: "An action for any sum of money actually collected accrues as soon as it is collected; and if that action be suspended, such suspension appears to the court to release the sureties with respect to the sum so suspended as completely as they would be released from the whole bond if the whole money had been collected."<sup>13</sup> Where, after judgment against principal and surety, the creditor agreed to take, within a certain time, land from the principal for part of the debt, it was held that the surety was

<sup>11</sup> *Perry v. Armstrong*, 39 N. H. 583.

<sup>12</sup> *Dunham v. Countryman*, 66 Barb. (N. Y.) 268. And a court of equity has jurisdiction to enjoin the collection of the same at the suit of a surety of thereto, if the extension agreement was verbal and was without his knowledge or consent. *Bradshaw v. Combs*, 102 Ill. 428, in which case the maker of an 8 per cent note which became due July 13, 1865, endorsed upon it and signed, July 13, 1870, the following: "It is agreed by the parties to this note that the interest shall be at the rate of ten per cent

until paid." Held that the surety might show, by parol, that the creditor, in consideration of the increased rate of interest, had verbally, without his consent, agreed to forbear for one year. And upon such showing its collection from the surety was enjoined. Compare § 402.

<sup>13</sup> *Hopkirk v. McConico*, 1 Brock. 220, per Marshall, C. J. Holding that surety in sealed bond is discharged at law by time given before breach, but not after breach, see *United States v. Howell*, 4 Wash. 620. See also on this point, *Hayes v. Wells*, 34 Md. 512.

discharged. If the surety had paid the debt within that time he alone could have received payment from his principal in land instead of money, and his rights could not be thus changed and he held liable.<sup>14</sup> Where the holder of a bill of exchange agreed with the acceptor that he would not look to the acceptor for payment till he had exhausted, without success, the legal remedies against the indorser, it was held the indorser was discharged.<sup>15</sup> Certain debtors agreed to pay their indebtedness in two, four, six and eight months from the date of their agreement, and a surety became responsible that they would do so. About three weeks after the date of this agreement one of the creditors took for the debt, from the principals, certificates of deposit, dated the day they were given, and payable in two, four, six and eight months. Held, this was a giving of time and discharged the surety.<sup>16</sup> A creditor, in renewal of the notes of a firm which he held, and which were secured by the bond of a surety, took the individual notes of a member of the firm, payable at a future time, signed in this wise: "For the late firm of Pease, Chester & Co. Wm. J. Pease." Held that, though time might not thereby be given to all the members of the firm, it was given to the maker of the renewal notes, and the surety was discharged.<sup>17</sup> Where a note, payable twelve months after date, was taken for an existing debt, it was held that the remedy on the debt was suspended until the maturity of the note, and that the sureties to the original debt were thereby released.<sup>18</sup> An extension of time for the payment of a matured legacy by a legatee of full age, by accepting the executor's note payable therefor at a future date, releases the sureties on the bond of a residuary legatee, if such extension was without their consent.<sup>19</sup>

**§ 396. Suspending fine by governor of state does not release surety—Other cases holding surety not discharged by**

<sup>14</sup> *Bangs v. Strong*, 7 Hill (N. Y.) 250.

<sup>15</sup> *Ige v. Bank of Mobile*, 8 Port. (Ala.) 108.

<sup>16</sup> *Gross v. Parrott*, 16 Cal. 143.

<sup>17</sup> *Farmers & Mechanics' Bank v. Kreheval*, 2 Mich. 504.

<sup>18</sup> *Mobile Life Ins. Co. v. Randall*, 71 Ala. 220.

<sup>19</sup> *Durfee v. Abbott*, 61 Mich. 471. But such action by an infant legatee was held not to release the sureties unless ratified by him after arriving at full age. *Durfee v. Abbott*, 61 Mich. 471.

**extension of time.**—A party was fined \$500 and replevied (stayed) the judgment with surety. The governor of the state respited the payment of \$250 of the fine for six months. Held, the surety was not discharged. The court said the governor had the constitutional right to grant the respite. The surety knew this when he became such, “and must be held to have agreed that its exercise should not impair or destroy his obligation to pay the debt.” This power of the governor cannot be embarrassed or clogged by the danger of ultimate loss of the amount of the fine arising from the release of the person who may have replevied it. A distinction is made between the case of the state and a private individual.<sup>20</sup> If the creditor notify the principal that if he does not pay before a certain time suit will be commenced against him, this is not such an agreement to give time as discharges the surety.<sup>21</sup> The holder of a note received from the principal two four-months bills, accepted by the principal, the aggregate of which equaled the amount of the note, with the understanding that if the bills were paid they should discharge the note, but the note was not to be canceled, nor any part of its “obligation surrendered until these acceptances were taken up.” One of the bills was sold and the amount credited on the note, but not being paid, the credit was scratched off. Held, the surety was not discharged, as the creditor might at any time have sued the note.<sup>22</sup> A statute provided that “a surety against whom a judgment may be rendered may obtain judgment against his principal immediately for the amount for which he has been made so liable.” Judgment was recovered against a principal and surety, and the creditor stayed execution for six months. Held, the surety was not discharged because his remedy against the principal was not suspended.<sup>23</sup> Where a creditor before judgment agreed that the principal should have the privilege at any time within sixty days after judgment of paying the debt in books, it was held the surety was not discharged. The court said there was no mutuality in the agreement. The principal might deliver the books, but was not bound to do so. The creditor had a right to proceed

<sup>20</sup> *Nall v. Springfield*, 9 Bush (Ky.) 673, per Lindsay, J.

<sup>22</sup> *Weller v. Ransom*, 34 Mo. 362.

<sup>23</sup> *Peay v. Poston*, 10 Yerg.

<sup>21</sup> *McGuire v. Bry*, 3 Rob. (La.) (Tenn.) 111.



§ 398. If creditor take principal's note for extended period, it enlarges the time and discharges the surety.—When the principal and surety are bound to the creditor by a note or other negotiable instrument, if the creditor take from the principal a new note<sup>35</sup> or bill of exchange<sup>36</sup> for the debt, falling due after the period when the original obligation matures, this generally amounts to an extension of time and discharges the surety. It has been said that: "The rule is too well settled to justify the citation of authorities to support it, that the giving of a valid obligation, payable in the future,

not discharge a surety," said Lumpkin, J. "The plaintiff in error relied upon the decision of this court in *Hayes v. Little*, 52 Ga. 555, and others of somewhat similar import. In the case just cited, it was held that where a plaintiff at a given term of court took a verdict against a principal and sureties, but failed for several terms to enter a judgment thereon, the principal in the meantime becoming insolvent, the sureties were discharged. This case proceeded upon the theory that after the verdict had been taken, the court had no further control of the action; and, nothing remained to be done except for the plaintiff or his attorney to enter up judgment, a failure to do so, resulting in injury to the sureties, was good cause for their discharge. We are not disposed to extend further the doctrine there laid down."

<sup>35</sup> *Hart v. Hudson*, 6 Duer (N. Y.) 294; *Kelty v. Jenkins*, 1 Hilton (N. Y.) 73; *Simmons v. Guise*, 46 Ga. 473; *Dixon v. Spencer, McKay & Co.*, 59 Md. 246; *Greene v. Bates*, 74 N. Y. 333. The taking of a renewal note amounts to an extension of time of the original, and discharges a surety thereon. *First Nat. Bank v. Leavitt*, 65 Mo. 562. If in the taking of a new note it was not the intention to discharge the surety on

the old, the burden is on the creditor of showing such intention. *Stuart v. Lancaster*, 84 Va. 772. Where the holder of a note agreed with the principal debtor to take a new note for the debt, to be signed by himself and the surety on the first note, and the new note was given but not signed by the surety, it was held there was not such an agreement for an extension on the old note as discharged the surety thereon. *Miller & Thompson v. McCullen*, 69 Iowa 681. In *Fredericktown Savings Institution v. Michael*, 81 Md. 487, 32 Atl. Rep. 189, a surety was held released by the principal's giving a new note, though the new note was afterwards adjudged to be void as an unlawful preference by a bankrupt. Other cases holding surety discharged by creditor's taking new note from principal payable at a later date are: *St. Stephens Bank v. Bonness*, 32 New Bruns. Rep. 486 at 498, and *O'Gara v. Union Bank of Canada*, 22 Can. Sup. Ct. 404, 435.

<sup>36</sup> *Maingay v. Lewis*, Irish Rep. 5 Com. Law 229; *Bellingham v. Freer*, 1 Moore's Priv. Con. Cas. 333. Holding that taking a note for extended period does not ipso facto amount to a giving of time, see *Shaw v. The First Associated Reformed Presbyterian Church*, 39 Pa. St. 226.

operates to suspend all right of action on the consideration for which it is given until the expiration of the time fixed for the payment of the obligation, and this although the obligation is not itself payment."<sup>37</sup> Again, it has been said that: "A creditor who, in receiving a new note, surrenders the first, novates his debt; the sureties it had for the payment of the first are discharged."<sup>38</sup> Where the principal gave his creditor a note for the debt, due one day after date, the surety was thereby discharged. The court said that taking a note for a debt was not payment thereof, unless expressly so agreed. "But if the creditor takes the bill or note of his debtor, payable at a future day, it is an extension of credit, and he cannot legally commence and sustain a suit for the original indebtedness until such bill or note becomes due and payable. \* \* Taking a note from a debtor for a debt due on a simple contract, though it does not merge the contract, and a suit may generally be brought upon the original consideration by producing and delivering up the note at the trial, has always been considered a valid agreement between the parties, and a suspension of the day of payment until the note becomes due."<sup>39</sup> Where principal and sureties were liable on a note, and the creditor agreed to extend the time of payment and take a less sum, and took the note of the principal for such less sum for an extended period, but upon the stipulation that, if the last note was not paid, the original note should remain valid and binding, it was held that the sureties were discharged.<sup>40</sup> The holder of an overdue non-negotiable note, on which there was a surety, accepted from the principal four new negotiable notes, three of which were payable at a future day, and the other on demand after date, and agreed that the original note should remain in his hands as collateral security for the payment of the new ones. Held, the effect of this arrangement was to enlarge the time of payment for a part

<sup>37</sup> Chickasaw County v. Pitcher, 36 Iowa 593, per Cole, J.

<sup>38</sup> Morgan v. Their Creditors, 1 La. (Miller) 527, per Martin, J.

<sup>39</sup> Fellows v. Prentiss, 3 Denio, 512. And to same effect see Greene v. Bates, 74 N. Y. 333; First Nat. Bank v. Leavitt, 65 Mo. 562. But the acceptance of a judg-

ment note payable one day after date in lieu of an old indebtedness is held not such an extension of time as will discharge sureties on the old note. Merriman v. Barker, 121 Ind. 74, 22 N. E. Rep. 992.

<sup>40</sup> Robinson v. Offutt, 7 T. B. Mon. (Ky.) 540.

of the debt, and to change the character and terms of the contract with respect to the whole of it, and that the surety was thereby discharged.<sup>41</sup>

**§ 399. The same, continued—Surety released by taking new note.**—Where, after a note with sureties became due, the creditor received payment of a part of it, and took the negotiable note of the principal at sixty days for the remainder, and indorsed on the back of the original note that when the sixty days' note was paid it should be a full payment of such original note, it was held the surety was discharged.<sup>42</sup> After the maturity of a note, the principal executed a new note due at an extended period, which was indorsed by the creditor and discounted, and the avails paid to the creditor, and the original note was retained by him. The principal paid \$100 on the last note, and another note was made by the principal for an extended time, and when it was due the principal paid \$200 on it. Held, the surety was discharged. The court said the facts constituted an implied agreement for an extension of time, and the receipt of the money on the new note was a sufficient consideration for it. The fact that the original note was not surrendered made no difference, as the new notes were not taken as collateral merely.<sup>43</sup> An auctioneer having sold goods, and paid over only a small portion of the proceeds, gave his notes due at different times for the balance. Held, his sureties were discharged. The court said: "In this case the debt was divided, and several portions of it thrown into the form of a negotiable instrument. From these facts, what but an agreement to wait until their maturity can be implied?"<sup>44</sup> When a debt became due, the creditor told the principal he would wait if the principal would pay twelve per cent. interest, but no definite time of extension was in terms agreed upon. A note for one year's interest at that rate was given by the principal to the creditor, which was paid, and another note for interest given. Held, the surety was discharged. The court said: "There is no substantial difference between taking notes for the inter-

<sup>41</sup> *Andrews v. Marrett*, 58 Me. 539.

<sup>43</sup> *Hubbard v. Gurney*, 64 N. Y. 457.

<sup>42</sup> *Morton v. Roberts*, 4 T. B. Mon. (Ky.) 491.

<sup>44</sup> *Mouton v. Noble*, 1 La. Ann. 192, per Eustis, C. J.

est only and notes for the principal, for it is the effect of the one as clearly as of the other to show an express understanding that the period for paying the debt itself was prolonged, else for what was the twelve per cent. paid?"<sup>45</sup> Where the principal debtor on a promissory note procured its surrender and an extension of time by giving a new note to which he had forged a surety's name, it was held that the extension so procured would not discharge the surety.<sup>46</sup> A different rule seems to prevail in Pennsylvania.<sup>47</sup>

**§ 400. Surety on bond and for open account discharged by creditor taking principal's note, check or trust deed for extended time.**—If the debt for which the surety is bound is evidenced by a bond or other sealed instrument and the creditor take from the principal, for the debt, a note, bill or other negotiable instrument which falls due after the original obligation matures, this usually amounts to an extension of time and discharges the surety.<sup>1</sup> In a leading case in which this was held the court said: "The obligee thinks fit totally to change the nature of the security and the credit, \* \* and doing this, he does this material injury to the surety; he has

<sup>45</sup> *Darling v. McLean*, 20 Up. Can. (Q. B.) 372, per Robinson, C. J.

<sup>46</sup> *Hubbard v. Hart*, 71 Iowa, 668.

<sup>47</sup> In *Phoenix Brewing Co. v. Rumberger*, 181 Pa. St. 251, 37 Atl. Rep. 340, the principal having an open account for beer with a brewery, without request, sent his two judgment notes for an amount equal to the balance due and closed his account. When the judgment notes became due the brewery entered judgment upon them. Held, that the surety was not discharged. The court, Fell, J., said that it could not be conceded that the taking of a note payable at a future day for an existing debt implies, even prima facie, an agreement to wait until the note matures, and discharges the parties secondarily liable for the payment

of the debt as sureties or guarantors. Citing *Shaw v. First Associated Reformed Presbyterian Church*, 39 Pa. St. 226; *Hutchinson v. Woodwell*, 107 Pa. St. 510; *Buck v. Wilson*, 113 Pa. St. 423, 6 Atl. Rep. 97.

<sup>1</sup> *Armestead v. Ward*, 2 Patten, Jr. & Heath (Va.) 504; *Clarke v. Henty*, 3 Younge & Coll. (Exch.) 187; *Hooker v. Gamble*, 12 Up. Can. (C. P.) 512; *Smith v. Crease's Ex'rs*, 2 Cranch, C. C. 481; *Hooker v. Gamble*, 9 Up. Can. (C. P.) 434; *Bangs v. Mosher*, 23 Barb. (N. Y.) 478; *Dixon v. Spencer*, *McKay & Co.*, 59 Md. 246. In *Carter v. Duncan*, 84 N. C. 676, it was held that where a creditor extended the time of payment on a bond beyond the date of the commencement of a suit thereon the surety was discharged, if done without his knowledge.

a right the day after the bond is due to come here (into chancery) and insist upon its being put into the suit; the obligee has suspended that till the time contained in the notes runs out; therefore he has disabled himself to do that equity to the surety which he has a right to demand." The court will not inquire whether the surety is benefited or not. "You cannot keep him bound and transact his affairs (for they are as much his as your own) without consulting him. You must let him judge whether he will give that indulgence, contrary to the nature of his engagement."<sup>2</sup> Extending the time of payment of an open account by taking the note of the principal for it discharges the surety.<sup>3</sup> Certain parties executed a bond by which they became sureties for three months from the date of the sales respectively for any bills of goods which might be sold the principal. A sale was made and the creditor took the negotiable note of the principal for the amount, which, allowing days of grace, became due one day after the three months' credit expired, and it was held the sureties were thereby discharged.<sup>4</sup>

§ 401. **The same, continued—Sureties released by taking new note.**—Principal and sureties executed a bond conditioned that the principal would pay for all sewing machines furnished him by the plaintiff when the price was due, or within thirty days after notice of default in such payment. When the amount was due the plaintiff took the principal's note therefor, due in three months, and it did not appear that

<sup>2</sup> Rees v. Barrington, 2 Vesey, Jr., 540, per the Lord Chancellor.

<sup>3</sup> Lee v. Sewall, 2 La. Ann. 940; Myers v. Welles, 5 Hill (N. Y.) 463; Howell v. Jones, 1 Cromp., Mees. & Ross. 97; Id., 4 Tyrwh. 548. In Herman v. Williams, 36 Fla. 136 (1895), defendant on April 27, 1888, guaranteed payment of all purchases made by Cohen, his son-in-law, on April 25, 1888. In March, 1889, without notice to the guarantor, plaintiff took from Cohen a series of notes, the last payable in nine months, for the balance remaining overdue and unpaid

on account of that purchase, and interest thereon. Held, that while there might be a question as to whether those notes were accepted in payment or not, they had the effect, at least, of extending the time of payment, and that, inasmuch as they provided for payment of interest on the interest that was due on the balance of the price, the extension was made for a sufficient consideration, and the guarantor was thereby released.

<sup>4</sup> Appleton v. Parker, 15 Gray 173.

the same was taken as collateral security. Held, this was a giving of time which discharged the sureties on the bond.<sup>5</sup> If after the debt is due the creditor accept from the principal his check for the amount, due in fifteen days, this amounts to an extension of time and discharges the surety.<sup>6</sup> So where after the debt was due the creditor received the check of the principal for the amount dated ahead, and at its maturity presented it for payment, it was held the surety was discharged.<sup>7</sup> So, also, where such a check was accepted by the creditor to be in full satisfaction of the debt, if paid, it was held the surety was discharged.<sup>8</sup> After a note, on which principal and surety were liable, fell due, the principal executed a deed of trust to the creditor with authority to the trustee to sell the property conveyed for the satisfaction of the debt, after six months. There was no express agreement for delay, but the court held that such an agreement was necessarily implied and the surety was thereby discharged.<sup>9</sup> After the maturity of a note on which principal and surety were liable, the principal gave the creditor a trust deed upon land to secure the note, and in the trust deed provided that no sale of the land should be made for eighteen months, and if within that period the note was paid, the trust deed should be null and void. The trust deed was accepted by the creditor, and the court held that the time of payment was extended and the surety discharged.<sup>10</sup>

<sup>5</sup> *Weed Sewing Machine Co. v. Oberreicht*, 38 Wis. 325. See *Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260.

<sup>6</sup> *Albany City Fire Ins. Co. v. Devendorf*, 43 Barb. (N. Y.) 444.

<sup>7</sup> *Place v. McIlvain*, 38 N. Y. 96.

<sup>8</sup> *Okie v. Spencer*, 1 Miles (Pa.) 299. Holding that the creditor who receives a check from the principal who has no money in bank, but promises to deposit sufficient to meet it in two or three days, does not thereby discharge the surety, see *Bordelon v. Weymouth*, 14 La. Ann. 93.

<sup>9</sup> *Lea v. Dozier*, 10 Humph. (Tenn.) 447. But see *Sayre v. King*, 17 W. Va. 562, where it was

held that the taking of a deed of trust as collateral security did not suspend the right of action on the original debt, and did not discharge the sureties from liability unless they could prove that the consideration for such security was an extension of time.

<sup>10</sup> *Smarr v. Schnitter*, 38 Mo. 478. To contrary effect, see *Headlee, Adm'r, v. Jones*, 43 Mo. 235. Holding that giving time to the principal in consideration of a deed of trust on personal property given by the principal to the creditor discharges the surety, see *Smith v. Clopton*, 48 Miss. 66. See, also, *Semple v. Atkinson*, 64 Mo. 504.



§ 402. **When surety not discharged if creditor take principal's note for extended period.**—Where the surety in a bond claimed to be discharged because a note at two months was taken from the principal by the creditor, it was held that it was competent to prove by parol that it was orally agreed between the creditor and principal that taking the note should not suspend the remedy on the bond.<sup>11</sup> Principal and surety were liable on a bond, and the creditor accepted from the principal his promissory notes, falling due at a time subsequent to the maturity of the bond, but at the same time clearly expressed his intention of holding the surety on the bond, and there was no express agreement that the notes should be received as payment of the bond. Held, the surety on the bond was not discharged. The notes were simply collateral to the bond, and taking them did not suspend the remedy on it, as it was clearly the intention of the parties that such remedy should not be suspended.<sup>12</sup> Where the principal after the debt became due gave the creditor a note for the amount at ten days from date, but antedated it so that it matured by its terms before the original debt was due, it was held there was no extension and the surety was not discharged.<sup>13</sup> A held an overdue note of B, indorsed by C, and D guaranteed its payment within sixty days after the date of the guaranty. Held, there was no presumption of law that the guaranty was taken for the benefit of B, or that it extended to him the time of payment. It was an independent contract, which did not suspend the right of action of A against B, and there being no express agreement for extension, C was not discharged.<sup>14</sup> A principal and two sureties were liable on a note, and it was agreed that the principal might have further time by giving a new note with the same sureties. Such new note was given, which was signed by only one of the sureties. In an action on the new note judgment by default was rendered against the principal, but it was held not obligatory on either of the sureties. Held,

<sup>11</sup> Wyke v. Rogers, 1 De Gex, did not discharge the surety, see Macn. & Gor. 408. Fox v. Parker, 44 Barb. (N. Y.)

<sup>12</sup> Paine v. Voorhees, 26 Wis. 541.

522; Jones v. Sarchett, 61 Iowa, 520. For case holding under peculiar circumstances that notes for extended time were collateral and

<sup>13</sup> Robinson v. Dale, 38 Wis. 330.

<sup>14</sup> Williams v. Covilland, 10 Cal. 419.



the sureties were liable on the old note. Having defeated a recovery on the new note, they were estopped to set it up as an extension of time.<sup>15</sup> A guaranty was as follows: "If \* \* (A) purchases a case of tobacco on credit, I agree to see the same paid for in four months." A purchased the tobacco and gave his note at four months for it. Held, giving the note did not discharge the guarantor.<sup>16</sup> So where a party guaranteed the payment of a bill of goods already bought, for which the principal had given his note, and guaranteed the payment for such other bills as the principal might buy, and the principal bought other bills and gave his notes for them, but none of the notes was negotiated, it was held the giving of such notes was not a payment by the principal which would discharge the guarantor.<sup>17</sup>

**§ 403. Surety not discharged by creditor taking collateral security for extended time.**—The mere fact that the creditor takes a collateral security for the debt which matures after the time the debt for which the surety is liable comes due will not discharge the surety if it does not amount to an extension of the time of payment.<sup>18</sup> If when the collateral security is given there is an express agreement, either that the time of payment of the debt shall or shall not be extended thereby, such agreement will prevail. If there is no express

<sup>15</sup> *Williams v. Martin*, 2 Duvall (Ky.) 491.

<sup>16</sup> *Case v. Howard*, 41 Iowa 439.

<sup>17</sup> *Willey v. Thompson*, 9 Met. (Mass.) 329. For a questionable decision, holding that if a legatee takes the note of an executor due one day after date, he does not discharge the executor's surety, see *Cooper v. Fisher*, 7 J. J. Marsh. (Ky.) 396. Such act, however, would discharge the sureties on the bond of a residuary legatee; but if the legatee were an infant, it is held such sureties would not be released unless he ratified the taking of such note after arriving at full age. *Durfee v. Abbott*, 61 Mich. 471.

<sup>18</sup> *Sigourney v. Wetherell*, 6 Met. (Mass.) 553; *Shubrick's Ex'rs v.*

*Russell*, 1 Des. (S. C.) 315. But see *Slagle v. Pow*, 41 Ohio St. 603. Holding that the taking of a collateral security does not bar a suit on the principal debt, see *Mendenhall v. Lenwell*, 5 Blackf. (Ind.) 125; *Dugan v. Sprague*, 2 Ind. 600; *Mills v. Gould*, 14 Ind. 278; *Fireman's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160. In *Mobile Life Ins. Co. v. Randall*, 71 Ala. 220, it was held that where a note payable twelve months after date was taken for an existing debt, the remedy on the debt was suspended until the maturity of the note, notwithstanding there may have been no express agreement to that effect, and the sureties on the original debt were discharged.

agreement, it has been held that no agreement to delay the collection of an overdue debt is implied from the receipt by the creditor from the principal of a note or other obligation not yet due, merely as collateral security therefor. In holding this to be the law the following distinctions were drawn: "There is a class of securities payable on time, the taking of which, on an antecedent debt, implies an agreement for the suspension of the antecedent debt; but that class of cases is confined to those where the creditor accepts the note or bill for and on account of the antecedent debt, and the new security, for the time being, at least, is to take the place of and represent the original debt. That class is distinguishable from, and not to be confounded with, the class where the creditor has accepted simply a new additional or collateral security for an antecedent debt. In the former transaction an agreement to give time may be implied, but not out of the latter transaction."<sup>19</sup> Where principal and surety were liable on a bond, and the creditor took from the principal a new bond for the same amount, due at a later period than the first, and drawing a larger interest, but with the express understanding that the new bond should be held as collateral security, and that the first bond should remain in force, it was held that the surety was not discharged.<sup>20</sup> After the note upon which a

<sup>19</sup> *Austin v. Curtis*, 31 Vt. 64, per Bennett, J., overruling *Michigan State Bank v. Estate of Leavenworth*, 28 Vt. 209. Holding that a giving of time will be presumed from taking collateral security, see *Hill v. Bostick*, 10 Yerg. (Tenn.) 410.

<sup>20</sup> *Remsen v. Graves*, 41 N. Y. 471. Holding that where a new note of the principal, with new sureties for extended time, is taken by the creditor as collateral to old note, without any agreement to give time, the surety on the old note is not discharged, see *Globe Mutual Ins. Co. v. Carson*, 31 Mo. 218. See, also, *Newcomb v. Blakeley*, 1 Mo. App. 289. So the giving of a note secured by deed of trust maturing at a date later than the

original note for which it is given as collateral security is held not to release the surety on the original note though it be given without his knowledge or consent. *Noll v. Oberhellmann*, 20 Mo. App. 336. In *Schlager v. Teal*, 185 Pa. St. 322, 39 Atl. Rep. 963, the maker of a note gave a new note running for a longer time, with the understanding it should be collateral to the old note and not in payment. Held, that the surety on the old note, who had no notice of the transaction, was not discharged. Conversely, in *Greenway v. William D. Orthwein Grain Co.*, 85 Fed. Rep. 536, 29 C. C. A. 330, 56 U. S. App. 523, a four months' note was deposited as collateral security for a note running seven months.

surety was liable came due, the principal gave the creditor a bill of exchange, due in a year, as collateral security, and the creditor gave him a receipt which stated that the amount of the bill, when collected, should be applied on the note. Held, these facts did not discharge the surety. It was insisted that there was an implied promise to indulge the makers of the note till the maturity of the bill. But (the court said) we think this inference is entirely answered by the other facts in the verdict, for it is found, also, by the jury, that the bill was taken as collateral security merely, which shows that the agreement to apply its proceeds to the payment of the note was not understood by the parties as giving the debtor any claim to indulgence.<sup>21</sup> A party gave another a letter of credit upon which goods were sold. The creditor took up a note given by the purchaser for the price, and accepted a note signed by the purchaser, and another due at a time in the future. The time when this last note became due was not beyond the time for which the guarantor had become liable. It was held that taking the new note did not discharge the guarantor.<sup>22</sup> A note of a bank provided that the bond of the cashier should be renewed every year, but that the renewal or giving a new bond should not affect the old one, unless it was actually surrendered to be canceled. A renewal bond with different sureties was given, but the old one was not surrendered to be canceled, and it was held that the sureties on the old bond were not thereby discharged.<sup>23</sup>

**§ 404. When surety not discharged if creditor take from principal mortgage for extended time as collateral security for the debt.**—It has been repeatedly held that the mere fact that the creditor takes from the principal a mortgage or trust deed of property as collateral security for the debt for which the surety is liable, which matures after the maturity of such debt, does not of itself, in the absence of an agreement to that

Held, that the time of payment of the four months' note was not thereby extended.

<sup>21</sup> *Wade v. Staunton*, 5 How. (Miss.) 631, per Trotter, J.

<sup>22</sup> *Norton v. Eastman*, 4 Greenl. (Me.) 521.

<sup>23</sup> *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171. Holding sureties not discharged by creditor taking collateral security for extended time, see *Frickee v. Donner*, 35 Mich. 151; *Adams v. Logan*, 27 Gratt. (Va.) 201.

effect, extend the time or discharge the surety.<sup>24</sup> Thus, where a judgment was recovered against a principal, and the creditor then took from the principal a deed of trust on real estate, which stipulated that, if the principal should not pay the judgment within a year, the trustee should sell the real estate for the satisfaction of the debt, it was held that no time was thereby given on the judgment, and the surety was not discharged.<sup>25</sup> The acceptance by a creditor of a bond and mortgage, payable at a future day, as collateral security for the amount of an execution in the hands of the sheriff, is not ipso facto a stay of the execution.<sup>26</sup> After the maturity of a note, upon which principal and surety were liable, the principal executed and delivered to the creditor as collateral security a mortgage of real estate, to secure a larger sum than the note, in which the amount of the note was included. The mortgage contained a covenant on the part of the mortgagor to pay the money on a day therein named, but no provision that the right of action on the note should be suspended. Held, the remedy on the note was not suspended, and the surety was not discharged.<sup>27</sup> A creditor took from the principal a

<sup>24</sup> *Burke v. Cruger*, 8 Tex. 66; *Williams v. Townsend*, 1 Bosw. (N. Y.) 411; *German Ins. Co. v. Vahle*, 28 Ill. App. 557. The giving of a bond as collateral security to a subsisting bond and mortgage does not per se, and in the absence of any agreement, operate as a suspension of the right to prosecute such bond and mortgage, and a surety of the mortgagor will not be released by the mere giving of such collateral bond. *Firemen's Ins. Co. v. Wilkinson*, 35 N. J. Eq. 160. The giving of a chattel mortgage to secure a pre-existing debt will not discharge sureties of the debtor unless the mortgage on its face purported extend the time of payment of the debt. *Meguiar v. Groves*, 1 Fed. Rep. 279 (Dist. Ct. D. Ky.). See, however, as opposed to the doctrine herein, *Munster & Leinster Bank v.*

*France*, Law. Rep. Irish (24 Q. B. and Ex. Div.) 82. See, upon this subject, *Bowling v. Flood*, 1 B. J. Lea (Tenn.) 678; *Benneson v. Savage*, 130 Ill. 352. In *Fisher v. Denver. National Bank*, 22 Colo. 373, 45 Pac. Rep. 440, defendant bank, after the maturity, of a note on which plaintiff was surety, took as collateral thereto, a note and trust deed maturing at a later date, without defendant's knowledge or consent. Held, that this was not even prima facie evidence of an extension of the time of the payment of the original debt and that the defendant was not thereby discharged as surety.

<sup>25</sup> *Pendexter v. Vernon*, 9 Humph. (Tenn.) 84.

<sup>26</sup> *Bank of Pennsylvania v. Potius*, 10 Watts (Pa.) 148.

<sup>27</sup> *Breugle v. Bushey*, 40 Md. 141. See a case similar in principle in

mortgage, conditioned that he would make a reconveyance if the debt for which a surety was liable, and other debts, were paid within five years. There was no express agreement to wait five years, nor any other time, and it was held the surety was not discharged.<sup>28</sup> Principal and surety were liable on several notes, maturing at different times, and the principal executed a trust deed of land to secure the payment of the notes, which provided that, in case of default for thirty days in the payment of any of the notes, they should all become due, and the trustee might sell the property and pay all the notes, whether due or not. Held, the surety was not thereby discharged.<sup>29</sup> Where principal and surety were liable on a note, and the principal assigned to the creditor all his household goods, etc., as a further security for the debt, with the proviso that he should not be deprived of the possession of the property assigned until after three days' notice, it was held that no time was given and the surety was not discharged.<sup>30</sup> When the creditor takes from the principal a mortgage for an extended time, as security for the debt, the surety may prove by parol an agreement for delay between the principal and creditor, prior to the making of the mortgage.<sup>31</sup> The mere fact that after a surety has become liable the creditor takes a trust deed or other security for the debt, where there is no extension of time, will not affect the liability of the surety.<sup>32</sup>

**§ 405. When surety not discharged by extension for less period than that in which judgment could be recovered—Injunction obtained by principal.**—If the time of payment is extended for a definite time, but the extension expires before judgment could have been obtained against the principal,

Illinois, *German Ins. & Savings Inst. v. Vahle*, 28 Ill. App. 557.

<sup>28</sup> *Thurston v. James*, 6 R. I. 103.

<sup>29</sup> *Morgan v. Martien*, 32 Mo. 438.

<sup>30</sup> *Twopenny v. Young*, 3 Barn. & Cress. 208.

<sup>31</sup> *Morse v. Huntington*, 40 Vt. 488. Where, in consideration of an agreement for extension, a mortgagor gave a chattel mortgage as additional security, and empow-

ering the mortgagee, in case the latter apprehended danger, to foreclose, it was held that such a clause did not defeat the operation of the extension, and that the sureties to the original debt were discharged if such extension was without their consent. *Kane v. Cortesy*, 100 N. Y. 132.

<sup>32</sup> *Scanland v. Settle*, Meigs (Tenn.), 160; *Oxley v. Stover*, 54 Ill. 159.

it has been held, under certain peculiar circumstances, that the surety was not thereby discharged. Thus, where the principal died, and the creditor made a binding agreement with his administrator not to sue for four months, where by statute he could not have sued till a year after the death of the principal, it was held the surety was not discharged.<sup>33</sup> So it has been held that a surety is not discharged by the creditor's taking from the principal a cognovit in an action he had brought against the principal, with a stay of execution until a day earlier than that upon which judgment could have been obtained in the regular course, because by the arrangement time was not given, but the remedy was accelerated.<sup>34</sup> Suit having been brought against the principal in a note, and the action being soon for trial, the creditor took a cognovit from the principal for the debt, payable in three instalments—the first on April 28th, the others in May and June; but if the principal failed in any of these payments, the creditor was to be at liberty to immediately enter up judgment, and issue execution for the whole sum. The first instalment was not paid. If the creditor had proceeded in his action he could not have obtained judgment before April 28th. Held, no time was given, and the surety was not discharged.<sup>35</sup> A judgment was recovered against a party in the court below, from which he prosecuted a writ of error to the supreme court, giving a surety on the writ of error bond. The judgment was affirmed, and, by virtue of a statute allowing it, judgment was rendered by the supreme court against the principal and surety. The principal then got an injunction against proceedings being had under the judgment, to which latter proceeding the surety

<sup>33</sup> *Gardner v. Van Nostrand*, 13 Wis. 543; *Story Prom. Notes*, § 415; *Daniel Neg. Inst.*, §§ 1319, 1313. But see *Revell v. Thrash*, N. C., June, 1903, 44 S. E. Rep. 596, where it was held that the rule alluded to in this section does not apply where the extension is for a definite time, however short. In that case the holder of an overdue note accepted a payment of \$10 in Oct., 1895, and indorsed upon it, "Interest paid to Dec. 29, 1895." Held, it was for the jury to say

whether or not there was an agreement to give time. Citing *Pipkin v. Bond*, 40 N. C. 91; *Forbes v. Sheppard*, 98 N. C. 111, 3 S. E. Rep. 817; *Scott v. Fisher*, 110 N. C. 311, 14 S. E. Rep. 799, 28 Am. St. Rep. 688.

<sup>34</sup> *Hulme v. Coles*, 2 Simons, 12; *Barker v. McClure*, 2 Blackf. (Ind.) 14; *Snydam v. Vance*, 2 McLean, 99; *Fletcher v. Gamble*, 3 Ala. 335.

<sup>35</sup> *Price v. Edmunds*, 10 Barn. & Cress. 578; *Id.*, 5 Man. & RyL. 287.



was not a party. Held, the surety was not thereby discharged.<sup>36</sup>

§ 406. If creditor continue case against principal, surety discharged—Other cases holding surety discharged by extension of time.—Suit having been brought on a note against a principal and surety, the creditor by a binding contract agreed to continue the case one term, and did so. Held, this was a giving of time which discharged the surety.<sup>37</sup> The obligee in a bond having placed himself in such a position with regard to the principal that he could not demand payment of the bond until a certain agreement entered into with third parties had been carried into effect, it was held that this was such a giving of time as discharged the surety in the bond.<sup>38</sup> A creditor who holds a guaranty to secure a floating balance cannot, without the surety's consent, give time to the principal for a portion of the debt, and yet hold the surety liable for that portion.<sup>39</sup> But a contract of suretyship for the performance by the vendee of a continuing agreement of purchase and sale, by which goods purchased from time to time, as required, are to be paid for at stated periods, is not discharged by mere forbearance on the part of the vendor to enforce payment, as provided by the contract, without a binding agreement for extension of time.<sup>40</sup> A contract provided that a principal should take from a gas company tar, etc., and pay for each month's supply within the first fourteen days of the ensuing month after account rendered, "unless the company should, by writing signed by their secretary, allow a longer time for payment." More than fourteen days elapsed after a monthly bill was rendered, and it was not paid, and the secretary of the gas company afterwards accepted the note of the principal at thirty days for the amount. Held, that assuming this to be a giving of time, by "writing signed by the secretary," within the meaning of the contract, as such time was given after the breach of the contract, the surety thereon was discharged from liability from the bill for that month, but not

<sup>36</sup> *Hodges v. Gewin*, 6 Ala. 478.

Gor. 113; *Id.*, 2 Hall & Twells, 223.

<sup>37</sup> *Wybrants v. Lutch*, 24 Tex. 309. To similar effect, see *Philips v. Rounds*, 33 Me. 357.

<sup>38</sup> *Davies v. Stainbank*, 6 De Gex, Macn. & Gor. 679. Compare § 393.

<sup>40</sup> *McKecknie, v. Ward*, 58 N. Y.

<sup>38</sup> *Cross v. Sprigg*, 2 Macn. & 541.



for subsequent months.<sup>41</sup> Where a surety is liable for rent payable quarterly, and time is given as to one or more instalments, the surety is discharged as to these only, and not from such as to which no time is given, even though they are all secured by one lease, and relate to the same premises.<sup>42</sup>

**§ 407. Agreement for extension must be made by party having authority—Conditional agreement for extension.**—An agreement for an extension of time, in order to be valid and work the discharge of the surety, must be made on behalf of the creditor by some one having authority to bind him. The holder of a note indorsed in blank is prima facie presumed to be the owner thereof, but this presumption is rebutted if he declares he is not the owner.<sup>43</sup> It has been held that the attorney of a plaintiff in a suit has no power without express authority to suspend an execution issued in the suit in which he is attorney.<sup>44</sup> It has also been held that such attorney has no power to bind his client by an agreement before judgment that judgment shall be stayed a given time, where such stay is not incorporated in the judgment.<sup>45</sup> But it has been held that an attorney appointed by a creditor to attend the examination of a poor debtor has authority to make

<sup>41</sup> *Croydon Gas. Co. v. Dickinson*, Law. Rep. 2 Com. Pl. Div. 46; reversing *Croydon Gas. Co. v. Dickinson*, Law Rep. 1 Com. Pl. Div. 707. So sureties on a continuing guaranty for the value of the goods to be supplied, not exceeding £300 in all, are held not entirely released from liability because the creditor, without their consent, extended time to the principal to the extent of £45 on account of a portion of the debt. *Dowden & Co. v. Levis*, Law Rep. Irish, 14 Q. B. (C. P. and Ex.) 307. See note 52, § 393.

<sup>42</sup> *Dacker v. Rapp*, 67 N. Y. 464.

<sup>43</sup> *Farwell v. Meyer*, 35 Ill. 40.

<sup>44</sup> *Union Bank v. Govan*, 10 Sm. & Mar. (Miss.) 333; *First National Bank of Monmouth v. Whitman*, 66 Ill. 331. In *Harper v. National*

*Life Ins. Co.*, 56 Fed. Rep. 281, 5 C. C. A. 505, 17 U. S. App. 48, the general agent of an insurance company, being indebted to it about \$30,000, was arrested for an embezzlement of \$2,000 and released upon payment of that amount. The company's attorney gave him a receipt stating that the time of payment of his entire indebtedness was extended five months. When the home office of the company, about a month later, first obtained knowledge of this agreement for extension, they immediately repudiated it and sent the agent a certified check for \$2,000 and interest thereon. It was held that the act of the attorney did not bind the company and that the sureties were not released.

<sup>45</sup> *Seawell v. Cohn*, 2 Nev. 308.

an agreement continuing the case, and in consequence a surety was discharged.<sup>46</sup> Where the board of police of a county consented that time might be given a principal upon his executing a new note and paying interest and costs, and the president of the board agreed to give the principal time without any new note being given, it was held the sureties were not discharged, as the president had no right to grant the extension except upon a new note being given, and this had not been done.<sup>47</sup> An auctioneer, being in arrear for auction dues coming to the state, the state treasurer gave him time by express agreement. Held, he had no authority to do so, and the sureties of the auctioneer were not discharged.<sup>48</sup> Where an intestate was surety on a note, it was held that the administrator of such intestate had power to consent to an extension of time to the principal, if such extension was for the interest of the estate.<sup>49</sup> A conditional agreement by the creditor to give time to the principal will not usually discharge the surety unless the condition is complied with, for otherwise there is no completed and binding contract for extension.<sup>50</sup> Principal and sureties signed a bond conditioned that the principal would complete a house within a certain time. Afterwards an agreement was written on the back of the bond, which it was intended should be signed by all the parties, and which by its terms extended the time for the completion of the building. One of the sureties did not sign this agreement. Held, the contract for extension was not complete nor binding; no time was given, and the sureties were not discharged.<sup>51</sup>

§ 408. **How surety of collector of taxes affected by extension of time—Other cases.**—The rule with reference to the discharge of a surety by extension of time has been variously

<sup>46</sup> Phillips v. Rounds, 33 Me. 357.

<sup>47</sup> Board of Police of Clark Co. v. Covington, 26 Miss. 470.

<sup>48</sup> State v. Beard, 11 Rob. (La.) 243.

<sup>49</sup> Smarr v. McMaster, 35 Mo. 349, approved in North v. Walker, 66 Mo. 454, where it was held that an executor had the power to make a valid agreement for an extension of the time of payment of a debt held by another against the estate

which he represented. And see the same doctrine further upheld in West v. Brison, 99 Mo. 684. But that an administratrix of an estate has no such authority to grant an extension of time, see Jackson v. Michie, 33 La. Ann. 723.

<sup>50</sup> Wheeler v. Washburn, 24 Vt. 293; Harnsberger's Ex'r v. Geiger's Adm'r, 3 Gratt. (Va.) 144.

<sup>51</sup> Barber v. Burrows, 51 Calif. 404.

party; it only declares it to exist, fixes the amount, and secures to the suitor the means of enforcing payment. \* \* When the creditor obtains a judgment against the principal debtor and the surety, both are, to be sure, equally and absolutely bound for the debt; but why is it that a payment of the judgment by the principal debtor releases the surety, or that a payment of it by the surety subrogates him to all the rights of the judgment creditor against the principal debtor? It can only be because the relation of principal and surety continues to subsist between them, even after judgment.<sup>7</sup> If the creditor take from the principal a confession of judgment, and grant a stay of execution for a definite time, and such stay is part of the judgment, or there is a binding agreement that such stay shall be given, the surety is generally held to be discharged thereby.<sup>8</sup> Such agreement must, in order to have this effect, be binding,<sup>9</sup> and for a definite time.<sup>10</sup> And if the time for which execution is stayed does not exceed that in which judgment could have been obtained by the ordinary course, it has been held there is not such a giving of time as will discharge the surety.<sup>11</sup> If, by virtue of a statutory provision, the remedy of the surety against his principal is not impeded by the stay of execution, it has been held the surety is not discharged thereby.<sup>12</sup> By the terms of a replevin bond, the sureties therein agreed that if a judgment for money was

Grant's Ch. 653; *Allison v. Thomas et al.*, 29 La. Ann. 732; *Gipson v. Ogden*, 100 Ind. 20. Contra, see *Farmers' Bank v. Horsey*, 1 Harr. (Del.) 514. Holding the contrary, with hesitation, see, also, *Duff v. Barrett*, 15 Grant's Ch. 632; *Duff v. Barrett*, 17 Grant's Ch. 187. See, also, on this subject, *Drake v. Smythe*, 44 Iowa, 410. A stipulation not to enforce a judgment of affirmance on appeal for a certain time is held such an extension as will release the sureties on the appeal bond. *Ross v. Ferris*, 18 Hun (N. Y.) 210.

<sup>7</sup> *Gustine v. Union Bank*, 10 Rob. (La.) 412. per Murphy, J.

<sup>8</sup> *Wingate v. Wilson*, 53 Ind. 78;

*Fordyce v. Ellis*, 29 Cal. 96; *State v. Hammond*, 6 Gill & Johns. (Md.) 157; *Ward v. Johnson*, 6 Munf. (Va.) 6; *Clippinger v. Creps*, 2 Watts (Pa.) 45; *Bank of Steubenville v. Leavitt*, 5 Ohio 208.

<sup>9</sup> *Wayne v. Kirby*, 2 Bailey, Law (S. C.) 551; *Woolworth v. Brinker*, 11 Ohio St. 593.

<sup>10</sup> *Miller v. Porter*, 5 Humph. (Tenn.) 294.

<sup>11</sup> *Ferguson v. Childress*, 9 Humph. (Tenn.) 382; *Fletcher v. Gamble*, 3 Ala. 335; *Suydam v. Vance*, 2 McLean, 99; *Barker v. McClure*, 2 Blackf. (Ind.) 14.

<sup>12</sup> *Grimes v. Nolen*, 3 Humph. (Tenn.) 412; *Williams v. Wright*,

9 Humph. (Tenn.) 493.

rendered against the principal, it might also be rendered against them. By agreement with the principal, judgment was had against him and the sureties, and by the terms of the same, judgment execution was stayed one year. Held, the sureties were not discharged, on the ground that the court had, by virtue of the bond and the provisions of the law, jurisdiction over the sureties, and they were bound by any judgment it might render to which they did not object. The court said this was not like giving time after a judgment had been rendered, because here the giving of time was part of the judgment, and the sureties being presumed to be in court, and not objecting, remained bound.<sup>13</sup>

**§ 410. Miscellaneous cases holding surety discharged by extension of time after judgment.**—A creditor, by directing the sheriff to put off the sale of property of the principal, taken in execution, to a day after the return day, and to suffer it to remain in possession of the principal, releases the sureties from that and any subsequent execution.<sup>14</sup> If, after a sale of real estate by order of the orphans' court, the guardian of one of the heirs takes a judgment from the administrator who made the sale for the share of his ward, and gives a stay of execution for one year, the surety of the administrator is released.<sup>15</sup> Where, after a judgment was recovered against a principal, the creditor entered a record in the case that execution was stayed for a definite time, it was held the surety was discharged.<sup>16</sup> The defendant in a suit in which judgment had been recovered gave a voluntary bond with two sureties, which provided for the payment of the judgment in cotton by a certain date. Afterwards the defendant sued out a writ of error to the supreme court, giving other sureties. By consent of the defendant, the judgment was affirmed in the supreme court, and an agreement was made between the defendant and the creditor that execution should be stayed a

<sup>13</sup> *Hershler v. Reynolds*, 22 Iowa 152. This case can be sustained only on the ground that, under the peculiar circumstances, the sureties must be presumed to have consented to the judgment. See to substantially similar effect, *Carraway v. Odeneal*, 56 Miss. 223.

<sup>14</sup> *Bullitt's Ex'rs v. Winstons*, 1 Munf. (Va.) 269. And see to same effect, *McKenzie v. Wiley*, 27 W. Va. 658.

<sup>15</sup> *Sawyers v. Hicks*, 6 Watts (Pa.) 76.

<sup>16</sup> *Smith v. Rice*, 27 Mo. 505.

definite time. Held, the sureties on the voluntary bond were discharged.<sup>17</sup> A creditor having commenced suit against the principal and held him to bail thereon, agreed to waive further proceedings upon the principal's giving him a warrant of attorney to confess judgment, on which warrant was a memorandum that no execution should issue on the judgment for three years. Held, the surety was discharged.<sup>18</sup> The principal in a writ of error bond agreed with the adverse party that the judgment should be affirmed, that he would deliver indorsed bills for the amount of the debt, payable by instalments, and that no execution should be levied, except in the event of the non-payment of the bills, and it was held that the sureties in the bond were discharged.<sup>19</sup> A became surety of the defendants in an execution for the delivery to the sheriff at a day certain of certain goods levied on. After that day the original award on which the execution issued was, by consent of the parties in the case, referred back to the arbitrators on exceptions filed, and the award was confirmed by agreement, and three months' stay of execution was given. Held, the execution was discharged and A released by the extension of time.<sup>20</sup> The assignors of a judgment "guarantied payment thereof in one year from this date." The assignee afterwards extended the time of payment of the judgment without the consent of the assignors. Held, that the assignors were sureties and not guarantors, and were discharged from liability.<sup>21</sup>

**§ 411. Whether surety on specialty discharged by parol agreement for extension.**—With reference to the effect of a parol agreement for extension of time on the liability of a surety who is bound by a sealed obligation, the decisions vary greatly. It has been held that a parol agreement to give time under such circumstances is not binding, because a specialty cannot be discharged, controlled or in any way affected by a contract of less dignity than itself.<sup>22</sup> A court which held the above also held that where, in such a case, acts had been

<sup>17</sup> *Comegys v. Booth*, 3 Stew. (Ala.) 14. *Leonard v. Village of Gibson*, 6 Bradw. (Ill. App.) 503.

<sup>18</sup> *Nisbet v. Smith*, 2 Brown's Ch. 579.

<sup>20</sup> *Blaine v. Hubbard*, 4 Pa. St. 183.

<sup>19</sup> *Comegys v. Cox*, 1 Stew. (Ala.) 262. See the same with reference to the sureties on an appeal bond.

<sup>21</sup> *Riddle v. Thompson*, 104 Pa. St. 330.

<sup>22</sup> *Carr v. Howard*, 2 Blackf.

done under the parol agreement and in pursuance of it, the surety was thereby discharged, because, the parol agreement being executed, it was not the agreement alone, but the things done under it, which was relied upon.<sup>23</sup> Other courts hold that the sealed instrument by which the surety is bound may be discharged by an extension of the time of payment, by a writing without seal or by a verbal agreement.<sup>24</sup> Still other courts, while admitting that a surety who is bound by a specialty may, in equity, be discharged by a parol agreement for extension, have held that such parol agreement cannot be set up as a defense at law.<sup>25</sup> The strong tendency of the later decisions is, however, as elsewhere shown, to permit the surety to make and rely upon, at law, any defense which he can sustain in equity, except in special cases where law cannot afford adequate relief.

**§ 412. When surety discharged by extension of time if fact of suretyship does not appear from the obligation.**—Where the fact of suretyship does not appear from the obligation, but the creditor, when he grants an extension of time to the principal, knows of such suretyship, the surety is discharged the same as if the fact of suretyship appeared from the obligation.<sup>26</sup> But if the fact of suretyship does not appear from

(Ind.) 190; *Tate v. Wymond*, 7 Blackf. (Ind.) 240.

<sup>23</sup> *Dickerson v. Comm'rs Ripley Co.*, 6 Ind. 128. On the same subject and to same effect, see *White v. Walker*, 31 Ill. 422.

<sup>24</sup> *Leavitt v. Savage*, 16 Me. 72. See, on this subject, *Gott v. State*, 44 Md. 319.

<sup>25</sup> *Steptoe's Adm'r v. Harvey's Ex'r*, 7 Leigh (Va.) 501; *Devers v. Ross*, 10 Gratt (Va.) 252; *Davey v. Prendergrass*, 5 Barn. & Ald. 187; *Wiltmer v. Ellison*, 72 Ill. 301; *Sayre v. King*, 17 W. Va. 562; *Glenn v. Morgan*, 23 W. Va. 467.

<sup>26</sup> *Greenough v. McClelland*, 2 Ellis & Ellis 424; *F. & M. Bank of Lexington v. Crosby*, 4 J. J. Marsh. (Ky.) 366; *Pooley v. Harradine*, 7 Ellis & Black. 431; *Stevens v. Oaks*, 58 Mich. 343. It is

held that there is no presumption in favor of the surety that the creditor had knowledge of the relationship. *Gipson v. Ogden*, 100 Ind. 20. A surety who set up in his defense an extension without his consent must, it is held, allege and prove that the holder of the obligation had notice of the suretyship. *Lamson v. First Nat. Bank*, 82 Ind. 21; *Tharp v. Parker*, 86 Ind. 102. The same rule has been held to apply where property occupies the position of surety. In *Cox v. Dowd*, 133 Nor. Car. 537, Dec., 1903, 45 S. E. Rep. 846, a woman assigned in blank a certificate of stock in a corporation to her brother to enable him to raise money. Held that her brother's agreement with his creditor for an extension of time without her con-



the obligation, and the creditor does not know of it when he grants the extension, the surety is not thereby discharged.<sup>27</sup> By a composition deed, certain creditors extended the time of payment to the principal for two years absolutely, and longer if he complied with certain terms. The creditor was the indorsee of a bill of exchange accepted by A for the accommodation of the principal, but this fact was not known to the creditor when he made the composition deed. He did, however, know that some of the parties on some of the paper of the principal were sureties, but he did not know which were such sureties. Held, A was discharged by the giving of time. The court said: "We think that, if the effect of the deed were to alter the position of the parties who should turn out to be sureties, it was wilfully done, and as inequitable as if they had express notice who those parties were."<sup>28</sup>

**§ 413. Giving time to principal does not discharge surety if remedies against surety reserved.**—If the creditor extends the time of payment to the principal, but at the same time expressly reserves all remedies against the surety, the surety is not discharged by such extension.<sup>29</sup> With reference to

sent did not release the property. The creditor had a right, being ignorant of conditions imposed as to the use of the stock, to assume that it was the property of the borrower.

<sup>27</sup> *Howell v. Lawrenceville Mfg. Co.*, 31 Ga. 663; *Nichols v. Parsons*, 6 N. H. 30; *Agnew v. Merritt*, 10 Minn. 308; *Kaighn v. Fuller*, 1 McCarter (N. J.) 419; *Roberts v. Bane*, 32 Tex. 385; *St. Maries v. Polleys*, 47 Wis. 67.

<sup>28</sup> *Bailey v. Edwards*, 4 Best & Smith, 761, per Blackburn, J.

<sup>29</sup> *Claget v. Salmon*, 5 Gill & Johns. (Md.) 314; *Wyke v. Rogers*, 1 De Gex, Macn. & Gor. 408. See to this point, *Austin v. Gibson*, 28 Up. Can. (C. P.) 554; *Hagey v. Hill*, 75 Pa. St. 108; *Boaler v. Mayor*, 19 J. Scott (N. R.) 76; *Currie v. Hodgins*, 42 Up. Can. (Q. B.) 601; *Price v. Barker*, 4 Ellis &

*Black*, 760; *Webb v. Hewitt*, 3 Kay & Johns. 438; *Owen v. Herman*, 13 Beav. 196; *Rockville Nat. Bank v. Holt*, 58 Conn. 526; *Jones v. Sarchett*, 61 Iowa, 520; *Canadian Bank v. Northwood*, 14 Ont. (Can.) 207; *Hartman v. Redman*, 21 Mo. App. 124; *Russell v. Brown*, 21 Mo. App. 51. Contra, *Gustine v. Union Bank*, 10 Rob. (La.) 412. If the rights of the surety to proceed against the principal are preserved, the surety will not be discharged. *Mueller v. Dobschuetz*, 89 Ill. 176. But an agreement for extension without reserving the right to proceed against the surety, if made without his consent, will of course exonerate him from liability. *Forbes v. Sheppard*, 98 N. C. 111. And see *First Nat. Bank v. Lineberger*, 83 N. C. 454. In *Gorman v. Dixon*, 26 Can. Sup. Ct. 87, it was held that "if the creditor giv-



this matter it has been said: "The giving of time to the principal debtor, with a reservation of the remedies, has in many cases the appearance of absurdity, because, when distinctly understood, it seems to be almost a flat contradiction in terms. Such a reservation of remedies, in order to hold the surety, must amount to this: that the creditor agrees to give time to the debtor, and yet they both agree that the

ing time to the principal debtor reserves his remedies against the surety the latter is not discharged," and that such reservation need not be express, but may be inferred from circumstances, as, in this case, that the old note was not surrendered, but was pinned to and retained with the renewal note. Citing *Wyke v. Rogers*, supra. Such reservation should be set up by replication. In *Hodges v. Elyton Land Co.*, 109 Ala. 617, 20 So. Rep. 23, the Elyton Land Co. sold certain land to Hodges and took his purchase money notes therefor. Hodges sold to Dodson & Brown, to whom afterwards the land company made a deed and took a purchase money mortgage securing Dodson & Brown's notes for the unpaid portion of the purchase money in pursuance of a written agreement between the land company and Dodson & Brown, in which Hodges did not join, wherein it was stipulated "that on the payment in full by the sub vendees (Dodson & Brown) of said promissory notes given by them to the Elyton Land Company, the Elyton Land Company will cancel and surrender to them said original notes given by said original vendees (the defendants) for said original purchase money. But until the payment in full by said sub vendees of the said notes given by them to the Elyton Land Company, the said notes of original vendees remain in full force, and are not

paid or discharged, except to the extent of the cash paid by said sub vendees to the Elyton Land Company on account of said purchase money, said original vendees being entitled, at their option, to the extension granted as aforesaid to said sub vendees." It was held, citing the text, that the extension did not release the original makers of the notes, because all their rights and remedies were preserved intact. Notwithstanding the agreement they might proceed by bill quia timet, on the maturity of the notes, to compel their payment to the plaintiff, or require the principal to sue by giving him written notice under the code, or they might pay the notes at maturity and proceed against Dodson & Brown for indemnification. "It is also clear," said the court, "that they lost no security otherwise available to them by the substitution of a deed and mortgage back for the retention of title and bonds for title involved in the original transaction, for this did not in point of fact affect them, since the land was applied to the debt under the substitutional arrangement, as it would have been under the original contract; and, moreover, under the agreement for the extension, they were in no sense bound by this transaction between plaintiff and Dodson & Brown."

surety may at any time force the creditor to proceed against the principal by a bill quia timet, or, by paying the whole debt, have an assignment of all the securities, and proceed immediately himself against the principal debtor, or in any mode authorized by the assigned securities. Such an agreement, reserving the remedies, might not in many cases be of the least benefit to the principal debtor, since it leaves him entirely at the mercy of his surety; yet if the parties do so expressly contract, the surety can have no cause to complain that the implied contract has been altered or impaired in any way to his prejudice, and therefore he cannot be discharged."<sup>30</sup> It has also been said that "the debtor cannot complain if the instant afterwards the surety enforces those remedies against him, and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him. \* \* It is very obvious that a principal debtor may gain little or nothing by such a composition as this with his creditor, inasmuch as he is left liable to the like proceedings against him by his sureties which his creditor might have instituted if no composition had been made. But if he pleases to subject himself to that liability by voluntarily executing an agreement which has that effect, there is no legal reason why he should not be held to that agreement."<sup>31</sup>

§ 414. The same, continued—Surety not released where remedies reserved.—Again, it has been said that the reservation of remedies against the surety "rebutts the presumption that the surety was meant to be discharged, which is one of the reasons why the surety is ordinarily exonerated by such a transaction; and secondly, that it prevents the rights of the surety against the debtor being impaired, the injury to such rights being the other reason; for the debtor cannot complain if the instant afterward the surety enforces those rights against him, and his consent that the creditor shall have recourse against the surety is impliedly a consent that the surety shall have recourse against him."<sup>32</sup> In order that the extension of time

<sup>30</sup> Salmon v. Clagett, 3 Bland's Ch. (Md.) 125, per Bland, C.

<sup>31</sup> Sohler v. Loring, 6 Cush, 537, per Metcalf, J.

<sup>32</sup> Kearsley v. Cole, 16 Mees. & Wels. 128, per Parke, B.; Exchange Building & Investment Co. v. Bayless, 91 Va. 134, 21 S. E. Rep. 279.

in such a case shall not discharge the surety, the remedies against him must be distinctly and explicitly reserved. "A stipulation of that kind is, in many cases, so very absurd that it must be seen plainly."<sup>33</sup> A creditor agreed to give time to the principal, but at the same time reserved the right to sue when requested by the sureties, and it was held the sureties were not discharged.<sup>34</sup> When at the time an agreement for extension between principal and creditor was made, it was also agreed between them that the surety should not be discharged, but should have the right at any time to pay the debt, and proceed against the principal, it was held the surety was not discharged.<sup>35</sup> After judgment had been recovered against principal and sureties, the principal and the creditor made an agreement for extension of time, and at the same time stipulated that the lien of the judgment should remain unimpaired against all the parties thereto. Held, that under this agreement it was the duty of the principal to procure the consent of the surety to the extension; and if he did not, the consideration for the agreement failed, the creditor was not bound by it, and the surety was not discharged.<sup>36</sup> Where, by a vote of creditors under the bankrupt act, a composition less than the full amount is accepted and time given, the fact that a deed releasing the principal is afterwards executed, in which the remedies against the sureties are reserved, will not prevent the release of the sureties. The time having been once given by the vote, the sureties were then discharged, and could not be rendered liable by subsequent matter without their consent.<sup>37</sup> Where a creditor agreed with the principal to extend the time of payment for six months, and in the same agreement the principal reserved the right to pay at any time within the six months, it was held the surety was discharged.<sup>38</sup>

**§ 415. Pleading extension of time—Variance—Evidence—Equitable proceedings.**—In suing a surety on a promissory note the consideration must be stated. An allegation that "for good

<sup>33</sup> *Boulton v. Stubbs*, 18 Vesey 20, per Lord Eldon, C.

<sup>34</sup> *Rucker v. Robinson*, 38 Mo. 154.

<sup>35</sup> *Morse v. Huntington*, 40 Vt. 488.

<sup>36</sup> *Hunt v. Knox*, 34 Miss. 655.

<sup>37</sup> *Wilson v. Lloyd*, Law Rep. 16

Eq. Cas. 60.

<sup>38</sup> *Wright v. Bartlett*, 43 N. H.

and sufficient consideration" further time was granted was held insufficient.<sup>39</sup> Facts, not conclusions of law, must be pleaded. And for the same reason a complaint by a surety seeking a new trial, and alleging as grounds therefor "surprise" and "excusable neglect," was held insufficient.<sup>40</sup> An answer by a surety alleging as defense an extension of time of payment, but failing to allege that such extension was for a definite time and without his knowledge, was held insufficient on demurrer.<sup>41</sup> So an answer alleging that the extension was had pursuant to a valid contract therefor was held insufficient.<sup>42</sup> Extension of time should be pleaded by the surety in bar and not as matter in abatement.<sup>43</sup> And the extension

<sup>39</sup> *Winne v. Col. Springs Co.*, 3 Col. 155; *Palmer v. White*, 65 N. J. Law 69, 46 Atl. Rep. 706. That a release by giving time must be specially pleaded before evidence to show it is admissible, see: *Bishop v. Hart*, 114 Iowa 96, 86 N. W. Rep. 218; *Manning v. Alger*, 78 Iowa 191, 42 N. W. Rep. 643; *McCormick Harvesting Machine Co. v. Rae*, 9 N. D. 482, 84 N. W. Rep. 346. That a plea of release on the ground that the time was extended must aver that the contract for such extension was upon a sufficient consideration: *Lake v. Thomas*, 84 Md. 608, 36 Atl. Rep. 437. That an agreement to give time must be pleaded and proved to have been made for consideration and facts showing consideration set up and proved, otherwise no defense, see *Smith v. Stubbs*, 2 Colo., Dec. 603, Colo. App., Feb., 1902, 63 Pac. Rep. 955.

<sup>40</sup> *Tracy v. Quillen*, 65 Ind. 249.

<sup>41</sup> *Prather v. Young*, 67 Ind. 480; *Chrisman v. Perrin*, 67 Ind. 586. See good example of where the answer was held sufficient. *Buck v. Smiley*, 64 Ind. 431. In *Tuohy v. Woods*, 122 Calif. 665, 55 Pac. Rep. 683, it is held not to be neces-

sary to aver that such extension was without the surety's consent, the burden of proving such consent being on the plaintiff. Upon principle, it would seem clear that such a plea should aver knowledge on the part of the person granting the extension that defendant was a surety. See *Southern Mutual Building & Loan Assn. v. Perry*, 103 Ga. 800, 30 S. E. Rep. 658; *Venable v. Lippold*, 102 Ga. 208, 29 S. E. Rep. 181; *Perkins v. Rowland*, 69 Ga. 661; *Howard v. Lumpkin*, 70 Ga. 322; *Strauss v. Friend*, 73 Ga. 782; *Strickland v. Vance*, 99 Ga. 531, 27 S. E. Rep. 152; *Laster v. Stewart*, 89 Ga. 181, 15 S. E. Rep. 42.

<sup>42</sup> *Davenport v. King*, 63 Ind. 64; *McCloskey v. Indianapolis Manuf'rs & Carpenters' Union*, 67 Ind. 86.

<sup>43</sup> *Brink v. Reid*, 122 Ind. 257, 23 N. E. Rep. 770. It may also be availed of by bill in equity filed by the surety to enjoin a suit against him upon the obligation from which he has been released by extension of time: *English v. Landon*, 181 Ill. 614, 618, 54 N. E. Rep. 911; *Beuter v. Dillon*, 63 Ill. App. 517; note 12, § 394.

should be made to appear by a preponderance of evidence.<sup>44</sup> Where a surety pleaded that the principal paid to the payee a sum of money "for the consideration alone of the extension of time for one year," and the proof was that the sum paid was for a year's interest in advance, held, no variance.<sup>45</sup> Where the testimony established *prima facie* that a written assent to an extension was signed by all the guarantors except one, who was willing to sign the same but had omitted so to do through inadvertence, such written assent was held admissible as tending to show the actual assent of the guarantors to the extension.<sup>46</sup> In an action on a guaranty of a certain bond and mortgage, the defense was that an extension had been granted the mortgagor. It was shown that a brother of plaintiff had a conversation with defendant's testator wherein the latter said he would guaranty for "two years longer for these bonds," and that thereupon the extension was granted. Held, insufficient.<sup>47</sup> An extension of time is held not available to a principal in a note as a defense when sued thereon before the extended time given has elapsed.<sup>48</sup> It is held that when the payee of a note is dead, and the only witness to prove an extension of time by the payee without the surety's consent, is the maker of the note, the maker is a competent witness to prove such agreement in a proceeding in equity to enjoin the administrator from suing the surety, though, under a statute, he would not be a competent witness in an action at law upon the note by the executor.<sup>49</sup> The surety who pleads release by giving time has the right to open and close.<sup>50</sup>

<sup>44</sup> *Brumble v. Ward*, 40 Ohio St. 267. For a case where the evidence was held not sufficient to show renewal of a note without the surety's consent, see: *Gray v. Farmer's Nat'l Bank*, 81 Md. 631, 32 Atl. Rep. 518.

<sup>45</sup> *Williams v. Scott*, 82 Ind. 405.

<sup>46</sup> *Rutherford v. Brachman*, 40 Ohio St. 604.

<sup>47</sup> *Tuska v. Eisner*, 21 J. & S. (N. Y. Super. Ct.) 442.

<sup>48</sup> *Williams v. Scott*, 83 Ind. 405.

<sup>49</sup> *Dodgson v. Henderson*, 113 Ill. 360, at 363, per Craig, J., followed in *English v. Landon*, 181 Ill. 614,

54 N. E. Rep. 911; *Bradshaw v. Combs*, 102 Ill. 428.

<sup>50</sup> In *Columbia Finance & Trust Co. v. Mitchell's Adm'r*, Ky. Ct. App., Mch., 1903, 72 S. W. Rep. 350, it was held that the surety on a note who admitted the execution thereof and pleaded discharge by extension of time without his consent had the burden of proof and was entitled to open and close. The court said: "The defendant Young admitted signing the note, and a judgment for plaintiff must have been entered against him thereon unless he had, by proper

**§ 415      DISCHARGE OF SURETY BY GIVING TIME.**

evidence, overthrown the prima facie case which the note made out against him. To do this he had to show that he was a surety in the note, and not the principal, and that a novation had been made

by which he was released. \* \* \*  
Same case on former appeal: *Young v. New Farmers' Bank's Trustee*, 102 Ky. 257, 43 S. W. Rep. 473. Compare § 446.

## CHAPTER XV.

### OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY ALTERATION OF THE CONTRACT.

- § 416. Surety discharged by alteration of the contract—General observations.
417. Surety discharged by changing date of note or adding interest not discharged by making or attaching collateral contract or making new contract.
418. How surety and principal affected by addition of new party to a note.
419. Instances of cases in which alteration of note will and will not discharge surety.
420. The same, continued.
421. When alteration is so far material as to discharge surety — Miscellaneous cases.
422. Miscellaneous cases wherein alteration held not to discharge surety—Effect of adding attesting witnesses.
423. Surety not discharged if after alteration is made he ratifies it—Consent in advance to alterations.
424. When surety on bond discharged if it is altered.
425. When surety on bond not discharged by its alteration.
426. When surety discharged if creditor advance to principal greater or less amount than that for which surety becomes liable.
- § 427. Surety discharged if variation of contract is for his benefit.
428. Cases holding surety not released where creditor alters contract to principal's advantage.
429. When surety on lease discharged by alteration of contract.
430. Same continued — When surety not discharged.
431. When judgment against principal does not bar suit against surety.
432. When surety not discharged because compensation of principal changed.
433. Surety for conduct of principal discharged if his duties are changed.
434. The same, continued — Whether surety released by principal's change of pay—Instances.
435. Same continued—Sureties of bank clerk, bookkeeper, sewing machine and ticket agents—Trustee.
436. When surety discharged if responsibility of the principal varied.
437. Discharge of surety of cashier, of surety on distiller's bond, and of surety when obligees subsequently become incorporated.
438. When change in membership of a firm releases surety therefor.



## § 416 DISCHARGE BY ALTERATION OF CONTRACT.

- § 439. Dealing by creditor with principal, which amounts to a departure from the contract, discharges surety—Acceleration of payments.
440. The same continued—Surety released by conduct amounting to departure from the contract—Obligee's failure to require stipulated settlements, etc.
441. When surety is released by alteration resulting from an order of court, increasing alimony, modifying injunction, etc.
- § 442. When surety is released in part by alteration of part of severable contract.
443. Surety released by alteration of contract from liability for future defaults only.
444. Miscellaneous cases holding surety discharged by alteration of contract.
445. Real or apparent alterations that do not release the surety—Indemnified surety not released.
446. Pleading — Instruction — Burden of proof—Right to open and close.

**§ 416. Surety discharged by alteration of the contract—General observations.**—As has already been seen, the surety is discharged if the time of payment is, by a binding agreement, extended for a definite period without his consent; the chief reason for such discharge being that his contract is in such case altered.<sup>1</sup> In this chapter, alterations of the contract

<sup>1</sup> There are cases holding that the alteration, to release the surety, must be not only material, but must also be made in bad faith and must do him an injury. In *Busjahn v. McLean*, 3 Ind. App. 281, 29 N. E. Rep. 494, a note was by mistake drawn for \$170 when the amount should have been \$175. The maker and payee made the amount \$175 without the consent or knowledge of the surety. Held, the surety was not released. Citing *McRaven v. Crisler*, 53 Miss. 542; *Jessup v. Dennison*, 2 Disney 150; *Boyd v. Brotherson*, 10 Wend. 93. In *Lee v. Butler*, 167 Mass. 426, 46 N. E. Rep. 52, defendant wrote plaintiff as follows: "Dear Lee: If your principal (£8,000) and interest at 10 per cent, is not paid as stipulated, I hereby make

myself responsible for its payment. Yours sincerely. John Swann." Lee changed the figure 8,000 to 6,000 to correct what he considered an error. Neither sum was correct. It was held that the alteration, although material, did not release the guarantor. "Two reasons are given for the rule," said Knowlton, J., speaking for the court. "First, that the identity of the contract is destroyed by the alteration; and, second, that no man shall be permitted, on grounds of public policy, to take the chance of committing a fraud without running any risk of loss by the event when it is detected. But the rule is not applied in this commonwealth to a writing of this kind, where the alteration is made in good faith to correct an error,

in other regards than by an extension of time will be treated of. It is a general rule that any agreement between the creditor and principal which varies essentially<sup>2</sup> the terms of the contract by which the surety is bound, without the consent of the surety, will release him from responsibility.<sup>3</sup> The altera-

under circumstances showing an implied authority to make the correction. The principle underlying the exception to the general rule seems to be that, where no one's rights are injuriously affected, and where it appears that the alteration was made with a view to carry out the intention of the party who signed the paper, the change ought not to render the contract invalid." In *London and San Francisco Bank v. Parrott*, 125 Calif. 472, 58 Pac. Rep. 164, defendants gave an absolute continuing guaranty of the account of the Capitol Packing Company with plaintiff bank to the extent of \$100,000. The packing company, having overdrawn its account nearly \$73,000, the bank took its note for that amount, payable one day after date in order to comply with a rule of the clearing house. Held, that taking that note was not such an alteration of the contract as released the guarantors. It was simply extending the credit in another form. Compare *O'Neal v. Kelly*, 65 Ark. 550, 47 S. W. Rep. 409, where an alteration of \$25 in a building contractor's bond released the surety.

<sup>2</sup> That an agreement extending time of payment is such a material alteration of a contract as will discharge a surety, see the following additional cases: *Lane & Saylor v. Scott & Culver*, 57 Tex. 367; *Wylie v. Hightower*, 74 Tex. 306; *Bailey v. Griffith*, 40 Up. Can. (Q. B. Div.) 418. But the indorsement of an agreement on the back of a note to extend the time of payment

is held not an alteration of the note. *Moore v. Macon Savings Bank*, 22 Mo. App. 684. The court held such indorsement to be only a memorandum of an agreement, and that it came within the rule that if the new writing is a memorandum made by the holder on the back of a promissory note, to the effect that the rate of interest after a certain date would be less than that stated in the body of the note, it was not an alteration of the note, and did not discharge a surety of the maker, though written in pursuance of an agreement between the holder and maker, and without the surety's knowledge. Compare § 428.

<sup>3</sup> *United States v. Tillotson*, 1 Paine, 305; *Eneas v. Hoops*, 10 Jones & Spen. (N. Y.) 517; *Driscoll v. Barker*, 2 P. & B. (N. B.) 407; *State v. Churchill*, 48 Ark. 426; *Blakey v. Johnson*, 13 Bush (Ky.) 197; *Thompson v. Massie*, 41 Ohio St. 307; *Robbins v. Robinson*, 176 Pa. St. 341, 35 Atl. Rep. 337. See, also, the leading case of *Rees v. Berrington*, 2 Ves. Jr. 540, 2 White & T. Lead. Cas. Eq., 1867, and note, p. 1906-8-15; *U. S. v. American Bonding & Trust Co.*, 89 Fed. Rep. 925, 32 C. C. A. 420, at 424, 61 U. S. App. 584; *Citizens Insurance Co. v. Cluxton*, 13 Ontario Rep. 382. In *Carter v. Nicol*, Iowa, May, 1902, 90 N. W. Rep. 352, the removal by a saloon keeper to an adjoining lot was held such an alteration as to release the sureties on his bond. The dissolution of the firm to whom defendant had guar-

tion must be by the parties to the contract.<sup>4</sup> Alterations made by a stranger cannot change its legal operation and effect and do not discharge the surety.<sup>5</sup> "The contract by which a surety becomes bound is voluntary on his part, without profit or advantage, and without having in view the prospect of gain. It is an act of benevolence to the obligor, and of convenience to the obligee, and of emphatic use to both. The obligations of social duty require, therefore, that he should be

anted an account releases the guarantor as to future dealings, even though he requests the new firm to continue the account guaranteed: *Schoonover v. Osborne*, Iowa, June, 1902, 90 N. W. Rep. 844. In *Fish v. Barbour*, 43 Mich. 19, 4 N. W. Rep. 502, special bail in a *capias* proceeding were held released by an amendment of the declaration without their consent incorporating new and different charges of fraud. In *Lauer v. Griffith*, 92 Ill. App. 388, the surety on an appeal bond given on appeal from the judgment of a J. P., whose jurisdiction is limited to \$200, was held released because the parties to the suit entered into a stipulation that the county court might enter judgment for whatever amount might be found due and judgment was thereunder entered for \$400. In *People v. Seelye*, 146 Ill. 189, 32 N. E. Rep. 458, Seelye, being sued as surety on a guardian's bond, pleaded that after the ward became of age the ward and the guardian made an agreement without the surety's knowledge by which the ward's money was invested in business by the guardian and lost. Held, per Bailey, J., that it was error for the court to sustain a demurrer to this plea. The demurrer should have been overruled and plaintiff put to his plea of confession and avoidance.

<sup>4</sup> But the principal may ratify an alteration made by a stranger. In *Wilson v. Fiske*, 22 R. I. 100, 46 Atl. Rep. 272, the bond for the release of an attachment recited that the writ was returnable July 20, 1896. The writ was afterwards changed by some one so as to be returnable July 31, 1896. Held, that the attachment plaintiff by entering the writ on the later date ratified the change and discharged the surety. In *City of Orlando v. Gooding*, 34 Fla. 244, 15 So. Rep. 770, the official bond of the city treasurer was delivered, in form, a joint bond to the city attorney, who penciled the words, "jointly and severally" and handed it to the treasurer for amendment. The principal returned it with those words apparently properly interlined. It appeared that the interlineation was made by a subscribing witness, either without the knowledge of any of the sureties or with the knowledge of only one of them. Held, that inasmuch as the city had no notice of any irregularity, that none of the sureties was released by the alteration (p. 254), citing and following *Bigelow v. Stilphen*, 35 Vt. 521, in which case a similar interlineation in a note by a stranger was held not to affect its validity.

<sup>5</sup> *Anderson v. Bellenger & Ralls*, 87 Ala. 334, 6 So. Rep. 82.

dealt with in fairness, and in a spirit of the utmost good faith. The obligor and the obligee are bound to know that, if they find it convenient to change or vary the terms of the original contract, they must seek the assent of the surety, because it is his contract as well as theirs, and if they will not do so they take upon themselves the hazard, and thus loosen the bonds of the surety.<sup>6</sup>

**§ 417. Surety discharged by changing date of note or adding interest not discharged by making or attaching collateral contract or making new contract.**—Altering the date of a note after it has been signed by a surety discharges him, if such alteration is made without his consent.<sup>7</sup> If the note is dated, but the amount is blank when the surety signs, he is discharged by an alteration of the date.<sup>8</sup> The date of a note was altered from 1836 to 1838, by the holder, in the presence of the surety, but without his consent. The original date of the note should have been 1838, and the alteration was made after the note would have been due with either date. Held, the surety was discharged, because the application of the statute of limitations to the note was changed, and the surety was put to the

<sup>6</sup> *Hobbs v. Rue*, 4 Pa. St. 348, per Coulter, J. Compare *Lee v. Butler*, note 1, supra, and see *Anderson v. Bellenger & Ralls*, 87 Ala. 334; *Farnsworth v. Coots*, 46 Mich. 117. It is held immaterial whether the alteration is effected by erasure or by interlineation, or by an indorsement. *Johnston v. May*, 76 Ind. 293.

<sup>7</sup> *Britton v. Dierker*, 46 Mo. 591. Thus, making the note fall due one year later is such an alteration as will discharge a surety thereon. *Wyman v. Yeomans*, 84 Ill. 403.

<sup>8</sup> *Bank of Com. v. McChord*, 4 Dana (Ky.) 191. Changing the time of payment from "one day" to "one year" after date is such an alteration as will discharge the surety. *Stayner v. Joice*, 82 Ind. 35. See, also, *Moore v. Hinshaw*, 23 Ind. App. 267, 55 N. E. Rep. 236, in which case inserting a rate

of interest in a space in a note left blank was held to release the surety, though the agreement before signing the note had been that it should bear interest at the rate inserted. In *Pelton v. San Jacinto Lumber Co.*, 113 Calif. 21, 45 Pac. Rep. 12, Caswell and Fuller, stockholders in the defendant corporation, indorsed its note in which no place of payment was designated. After such indorsement the president of the corporation altered the note so as to make it payable "at the Ilion National Bank, Ilion, N. Y." Held, that the general rule that the surety is discharged by alteration of the place of payment was not changed by reason of the circumstance that the guarantors were stockholders and that the alteration was made by the corporation and was for the benefit of the sureties as stockholders.

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trouble and expense of showing the truth.<sup>9</sup> If, at the time the surety signs a note, it does not draw interest, and the principal afterwards, without the consent of the surety, interlines the words "with interest from date," the surety is discharged.<sup>10</sup> So the addition to a note, after it is signed by a surety, of a clause making the interest payable annually or semi-annually, without the surety's consent, and with the knowledge of the payee or party taking the note, discharges the surety.<sup>11</sup> And where, in such a case, the surety first signed the note in pencil, with a promise to "ink over" his signature afterwards, and the note was altered by making the interest payable annually, and the surety afterwards, without knowing of the alteration, "inked over" his signature, it was held he was discharged.<sup>12</sup> Where it was agreed between the principal and creditor that the note should bear interest, but no such provision was contained in the note when it was signed by the surety, and it was afterwards, without the con-

<sup>9</sup> *Miller v. Gilleland*, 19 Pa. St. 119.

<sup>10</sup> *Kountz v. Hart*, 17 Ind. 329. To similar effect, see *Hart v. Clouser*, 30 Ind. 210; *Glover v. Robbins*, 49 Ala. 219; *Locknane v. Emerson*, 11 Bush (Ky.) 69. So a note bearing a certain rate of interest "per annum," which is changed so as to make it bear interest "after maturity," held such an alteration as discharges a surety thereon. *The Franklin Life Ins. Co. v. Courtney*, 60 Ind. 134. And adding the words "with ten per cent interest from date," to a note bearing no interest, renders it void as to the surety. *Jones v. Bangs*, 40 Ohio St. 139.

<sup>11</sup> *Dewey v. Reed*, 40 Barb. (N. Y.) 16; *Marsh v. Griffin*, 42 Iowa, 403; *Neff v. Horner*, 63 Pa. St. 327. In *Hill v. O'Neill*, 101 Ga. 832, 28 S. E. Rep, 996, a note was altered subsequent to the time when defendant became surety on it by the increase of the rate of interest

from 8 to 12 per cent and in its altered form came into the hands of an innocent holder for value. Held, that the surety was not liable at all. "In so far as the same concerns the surety," said *Atkinson, J.*, "it is immaterial by whom the alteration was made. If made by the transferee of the note, it requires no argument to prove the discharge of the surety, upon the well recognized and universally accepted principle that one who commits a forgery cannot thereby impose upon the other a legal obligation to perform the contract according to the tenor of the forged instrument; and it is equally certain that a material alteration in the obligation of the contract by one who is bound as principal, made after it is signed by the surety, will discharge the surety from liability to one who took the changed instrument bona fide and without notice."

<sup>12</sup> *Boatt v. Brown*, 13 Ohio St. 364.

sent of the surety, changed by the principal and creditor so as to conform to the agreement between them, it was held the surety was discharged.<sup>13</sup> The effect of a material alteration of a note as aforesaid is to entirely destroy the surety's liability thereon. The alteration cannot be erased and the surety held on the note as it originally was. The identity of the instrument has been destroyed, and on grounds of public policy the liability of the surety is entirely gone.<sup>14</sup> Where a surety signed a blank note, which the principal afterwards filled up so as to bear usurious interest, it was held the surety was not thereby discharged, because the note, notwithstanding its form, would only bear interest at the legal rate.<sup>15</sup> The maker of a note wrote on its back: "I hereby agree to pay ten per cent. interest on this note hereafter," and signed it. Held, this was not an alteration of the note, but was a new contract to pay greater interest, which no more changed the note than if written on a separate piece of paper, and the surety was not thereby discharged.<sup>16</sup>

<sup>13</sup> Fulmer v. Seitz, 68 Pa. St. 237.

<sup>14</sup> Neff v. Horner, 63 Pa. St. 327; Dewey v. Reed, 40 Barb. (N. Y.) 16; Fulmer v. Seitz, 68 Pa. St. 237; Marsh v. Griffin, 42 Iowa, 403; Locknane v. Emmerson, 11 Bush (Ky.) 69; Glover v. Robbins, 49 Ala. 219. In Banque Provinciale v. Arnoldi, 2 Ont. Law Reps. 624, it was held that where the holder, with innocent intention, inserted the words "jointly and severally" in a note, the sureties were released though they had no knowledge of the alteration until after the holder had cancelled it.

<sup>15</sup> Selser v. Brock, 3 Ohio St. 302.

<sup>16</sup> Huff v. Cole, 45 Ind. 300. Holding that altering the rate of interest discharges the surety, see Harsh v. Klepper, 28 Ohio St. 200. In United States Glass Co. v. Matthews (W. Va.), 89 Fed. Rep. 828, 32 C. C. A. 364, 61 U. S. App. 542, five defendants guaranteed payment of royalties on six patented machines by the lessee to the les-

sor, and attached the lease to the guaranty. The lease contained a provision that the lessee might have more machines at \$100 per month each. Without the guarantor's knowledge, after the guaranty was signed, a typewritten memorandum was by the lessee pasted on to the margin of the lease to the effect that such additional machines should be furnished within thirty days after they were called for. It was held, reversing the circuit court, that the guarantors were not thereby released. "This was a memorandum outside of the paper," said the court. "It was evidence of an independent collateral agreement between the parties to the license, making more definite one of the clauses of the license, but not in any way a change or alteration of the license, and did not remotely touch any of the provisions the performance of which the sureties had guaranteed." In Current v.



§ 418. **How surety and principal affected by addition of new party to a note.**—If, after a note has been executed by a surety and delivered, a new surety signs the note, without the knowledge and consent of the one first signing,<sup>17</sup> this is a material alteration which discharges the surety, notwithstanding the fact that it is a benefit to him.<sup>18</sup> The same thing was held where, after a note had been signed by a surety, the principal, without the consent of such surety, procured another surety to sign it, and afterwards delivered it to the payee, who then had knowledge of the facts.<sup>19</sup> Adding to a note the name

Fulton, 10 Ind. App. 617, 38 N. E. Rep. 419, after a contract had been signed between A on the one part and B, C, D and E on the other by which A agreed to drill a gas well and B, C, D and E agreed to pay him each \$105 therefor, A signed and attached to the contract a separate writing agreeing that no part of the product of the well should be piped to other markets. Held, that this was not an alteration but a separate contract, and therefore not admissible in evidence in a suit on the original contract. See, also, *Stuts v. Strayer*, 60 Ohio St. 384, 54 N. E. Rep. 368, in which case the sureties on a note were held not to be discharged by the fact that, at the time of its delivery, the maker, without the surety's knowledge or consent, executed a separate obligation in writing to the payee, in which he agreed to pay a higher rate of interest. Answering a contention that the two writings are to be construed together and being so construed show a change in the contract, Shauck, J., said: "Although these contracts are contemporaneous, they are not between the same parties. By the second instrument the principal debtor assumed an independent obligation to pay the interest re-

quired by the original contract of sale, and not embraced in the terms of the note executed by the principal and sureties, without in any manner attempting to effect a change in the contract to which the sureties were parties. \* \* The condition that, to discharge the surety, the variation must be in 'the terms of the contract by which the surety is bound' is indispensable."

<sup>17</sup> *Berryman v. Manker*, 56 Iowa, 150.

<sup>18</sup> *Bank of Limestone v. Penick*, 2 T. B. Mon. (Ky.) 98; *Gardner v. Walsh*, 5 Ellis & Black. 83; *Bank of Limestone v. Penick*, 5 T. B. Mon. (Ky.) 25. But see *Crandall v. First Nat. Bank of Auburn*, 61 Ind. 349. But if such new signature is obtained before delivery, it is held not such an alteration of the note as will discharge the former surety (*Ward v. Hackett*, 30 Minn. 150), for the reason that there is no contract to alter until after delivery and acceptance. *Graham v. Rush*, 73 Iowa 451.

<sup>19</sup> *Hall v. McHenry*, 19 Iowa 521. In *Keith v. Goodwin*, 31 Vt. 268, it was held that, if a surety intrusts a note signed by him to the principal, he thereby gives the principal authority to get additional sureties till the note is fair-



of an additional surety, with the assent of the payee and of the personal representative of the original deceased surety, with the agreement that the estate shall not be thereby released, is not an alteration which discharges the surety.<sup>20</sup> Where a note, signed by principal and surety, was, by its terms, payable at a bank, and it was expected that it would be discounted by the bank, but the bank would not discount it unless it was also signed by the holder, who thereupon signed it on its face, it was held this did not discharge the surety, as it was the same as if the creditor had indorsed the note.<sup>21</sup> But when a note, after it had been delivered, was signed by a stranger as joint and several maker, it was held to be such an alteration as discharged the surety.<sup>22</sup> If a surety sign a note after it has been executed and delivered by the principal, this, it has been held, is not such an alteration of the note as will discharge the principal. The contract of a surety need not be contemporaneous with that of the principal. The liability of the principal is not increased or diminished by the addition of a

ly launched on the market, and that in such case the signing of a new surety does not discharge the first one. In *Brey v. Hagan*, 23 Ky. Law Rep. 18, Apl., 1901, 62 S. W. Rep. 1, it was held that the addition of another surety to a note before delivery, without knowledge or consent of the first surety, does not release the first surety. Following *Edwards v. Mattingly*, 21 Ky. Law Rep. 1045, 53 S. W. Rep. 1032, in which case the court, in making the same ruling, said: "The addition of another security did not increase the liability of those already bound, and it can be reasonably presumed that the principal in such an obligation had implied authority from the surety previously bound to consent to or secure such additional name, when necessary to effect the object for which the note was executed, and we are of the opinion that such an addition may be made at any time before

its final delivery to the payee without invalidating it, provided it does not prejudicially affect the rights of persons who have executed it before such alteration." See, also, *McRumley Co. v. Wilcher*, Ky., Jan'y, 1902, no official report, 66 S. W. Rep. 7, 23 Ky. Law Rep. 1745, in which case the payee of a note signed by three sureties obtained the signature of a fourth surety by extending the time of payment one year; held, that the last surety was bound, the earlier ones discharged. Citing: *Bank of Limestone v. Penick*, 5 T. B. Mon. (Ky.) 25; *Shipp's Adm'r v. Suggetts Adm'r*, 9 B. Mon. 5, at 8; *Singleton v. McQuerry*, 85 Ky. 41, 2 S. W. Rep. 652.

<sup>20</sup> *Voiles v. Green*, 43 Ind. 374.

<sup>21</sup> *Bowser v. Rendell*, 31 Ind. 128.

<sup>22</sup> *Wallace v. Jewel*, 21 Ohio St. 163. To same effect see *Windle v. Williams*, 18 Ind. App. 158, 47 N. E. Rep. 680.

surety. The principal is liable to pay the whole debt without contribution, while, if additional sureties are added, one might become insolvent and contribution between them and the original surety be complicated.<sup>23</sup> Where a guardian, at his surety's request, and before any funds came into his hands, procured other sureties to his bond, it was held that such bond was valid as to all subsequently procured sureties and they were liable thereon.<sup>24</sup>

**§ 419. Instances of cases in which alteration of note will and will not discharge surety.**—The alteration of a note at the time of its delivery, by adding the words "payable at 53 Lake street," is material, and if done without the assent of the guarantors discharges them.<sup>25</sup> The addition to a note of a clause making it payable in gold, when gold is of greater value than legal tender money, in which the note might be paid, discharges the surety.<sup>26</sup> Adding to a non-negotiable note the words "or order," thereby making it negotiable, is a material alteration, which discharges the surety.<sup>27</sup> Where the holder of a note struck out the name of one of the indorsers, it was held that it operated as a discharge of a subsequent indorser, for such indorser, if he had paid the note, would, if no erasure had been made, have had a right to recover from the indorser whose name had been erased.<sup>28</sup> A note was guaranteed by the payee in the following words: "I guaranty the collection of the within note." The holder tore off the words "the collection of the," leaving the guaranty to read, "I guaranty the within note." Held, the guarantor was discharged.<sup>29</sup>

<sup>23</sup> *Miller v. Finley*, 26 Mich. 249. To similar effect, see *Stone v. White*, 8 Gray, 589. And where one of two joint makers of a note obtained of the payee an extension of payment and procured an additional surety, it was held the other maker was not released. *Gano v. Heath*, 36 Mich. 441. On same subject, see *Pulliam v. Withers*, 8 Dana (Ky.) 98; *Mersman v. Werges*, 112 U. S. 139.

<sup>24</sup> *State, use of Hickaday, v. Woods*, 84 Mo. 163.

<sup>25</sup> *Pahlman v. Taylor*, 75 Ill. 629.

<sup>26</sup> *Bogarth v. Breedlove*, 39 Tex. 561; *Hanson v. Crawley*, 41 Ga. 303. And on the other hand, where a note payable "in gold or its equivalent" was changed by erasing the words "in gold or its equivalent," it was held a material alteration. *Church v. Howard*, 17 Hun (N. Y.) 5.

<sup>27</sup> *Haines v. Dennett*, 11 N. H. 180.

<sup>28</sup> *Curry v. Bank of Mobile*, 8 Port. (Ala.) 360.

<sup>29</sup> *Newlan v. Harrington*, 24 Ill.

206.

After principal and surety had signed a note, and before its delivery, another party, without the consent of the surety, signed his name under that of the surety. After the delivery of the note, the holder cut off the name of the last signer. Held, this was a spoliation of the instrument which discharged the surety.<sup>30</sup> Principal and surety signed a note for \$3,000, which the principal presented for discount to the payee, who refused to discount it for that sum, but wrote across its face as follows: "\$2,000. This note was discounted for \$2,000, which amount is due upon it." Held, the surety was discharged. The note had no validity for any amount until it was delivered to the payee, and when so delivered it was a note for \$2,000, and the surety had not agreed to be bound by any such note.<sup>31</sup> Writing the word "cashier" after the payee's name, thus making the note the note of the bank, discharges the surety.<sup>32</sup> Upon the same principle a change in the creditor firm, without change of its name or style, releases the obligor on a continuing guaranty.<sup>33</sup>

§ 420. **The same, continued.**—If the surety signs a note in which the amount<sup>34</sup> or time of payment<sup>35</sup> is left blank, and intrusts it to the principal, he is bound to be a bona fide holder of the note, without notice, for such amount and time as the principal may insert in the blanks. Where the facts were such as to justify the belief that the principal was the agent of the surety for the purpose of altering a note from a larger to a smaller sum, it was held the surety was not discharged by such alteration.<sup>36</sup> Where a surety signs a note, complete in every

<sup>30</sup> Hall v. McHenry, 19 Iowa 521.

<sup>31</sup> Portage Co. Branch Bank v. Lane, 8 Ohio St. 405. Contra, M. & M. Bank v. Evans, 9 W. Va. 373. Holding surety discharged when holder of note gives it up to principal, erasing name of surety and taking new note for the amount from principal, see Rhodes v. Hart, 51 Ga. 320.

<sup>32</sup> Hodge v. Farmer's Bank, 7 Ind. App. 94, 34 N. E. Rep. 123.

<sup>33</sup> Bennett v. Draper, 139 N. Y. 266, 34 N. E. Rep. 791.

<sup>34</sup> Simpson's Ex'rs v. Bovard, 74

Pa. St. 351. To similar effect, see Patton v. Shanklin, 14 B. Mon. (Ky.) 13.

<sup>35</sup> Johns v. Harrison, 20 Ind. 317; Waldron v. Young, 9 Heisk. (Tenn.) 777. On this subject, when the date is blank, see Emmons v. Meeker, 55 Ind. 321.

<sup>36</sup> Ogle v. Graham, 2 Pen & Watts (Pa.) 132. Holding the surety not liable when a blank in a bond is filled for a larger sum than he stipulated to become liable for, see Hastings v. Clendaniel, 2 Del. Ch. 165.

§ 421 DISCHARGE BY ALTERATION OF CONTRACT.

respect, and permits the principal to take it to a bank for discount, and the principal alters it to a larger amount, the surety is discharged. In such a case it was said that: "The sureties assume a certain definite obligation, the extent of which is clearly and fully stated in the writing they sign. To that extent they give confidence and credit to the principal, but no farther." The note naturally passes into the hands of the principal. "The party receiving the note gives the confidence and trust to the party from whom he receives it. \* \* The surety may safely stipulate as such for a certain stated amount, and limit his liability to that sum. He does so when he puts his name to an instrument wholly filled up." It is otherwise where he signs a blank note.<sup>37</sup> Where a note with sureties is surrendered, and a new note having the same names is taken in extension by reason of representations that the signatures are genuine, the holder may, on discovering that the signatures of the sureties are forged, repudiate the new contract and hold the sureties on the old note.<sup>38</sup> Two sureties signed a note, and afterwards, without their consent, the name of a surety who had signed before them was stricken out. The payee, when he took the note, inquired why the name had been erased, and was told by the principal that it had been done by consent. Held, the two sureties were discharged. The erasure appearing on the face of the paper was sufficient to put the payee upon inquiry, and charge him with knowledge of the facts.<sup>39</sup>

§ 421. When alteration is so far material as to discharge surety—Miscellaneous cases.—Changing the payee in a note after it has been signed by a surety, by erasing the original and inserting a different payee, is held such a material alteration as will discharge the surety.<sup>40</sup> Writing the word "security" over the name of an indorser of a note, without his knowledge or consent, is held to be a material alteration.<sup>41</sup> Changing joint and several notes to joint notes of the makers thereof is held to be such a material alteration as will avoid

<sup>37</sup> *Agawam Bank v. Sears*, 4 Gray, 95, per Dewey, J.

<sup>38</sup> *Kincaid v. Yates*, 63 Mo. 45.

<sup>39</sup> *McCrumer v. Thompson*, 21 Iowa 244; and also see *The State v. Craig*, 58 Iowa 238.

<sup>40</sup> *Bell v. Mahin*, 69 Iowa 408; *Robinson v. Berryman*, 22 Mo. App. 509; *Ashoff v. Van Brunt*, 84 Mich.

575, 48 N. W. Rep. 151.

<sup>41</sup> *Robinson v. Reed*, 46 Iowa 219.

the notes against the surety thereon.<sup>42</sup> Words added upon the margin of an obligation and above the signatures of the obligors after delivery, whereby the sureties' liability is increased without their consent, is held to discharge them.<sup>43</sup> Where, after breach of a contract, the performance of which is guaranteed, the creditor and debtor entered into a new contract whereby the amount of damages then due is made payable at a future date, and on different terms from those in the original contract, held such an alteration as discharged the guarantors from liability.<sup>44</sup> Permission given an agent to sell lumber on credit, and to any extent, instead of for "cash in all cases" as the contract originally required, is held such an alteration of the contract as discharged a guarantor of the due performance of all the obligations imposed by the contract.<sup>45</sup>

**§ 422. Miscellaneous cases wherein alteration held not to discharge surety—Effect of adding attesting witnesses.**—Where the maker of a note, subsequent to a guaranty of the same, adds to his name the word "agent," held not such a material alteration as would discharge the guarantor.<sup>1</sup> Where a guarantor executed an instrument reading "we hereby guaranty," upon the promise that additional guarantors would be obtained, which had not been done, and the instrument was altered, before delivery, to "I hereby guaranty," held not a material alteration.<sup>2</sup> An unauthorized insertion in a guaranteed note of promises for the payment of current exchange or express charges, held not such an alteration as discharged a surety thereon.<sup>3</sup> Where a note was made payable upon the performance of certain conditions by the payees, and the principal maker subsequently indorsed upon the note the fact of the performance of the conditions, held not such an alteration as to discharge the surety.<sup>4</sup> Inserting

<sup>42</sup> Eckert v. Louis, 84 Ind. 99.

<sup>2</sup> Kline v. Raymond, 70 Ind. 271.

<sup>43</sup> Warren v. Faut's Trustee, 79 Ky. 1.

And see Rowley v. Jewett, 56 Iowa 492, 9 N. W. Rep. 353.

<sup>44</sup> Weed Sewing Machine Co. v. Winchel, 107 Ind. 260.

<sup>3</sup> Bullock v. Taylor, 39 Mich. 137. But aliter, provision for payment of attorney's fees in the event of proceedings to collect. Bullock v. Taylor, 39 Mich. 137.

<sup>45</sup> Evans v. Lawton, 34 Fed. Rep. 233.

<sup>1</sup> Manufacturers' and Merchants' Bank v. Follett, 11 R. I. 92.

<sup>4</sup> Jackson v. Boyles, 64 Iowa 428.

in a bond the words "are held and firmly bound" where omitted is held immaterial, where the language used sufficiently expresses the obligation intended.<sup>5</sup> Inserting in a delivery bond a description of the attached property, made in good faith by the officer to whom it is presented, and at the principal's request, is held not to be material, and will not release a surety thereon.<sup>6</sup> Changing the terms of sale in a trust deed given to secure bonds is held not such an alteration as to discharge a surety to the bonds.<sup>7</sup> Where a principal procures an unauthorized person to attest the signature of a surety to a bond left with him for delivery, held not to be such an alteration as released the surety.<sup>8</sup> And it is possible such might be the rule as to like conduct by an obligee in states where, by statute, attested writings may be proved by any competent testimony without calling the attesting witnesses, and where the addition of attesting witnesses does not in any way change their operation or effect. But where the addition of attesting witnesses makes the proof more difficult or causes a different section of the statute of limitations to apply there are decisions to the effect that the obligee, by procuring somebody, who was not present, to sign as an attesting witness, without the consent of the surety, so alters the contract that the surety is released.<sup>9</sup> Cutting the

<sup>5</sup> *Western Building Ass'n v. Fitzmaurice*, 7 Mo. App. 283.

<sup>6</sup> *Rowley v. Jewett*, 56 Iowa 492; *Starr v. Blatner*, 76 Iowa 356.

<sup>7</sup> *Womack v. Paxton's Ex'r*, 84 Va. 9.

<sup>8</sup> *Hall v. Weaver* (C. C. Oregon), 34 Fed. Rep. 104, Deady, J., in which case Stephens, at the request of the principal, before delivery, signed as an attesting witness, a bond in which defendants were sureties, though he did not in fact see any of the sureties sign it, and thereafter the principal delivered it to the obligee, who had no notice of any irregularity. Held, that the sureties were bound. The local law required that in the absence of an attesting witness the signature of the party must be proved,

—proof of the signature of the attesting witness was not enough, as in *Adams v. Frye*, 3 Metc. (Mass.) 104. Moreover, the code provided that an alteration shown to have been made innocently should not vitiate the instrument.

<sup>9</sup> In *White Sewing Machine Co. v. Saxon*, 121 Ala. 399, 25 So. Rep. 784, the agent of plaintiff company took an employee's fidelity bond after part of the sureties had signed it and, without their knowledge or consent, signed it himself as attesting witness, though he was not present when they signed it. Held, that the sureties were thereby discharged. The court said that "upon the general principle that any alteration is material which changes the effect and operation of



the contract on the face of the paper, either by modifying original stipulations or by adding new ones, express or implied, it would seem clear that the addition of an attestation, which imports the agreement of the parties upon and selection by them of a person to be the repository of the proof of execution and of the surrounding circumstances, *Ellerson v. State*, 69 Ala. 1, and under our laws has the effect of requiring the attesting witness to be called to prove execution, and authorizing execution to be proved, if he be dead or beyond seas by proving his signature, materially affects the rights of parties under the contract; and, as has been often said by this court, it is of no consequence whether the alteration, if allowed to operate, would be beneficial or detrimental to the party sought to be charged on the contract; the important question is not that, but whether the integrity and identity of the contract has been changed." Citing and following *Brockett v. Mountfort*, 11 Me. 115, in which case ten years after the date of a due bill plaintiff, who was not present when it was signed, wrote upon it, "Attest: C. T. S. Brackett"; Held, that the maker was thereby discharged. Without such attestation the suit would have been barred by the statute of limitations at the time the attestation was made. *Homer v. Wallis*, 11 Mass. 309, *Parker, C. J.*, same ruling upon like facts; the court relied upon the fact that a distinction is made in the Massachusetts statute of limitations between notes with and those without an attesting witness. *Marshall v. Gougler*, 10 S. & R. (Pa.) 164, holding it to be immaterial whether one who signed a note as an at-

testing witness when he was not present at its execution was actuated by fraudulent intent or not. If, by the procurement of the obligee, without the consent of the obligor, he falsely signed it as such attesting witness, the obligor was released. Approved by *Agnew, J.*, in *Neff v. Horner*, 63 Pa. St. (13 P. F. Smith) 327, 330. *Adams v. Frye*, 3 Metc. (44 Mass.) 103, action on a bond, the obligee in which had procured one Adams, who was not present when it was executed, to sign it as an attesting witness. The court set aside a verdict for plaintiff and stated the law as follows: "(1) That if the obligee of an unattested bond, after the execution and delivery thereof, shall, without the knowledge and assent of the obligor, fraudulently and with a view to gain some improper advantage thereby, procure a person who was not present at the execution of the bond, to sign his name thereto as an attesting witness, such act will avoid the bond, and discharge the obligor from all liability on the same; (2) That the act of the obligee in procuring the signature of one as a witness who was not present at its execution, and not duly authorized to attest it, will, if unexplained, be prima facie sufficient to authorize the jury to infer the fraudulent intent; but that it is competent for such obligee to rebut such inference; and, if the act be shown to have been done without any fraudulent purpose, the bond will not be avoided by such alteration." *Millberry v. Stover*, 75 Me. 69 (1883), holding that the rule does not apply where the attesting witness saw the note signed and afterwards, without the maker's consent and at the request of the payee, signed it as witness,



signatures of sureties from a mutilated bond and attaching them to an exact copy of the original, has been held not to release the sureties.<sup>10</sup>

§ 423. **Surety not discharged if after alteration is made he ratifies it—Consent in advance to alterations.**—If, after an alteration has been made in a note which would operate the discharge of the surety, he assents to such alteration, he will remain bound without any new consideration. “If the alteration had been made with his knowledge and consent, it is very clear that the note would not have been void. \* \* Nor is the rule different where the assent is subsequently given.”<sup>11</sup> After a note which had been altered came due, the surety urged the holder to bring suit on it, and suit was instituted against both principal and surety, and the surety furnished bonds for an attachment in aid against the property of the principal. The surety then admitted that he would have to pay whatever sum was not made out of the principal, and the words added to the note were erased at his request. Held, the surety had ratified the alteration, and could not complain of

there being no intent to defraud. *Henning v. Werkheiser*, 8 Pa. St. 518, holding that where plaintiff procured two persons who were not present at the execution of a bond to sign it as attesting witnesses, and the obligor ratified the signature of only one of them, “enough of the canker was left at the core of the instrument to destroy it,” and that the jury should have been instructed that it was void. *Foust v. Renno*, 8 Pa. St. 378, *Gibson, C. J.*, holding that where there is a general attestation by a witness who saw only one of several obligors sign the deed, whether the instrument was thereby invalidated or not depended on whether such attestation was made general ignorantly and innocently or with intent to defraud. Compare *Blackwell v. Lane*, 4 Dev. & B. (N. C.) 113; *Fuller v. Green*, 64 Wis. 159. The Ill. Stat. (2 S. & C. p. 1860)

applies to deeds, &c. only. Cf. Note 71, § 22.

<sup>10</sup> *State v. Harney*, 57 Miss. 863. But attaching such signatures to a joint and several bond, where the bond originally imposed a several liability, is such an alteration as to discharge the sureties: *State v. Harney*, 57 Miss. 863.

<sup>11</sup> *Pelton v. Prescott*, 13 Iowa 567. Holding that if guarantor consents to alteration, he cannot complain of it, see *Knoebel v. Kircher*, 33 Ill. 308. If a surety to a note, after learning of a material alteration therein, procures an extension of time thereon, he is held to have ratified the alteration and bound thereby. *Bell v. Mahin*, 69 Iowa 408. And he is estopped, under such circumstances, from setting up such alteration as a defense. *Jackson v. Johnson*, 67 Ga. 167; *National Building and Savings Association v. Fink*, 182 Pa. St. 52, 37 Atl. Rep. 1009.

it.<sup>12</sup> Certain sureties were the solicitors for their principal in making the original contract, and knew of all the subsequent transactions by which the contract signed by them as sureties was varied, and acted as solicitors for some of the parties in the subsequent transactions, and prepared some of the documents required by such transactions. Held, they were not discharged, upon the ground that from the circumstances they must be presumed to have consented to whatever changes were made.<sup>13</sup> If, at the time a surety does such acts as would amount to a ratification of the alteration, he does not know of said alteration, he will not be presumed to have ratified the same.<sup>14</sup> An officer whose duty it is to approve the official bond of another officer, and upon whose bond he is surety, is held not to ratify by his approval, as surety, an erasure of another surety's name on the bond on which he is surety, unless he has knowledge of all the facts.<sup>15</sup> There are frequent instances in the reports of consent in advance by the surety to alterations in the contract between the principal and the creditor.<sup>16</sup> Usu-

<sup>12</sup> *Gardner v. Harback*, 21 Ill. 129. That a ratification of alterations in an official bond does not require a separate consideration see: *State v. Paxton*, Neb., June, 1902, 90 N. W. Rep. 983. In *Dickson v. Bamberger*, 107 Ala. 293, 18 So. Rep. 290, a bond was alleged to have been altered after its execution by the insertion of a place of payment. Held, that it was proper to charge the jury that an "offer to pay and request for time, if made with knowledge of the alteration, would constitute a ratification of, and assent to, the alteration of the instrument."

<sup>13</sup> *Woodcock v. Oxford & Worcester R. R. Co.*, 1 Drewry, 521.

<sup>14</sup> *Benedict v. Miner*, 58 Ill. 19; *Boult v. Brown*, 13 Ohio St. 364. Though see *State v. Harney*, 57 Miss. 863, where it was held that they were estopped from setting up such alteration, even though they were ignorant of the change.

<sup>15</sup> *State v. Churchill*, 48 Ark. 426.

<sup>16</sup> In *McCormick Harvesting Machine Co. v. Laster*, 70 Ill. App. 425, it was held that sureties on an employee's bond might be held, notwithstanding a change of contract between employer and employee when they have expressly so agreed in the bond. Same case, 81 Ill. App. 316; *Robbins v. Robinson*, 176 Pa. St. 341, 35 Atl. Rep. 337. In *Clark v. Chapman*, 98 Calif. 110, 32 Pac. Rep. 812, and 33 Pac. Rep. 750, Spofford, Chapman and three others made and filed an arbitration agreement, all of them noting over their signatures that the name of Hamilton, a sixth party to the agreement, had been stricken out. At the same time Chapman executed his separate guaranty of payment of whatever amount might be found to be due Spofford, under the arbitration, in which guaranty he described the arbitration agreement as having been made by Hamilton as well as the rest. Held, that

ally a building contract contains a provision for alterations and when it does, the surety on the builder's bond is held liable, notwithstanding such alterations as are thereby provided for.<sup>17</sup> Where the surety consents in advance to alterations of one kind he is held discharged by alterations of any other kind that are made without his consent.<sup>18</sup>

striking out Hamilton's name did not affect Chapman's liability as a guarantor, since the reference thereto was for identification only and the change therein had been made with his consent. Extending the term of an employee's employment does not discharge the guarantor of his fidelity when such extension is expressly consented to in the contract of guaranty. *John A. Tolman Co. v. Butt*, Wis., Feb., 1903, 93 N. W. Rep. 546. Compare same plaintiff v. *Bowerman*, 5 S. D., 197, 58 N. W. Rep. 568; same v. *Griffin*, 111 Mich. 301, 69 N. W. Rep. 649; same v. *Reed*, 115 Mich. 71, 72 N. W. Rep. 1104; same v. *Rice*, 164 Ill. 255, 45 N. E. Rep. 496. Stipulations by which sureties consent in advance to alterations in the contract between principal and creditor seem to be strictly construed in favor of the surety. Thus an agreement that "no extension of time" shall release the surety has been held to apply to no extension after the first. *Trustees of Schools v. King*, 85 Ill. App. 220 at 222; *Rochester Savings Bank v. Chick*, 64 N. H. 410; *Miller v. Spain*, 41 Ohio St. 376. In *Blatchford v. Harris*, Ill. App. July, 1904, 19 Chgo. Law Jour. 1147, the endorsers of a \$5,000 note, by a writing endorsed thereon, waived "notice of protest." Held, Stein, J., that the word protest, as here used in its popular sense, includes all the steps necessary to fix the liability

of a drawer or endorser and includes demand upon the maker and notice to the endorsers, that the endorsers by waiving notice of demand did not waive demand itself, and that the holder, having failed to make demand for payment and to give notice of non-payment, as required by statute, the endorsers were relieved from liability. Citing to the effect that agreements of this character are not to be construed or extended beyond the fair import of their terms: *Backus v. Shipherd*, 11 Wend. 629; *Berkshire Bank v. Jones*, 6 Mass. 524; *Coddington v. Davis*, 3 Denio 16, 1 N. Y. 186; *Buckley v. Bentley*, 42 Barb. 646; *Buchanan v. Marshall*, 22 Vt. 361; *Jaccard v. Anderson*, 37 Mo. 91; *Sprague v. Fletcher*, 8 Oregon 367; *Wolford v. Andrews*, 29 Minn. 250; *Story on Prom. Notes*, § 272; 2 *Daniels on Neg. Instr.*, § 1096; *Bigelow on Bills, Notes and Checks* (2nd Ed.), 175. See, also, *Foerderer v. Moors*, 91 Fed. Rep. 476, 33 C. C. A. 641, 62 U. S. App. 538, note 73, § 51.

<sup>17</sup> *United States v. Freel*, 186 U. S. 309, Shiras, J., affirming 39 C. C. A. 491, 99 Fed. Rep. 237, holding that a contractor's consent in advance to changes did not include changes that made the contract a radically different undertaking. Compare *Fuller Co. v. Doyle* (C. C. Mo.), 87 Fed. Rep. 687.

<sup>18</sup> In *Plunkett v. Davis Sewing Machine Co.*, 84 Md., 529, 36 Atl.

**§ 424. When surety on bond discharged if it is altered.—**

A material alteration of a bond signed by a surety has the same effect to discharge him as in the case of a note or instrument not under seal. Thus, where the obligee in a replevin bond permitted one of the principals to erase his name from it, the sureties were held to be discharged.<sup>19</sup> If, after several sureties have signed a bond, the name of one is erased with the consent of some of the sureties and without the consent of others, those who consent remain bound, and those who do not are discharged.<sup>20</sup> Where, after an assessor's bond had been signed by himself and sureties, the penalty of the bond was erased and double the amount inserted without the consent of such sureties, and the bond was afterwards signed by other sureties and approved, it was held the first sureties were discharged.<sup>21</sup> Where, after a sheriff's bond had been signed by certain sureties, its penalty was without their consent reduced, and it was then signed by other sureties, it was held that the last sureties were bound and the first were discharged.<sup>22</sup> If a paper intended to be a bond is signed in blank as to the sum by a person as surety, and the surety gives no one any authority to fill up the blank, and the blank is afterwards filled without the surety's consent, he is not bound.<sup>23</sup> If, however, a

Rep. 115, the guaranty of a sewing machine agent's contract provided that the contract might be altered by the written agreement of the principals without affecting the surety's liability. Held, that a verbal alteration discharged the surety.

<sup>19</sup> *Martin v. Thomas*, 24 How. (U. S.) 315.

<sup>20</sup> *Smith v. United States*, 2 Wall. (U. S.) 219. To similar effect, see *The State v. Blair*, 32 Ind. 313; *Davis v. State*, 5 Tex. App. 48. To a contrary effect, where the name of one surety in a guardian's bond was erased and another substituted, see *Hill v. Calvert*, 1 Rich. Eq. (S. C.) 56. In *Cass County v. American Exchange State Bank*, N. D., May, 1902, 91 N. W. Rep. 59, the fifth

of six sureties who had signed a bond, was released by red ink cancellation of his signature. None of the names was recited in the bond. Held, that the sixth surety, who had no notice thereof, was released, but the first four were not released nor were four others, who afterwards signed with notice of the cancellation.

<sup>21</sup> *People v. Kneeland*, 31 Cal. 288. See, further, sureties' liability, where the alteration is by erasure, *City of Los Angeles v. Mellus*, 59 Cal. 444; *Brown v. Weatherby*, 71 Mo. 152; *State v. Churchill*, 48 Ark. 426.

<sup>22</sup> *People v. Brown*, 2 Doug. (Mich.) 9. To similar effect, see *Mitchell v. Burton*, 2 Head (Tenn.) 613.

<sup>23</sup> *Rhea v. Gibson's Ex'r*, 10

surety signs a bond, leaving blank the penalty, date and names of the obligees, expecting his principal will properly fill the blanks, and he does properly fill them and deliver the bond, the surety is liable.<sup>24</sup> Where a court accepts a bond with knowledge that the name of one of the sureties thereon had been erased without the knowledge or consent of the others, the latter are held discharged.<sup>25</sup> The alteration of a bail bond as to the term of court before which the principal is bailed to appear is held to release the sureties from liability, if done without their consent.<sup>26</sup> After a bail bond was executed, the sheriff, without the knowledge or consent of the sureties, added the figure "9" after the figures "188," making the year of appearance "1889" instead of "188" as originally written. Held, such an alteration as discharged the sureties.<sup>27</sup> Where the principal attached a seal to his signature it was held in one case that the sureties were released.<sup>28</sup>

Gratt. (Va.) 215. But see *City of Chicago v. Gage*, 95 Ill. 593, overruling *People v. Organ*, 27 Ill. 27; *Carrick v. Morrison*, 2 Marv. (Del.) 157, 42 Atl. Rep. 447.

<sup>24</sup> *Wright v. Harris*, 31 Iowa 272. See, also, *Lee Co. v. Welsing*, 70 Iowa 198. In *Palacios v. Brasher*, 18 Colo. 593, 34 Pac. Rep. 251, defendants signed in blank a printed form of bond, not under seal, for the release of property seized under an attachment writ, and made affidavit below their signatures as to their residence and financial responsibility. The bond was filled in by their attorney, in whose hands they placed it after signing and after being informed by him that the amount involved would not exceed \$2,000. It was held, reversing the trial court, that authority to fill in the blanks need not be under seal, or in writing at all, and need not be express but may be implied from circumstances. The court said (p. 598): "It certainly is consonant with justice and fairness that when a

person as a surety signs an incomplete undertaking, and places the same in the hands of another to use for a particular purpose, and with ostensible authority to fill in any needed matter to make the same effective, and the same is accepted in its completed form by the obligee without negligence on his part, that such surety ought to be estopped from controverting its validity to the prejudice of such obligee; and we think that the facts in this case most strongly invoke the application of this rule."

<sup>25</sup> *State v. McGonigle*, 101 Mo. 353; *State v. Findley*, 101 Mo. 368. Contra, *Owens v. Tague*, 3 Ind. App. 245, 29 N. E. Rep. 784.

<sup>26</sup> *Heath v. State*, 14 Tex. App. 213.

<sup>27</sup> *Wegner v. State*, 28 Tex. App. 419. For other cases holding sureties discharged by alteration of the bond, see *United States v. O'Neill*, 19 Fed. Rep. 567; *Bailey v. Boyd*, 75 Ind. 125.

<sup>28</sup> In *State v. Smith*, 9 Houston (Del.) 143, 31 Atl. Rep. 516, a col-

§ 425. **When surety on bond not discharged by its alteration.**—It has been held that if a principal gets the name of a surety to his official bond, and afterwards, without the consent of such surety, he gets another surety to sign the bond, this does not discharge the first surety.<sup>29</sup> Where A, as one of two sureties, signed a bond to dissolve an attachment, but upon his answers as to his estate the bond was not approved, and he went away, and afterwards an additional surety was obtained and the bond was then approved, without anything further being said to A, it was held that he was liable on the bond.<sup>30</sup> After a bond had been signed by three sureties, the names of two were accidentally cut off, and they afterwards signed the bond without attaching any seal to their names. Held, the other surety was not discharged.<sup>31</sup> If at the time a surety signs a bond there is a blank in the body thereof at the place where his name ought to be, the insertion of his name in such blank without his knowledge will not discharge him.<sup>32</sup> An administrator procured his bond from the clerk's office some time after it had been signed by himself and several sureties, and approved by the court. He then struck out the name of one of the sureties and inserted therein the name of another person as surety, and the bond was signed by such other person. This was done without the knowledge of the clerk or of any of the parties to the bond, except the one whose name was stricken out. Held, the surety whose name was stricken out, and all the sureties, were liable in equity on the bond.<sup>33</sup> A principal and his sureties were sued by a city for not complying with a written contract to construct water-works. They offered to prove that the contract had been changed by parol, completed as changed and accepted by the

lector signed his official bond, without seal, and after his sureties had signed it, and without their knowledge, attached a seal to his signature. Held, that the sureties were not bound and that judgment by confession against them must be set aside. No opinion filed, but briefs given fully.

<sup>29</sup> Governor v. Lagow, 43 Ill. 134; State v. Dunn, 11 La. Ann. 549.

<sup>30</sup> Sampson v. Barnard, 98 Mass. 359.

<sup>31</sup> Rhoads v. Frederick, 8 Watts (Pa.) 448.

<sup>32</sup> Smith v. Crooker, 5 Mass. 538; The State v. Pepper, 31 Ind. 76. See City of Chicago v. Gage, 95 Ill. 593.

<sup>33</sup> Harrison v. Turbeville, 2 Humph. (Tenn.) 242.



city. Held, the fact could not be shown, as the city could only contract through its corporate authorities by ordinance.<sup>34</sup> A party guarantied the payment of rent, reserved by a lease under seal. Afterwards the lessor agreed by parol to reduce the monthly rent, and the new agreement was completely executed. In a suit on the guaranty it was held that, as the parol agreement had been executed, it superseded the lease, and the surety was discharged at law.<sup>35</sup>

§ 426. When surety discharged if creditor advance to principal greater or less amount than that for which surety becomes liable.—Certain parties made a mortgage, conditioned to indemnify the mortgagee from all advances, etc., which he should “incur or make on account of the said \* \* (principal), not to exceed at any one time the sum of \$10,000.” The mortgagee advanced on account of the principal a much greater sum, and it was held the mortgagors were not discharged by that fact. The object of the restriction of the amount to be advanced was to limit their liability to that sum, and not to prevent the mortgagor from giving the principal a credit beyond that amount.<sup>36</sup> The same thing was held where a guaranty was as follows: “I guaranty the payment of all sums which B may owe C for goods which he may sell B, provided that the whole amount which B shall owe C at any one time shall not exceed \$1,100, it being the understanding that I am in no event to be liable for more than that sum. And if B shall fail punctually to pay C any sum which may become due to him, I am to have ninety days after demand in writing made on me, under this guaranty, to pay the amount for which he may be so in default; and this guaranty is upon the condition that said C shall, once in every eight months from the date hereof, give me notice in writing of said B’s account with him.”<sup>37</sup> Certain individuals mortgaged divers lots owned by them to a bank, to secure a loan

<sup>34</sup> *Sacramento v. Kirk*, 7 Calif. 419.

<sup>35</sup> *White v. Walker*, 31 Ill. 422. Holding that in such a case, where the parol agreement has not been executed, the surety is not discharged, see *Chapman v. McGrew*, 20 Ill. 101.

<sup>36</sup> *Clagett v. Salmon*, 5 Gill. & Johns. (Md.) 314. To the same effect: *Fertig v. Bartles* (C. C., N. J.), 78 Fed. Rep. 866.

<sup>37</sup> *Curtis v. Hubbard*, 6 Met. (Mass.) 186. See, also, *Pratt v. Matthews*, 24 Hun (N. Y.) 386.



to be made to the trustees of Shawneetown, not to exceed \$20,000. The loan was to run ten years, and the money to be used for walling the banks of a river adjacent to the lots. The bank loaned the trustees almost \$40,000 for that purpose, and took their note for it, and brought a bill to foreclose the mortgage. Held, on demurrer to the bill, that it did not pretend to show that the loan was made in pursuance of the mortgage. The mortgage limited the loan to \$20,000, the bill showed it was for twice that sum. "The sureties have never undertaken to guaranty the performance of such an agreement as was made. \* \* It is not an answer to say that the sureties are only sought to be held responsible to the extent of \$20,000, for it may well be that they would not have become responsible for any amount but for the assurance that the loan would be limited to the amount stipulated."<sup>38</sup> The plaintiff agreed to let one N have \$10,000 in cash, and to convey to him, clear of incumbrance, a tract of land worth \$10,000, and to take N's two notes therefor, payable in one and two years each, for \$10,000. N was also to pledge certain railroad shares as collateral security, and furnish the bond of responsible men, conditioned that they would take such shares and notes at the expiration of the two years, and pay such sum as should remain unpaid upon the notes. Two sureties, with the knowledge of this agreement, executed such a bond. Afterwards, by an agreement between the plaintiff and N, the plaintiff only let N have \$8,317, retaining the balance for interest in advance on the two notes, and, instead of conveying the land clear to the plaintiff, took back a mortgage on it to secure the purchase money. Held, the sureties were discharged. The court said: "The current of authorities seems to run very decidedly one way, and it is to the effect that any variation between the principal and the creditor of the terms of the original undertaking, for the performance of which the surety became responsible, will discharge the surety, if done without his assent, however the change may affect his interest."<sup>39</sup> Declaration that in consideration that A would give B "credit for the amount of 400l." the defendant would guaranty B's dealings "to the amount of 400l. aforesaid." B only bought 300l. worth of goods, and the

<sup>38</sup> Ryan v. Shawneetown, 14 Ill. 20, per Caton, J.

<sup>39</sup> Watriss v. Pierce, 32 N. H. 560, per Eastman, J.

defendant, being sued on the guaranty, set up that as 400l. worth of goods were not advanced, he was not liable. Held, he was liable. The proper construction of the guaranty was that the defendant was to be liable to the extent of 400l. If it were otherwise, B might, by his refusal to buy 400l. worth of goods, have prevented the defendant from becoming liable at all.<sup>40</sup> Where a surety agreed to become responsible for the price of such goods as his principal should order, and the principal sent a written order to the merchant stating the number of articles he wished to purchase and naming the prices he would pay for them, and the merchant shipped a larger quantity of goods than was specified in the order, and invoiced at a higher price than mentioned in the order, and thereafter, without disclosing to the surety these facts, presented to him for signature a bill of exchange for the price of the goods shipped, representing to him it was for the goods ordered, and that the principal had accepted the bill, held, the surety was discharged.<sup>41</sup>

**§ 427. Surety discharged if variation of contract is for his benefit.**—If a material alteration is made in the contract without the surety's consent he is discharged, even though the alteration may be for his benefit. With reference to this it has been said: "No principle of law is better settled at this day than that, the undertaking of the surety being one strictissimi juris, he cannot, either at law or in equity, be bound farther or otherwise than he is by the very terms of his contract. \* \* Neither is it of any consequence that the alteration in the contract is trivial, nor even that it is for the advantage of the surety. *Non haec in foedera veni* is an answer in the mouth of the surety from which the obligee can never extricate his case, however innocently or by whatever kind intention to all parties he may have been actuated. \* \* He is not bound by the old contract, for that has been abrogated by the new; neither is he bound by the new contract, because he is no party to it; neither can it be split into parts so as to be his contract to a certain extent and not for the residue; he is either bound in toto or not at all."<sup>42</sup> A, for

<sup>40</sup> *Lindsay v. Parkinson*, 5 Irish Law Rep. 124.

<sup>41</sup> *Barber v. Morton*, 45 Up. Can. (Q. B.) 386.

<sup>42</sup> *Bethune v. Dozier*, 10 Ga. 235, per Lumpkin, J. To similar effect, see *Rowan v. Sharp's Rifle Manuf'g Co.*, 33 Conn. 1; *Weir*

B's accommodation, indorsed B's note to C. It was agreed between all the parties at that time that B should give C a mortgage upon his stock of goods as a security for the debt, and this was done as agreed. C failed to record the mortgage, and at the end of three months canceled it and took another. Held, A was entirely discharged notwithstanding it was affirmatively proved that the mortgage, if duly recorded and uncanceled, would have been no protection to the surety by reason of older liens; and this on the ground that the contract had been altered without the surety's consent.<sup>43</sup> Where, after a surety had become liable for an annuity, the rate of the annuity was, without his consent, altered from 20l. to 9l. per cent., it was held he was discharged. The court said: "Whether this alteration was likely to be injurious to the surety, I will not inquire; the alteration, whether beneficial or not, should not have been made without his full knowledge and assent; the surety has a right to know what is the contract to which he is party as surety."<sup>44</sup>

Plow Co. v. Walmsley, 110 Ind. 242; Dey v. Martin, 78 Va. 1; Christian & Gunn v. Keen, 80 Va. 369; Cornell v. Eagan, 13 Daly (N. Y. Com. Pleas) 505. "This proposition is so firmly imbedded in the law of principal and surety that no considerations of apparent equity are permitted to disturb it, however great the hardships may be which, in individual cases, appeal for a modification of the rule." Warden v. Ryan, 37 Mo. App. 466; Polak v. Everett, 1 Q. B. Div. 669, per Blackburn, J.; Rees v. Berrington, 2 Ves. 540; Wulff v. Jay, L. R. 7 Q. B. 756; Holme v. Brunskill, 3 Q. B. D. 495. In *Prairie State National Bank v. United States*, 164 U. S. 227, at 237, 240, 41 L. Ed. 412, 17 Sup. Ct. Rep. 142, the court held, upon this principle, that a government building contractor could not, independent of the statutory prohibition, make a valid assignment of the unpaid balance of the contract price to a

bank furnishing him money for the prosecution of the work. For such an assignment, if it were valid, would discharge the sureties who are entitled to stand on the very terms of their undertaking and are released by any change without their consent, no matter how trivial and even though it may be to their advantage. Citing *inter alia* *Reese v. United States*, 76 U. S. (9 Wall) 13, 19 L. Ed. 541, by Justice Field, and *Polak v. Everett*, L. R. 1 Q. B. Div. 669. Compare *U. S. Fidelity & Guaranty Co. v. Omaha Bldg. & Constr. Co. (Neb.)*, 116 Fed. Rep. 145, 53 C. C. A. 465, note 83 to § 154, *supra*.

<sup>43</sup> *Atlanta National Bank v. Douglass*, 51 Ga. 205.

<sup>44</sup> *Eyre v. Hollier, Lloyd & Gould (Temp. Plunkett)* 250, per Plunkett, C. In *Driscoll v. Winters*, 122 Calif. 65, 54 Pac. Rep. 387, defendant, who had guaranteed that Winters would perform a contract by which he was required

**§ 428. Cases holding surety not released where creditor alters contract to principal's advantage.**—The editor notes a tendency in some jurisdictions to hold the surety liable for the principal's default, notwithstanding changes in the contract between principal and obligee which have apparently done the surety no injury. Thus, in a Massachusetts case, the surety on a note claimed his release by reason of the principal's agreement with the creditor to pay a lower rate of interest after a certain date. The court held the defense insufficient and said: "Where the act of which the surety complains is a new agreement changing some of the terms of the original agreement, we think the true rule is, that if such new agreement is or may be injurious to the surety, or if it amounts to a substitution of the new agreement for the old, so as to discharge and put an end to the latter, the surety is discharged. But if the change in the original contract from its nature is beneficial to the surety, or if it is self evident that it cannot prejudice him, the surety is not discharged."<sup>1</sup> In a case in the circuit court of appeals defendants were sureties on the bond of a brewery agent at Galveston, whose contract obliged him to pay for beer upon receipt of bills of lading issued at St. Louis, the point of shipment. About January 20, 1894, the obligee wrote to the agent that it had obtained an exceptionally low rate of freight until February 3 and urged him to "get all the beer you can" and wrote, "You don't need to pay for this beer, which you order ahead, as provided for in the contract." It was held, reversing the trial court, that "those words when illustrated by the context of the letter and other evidence in the case, must be limited to a partial, rather than an entire release of the sureties. \* \* The purpose of the plaintiff company in indefinitely extending the time to which Hayes might pay for the car loads of beer received during the period

to furnish sixty-three gallons of milk per day for one year, was held released by a reduction of the quantity to be furnished to thirteen gallons per day. See notes to next section.

<sup>1</sup> Cambridge Savings Bank v. Hyde, 131 Mass. 77. See, also, Preston v. Huntington, 67 Mich. 139, where a surety on a lease was

held not discharged by reduction of the rent. See, also, dissenting opinion of Pardee, J., in Jacksonville R. R. v. Hooper, 85 Fed. Rep. 620, 29 C. C. A. 382, 52 U. S. App. 579, where the majority of the court held a supersedeas bond not released by an agreement for delay pending negotiations for settlement. Note 2, § 416.

covered by the letter," said the court, "was to enable him to meet advantageously the increased freight rates which the company knew might be established by the railway lines in the immediate future. Under that view of the import of the letter, the sureties were benefited, rather than damaged, by the prolongation of the time for Hayes to pay for increased shipments. It seems reasonable to suggest that Hayes, by selling the large quantities of beer for which he did not have to pay cash, would be in a better financial condition to more readily meet the obligations in which his sureties were interested. In the line of that suggestion it would follow that Hayes' sureties were benefited, rather than damaged, by the creditor's indulgence." They were therefore held liable except for the beer sold on credit.<sup>2</sup>

**§ 429. When surety on lease discharged by alteration of contract.**—Before the expiration of the lease of a house and lot the house was destroyed by fire, and, by mutual agreement between the landlord and tenant, the lease was canceled. Held, this was not such an alteration of the contract as discharged a surety on the lease for rent which had accrued prior to the time of cancellation. The court said: "The obligation which the lessees undertook to perform, so far as it relates to the payment of the rent which had then accrued, was not changed; it remained in the precise terms it was before; it was, as to the then future, the executory portion of it that was abrogated. \* \* The obligation to pay the rent for which judgment has been recovered has not in letter or spirit been changed, nor is it pretended that any right of the defendant growing out of the contract is, so far as it relates to that obligation, in any respect altered or impaired."<sup>3</sup> A lease

<sup>2</sup> *St. Louis Brewing Association v. Hayes* (Tex.), 71 Fed. Rep. 110, 17 C. C. A. 634, Boarman, J. Cf. Note 1, § 416.

<sup>3</sup> *Kingsbury v. Westfall*, 61 N. Y. 356, per Gray, C. To similar effect, see *Kingsbury v. Williams*, 53 Barb. (N. Y.) 142. In *Morrill v. Baggott*, 157 Ill. 240, 41 N. E. Rep. 639, the defendant being sued in assumpsit on his guaranty of a lease, pleaded that after the making of the lease and without his consent the lessor agreed with the lessee to credit lessee \$700 in rent, provided the lessee made certain repairs, and had thereby altered the contract and discharged defendant. Held, that the plea was not good. "Such agreement would seem to be purely collateral to the lease," said the court, Bailey, J. (p. 243). "No provision of that instrument was altered nor was any obligation growing out of it modified or suspended. The les-

with surety provided for the payment of rent quarterly. The lessee paid, and the landlord accepted, rent monthly for some time, but there was no agreement that the rent should be so received. Held, the contract was not changed nor the surety discharged.<sup>4</sup> Where a lease with surety provided for the payment of \$43 a month as rent, and the landlord subsequently agreed to take \$40 a month, it was said that this did not discharge the surety.<sup>5</sup> A yard, shed and frame dwelling-house was rented for \$375 a month, and a stranger guarantied the rent. The lessor took back the dwelling-house and rented it to another, and reduced the rent for the remainder of the premises to \$300 a month, and it was held the guarantor was thereby discharged.<sup>6</sup> A lease with surety provided that if the premises should be destroyed by fire the lease should

sees, notwithstanding the agreement, remained liable to pay each instalment of rent as it matured, by the terms of the lease. It is not pretended that the \$700 credit was to be applied in satisfaction of any particular instalment of rent, or that any instalments were to await the performance by the lessees of their contract in relation to the improvements on the premises. The only effect upon the lease of the agreement alleged was, to obligate the plaintiff to give the lessees a credit of \$700 on account of rent when the improvements contracted for should be completed." Affirming 57 Ill. App. 530.

<sup>4</sup> Ogden v. Rowe, 3 E. D. Smith (N. Y.) 312.

<sup>5</sup> Ellis v. McCormick, 1 Hilton (N. Y.) 313.

<sup>6</sup> Penn v. Collins, 5 Rob. (La.) 213. And where, after notice to quit, a tenant entered into an agreement with his landlord surrendering part of the demised premises, thereby reducing the rent, whereupon the notice was withdrawn, it was held that such agreement was a material alteration of the original contract between the

tenant and landlord and discharged from liability a surety for the rent. Holme v. Brunskill, Law Rep. (3 Q. B. Div.) 495. In this case it was held to be not a question for the jury whether the alteration was material or not. The court said that "if it is not self evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety, the court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question, whether the surety is discharged or not, to be determined by the finding of a jury as to the materiality of the alteration or on the question whether it is to the prejudice of the surety, but will hold that in such a case the surety himself must be the sole judge whether or not he will consent to remain liable, notwithstanding the alteration, and that if he has not so consented he will be discharged." See, also, Polak v. Everett, 1 Q. B. Div. 669, per Blackburn, J.; Wulff v. Jay, L. R. 7 Q. B. Div. 756; Samuell v. Howarth, 3 Mer. 272; Winslow v. Verner, 30 New Bruns. R., 152, 156.



thereupon terminate. The premises were totally destroyed by fire, but the tenant still held the site and refused to surrender. Held, the surety was discharged from the time the premises were destroyed, as the lease was thereby terminated, and if there was a further holding it was not under the lease.<sup>7</sup> Principal and surety executed a lease by which they covenanted to return the property in good order. The principal held over for about a year after the expiration of the term, without any demand for possession by the lessors. Held, the surety was not liable for rent during the holding over, as that was by the express or implied consent of the lessors, and amounted to a new contract.<sup>8</sup> It has been held that the assignment of a lease contrary to its terms releases the guarantor of rent not consenting thereto.<sup>9</sup>

**§ 430.—Same continued—When surety not discharged.**—A surety for the performance of a contract of lease is discharged by any subsequent material change therein to which he does not assent. Thus where during the life of a lease for three years an agreement was entered into between the lessor and lessee whereby the latter was to surrender the premises at the end of the second year, and pay certain sums in full of all rent due under the lease, it was held that a surety for the performance by the lessee of the original lease was discharged by such agreement.<sup>10</sup> And where premises were leased under stipulation that at the expiration of the term the lessee should deliver up the premises in as good condition as when received, wear and tear excepted; and contemporaneously with the lease it was agreed between the lessor and lessee that the building should be changed and remodeled by the lessor, possession to

<sup>7</sup> Taylor v. Hortop, 22 Up. Can. (C. P.) 542.

<sup>8</sup> Kyle v. Proctor, 7 Bush (Ky.) 493.

<sup>9</sup> In Randol v. Tatum, 98 Calif. 390, 33 Pac. Rep. 433, a lease, which contained a condition that the term might be forfeited if assigned without consent and a covenant not to assign, was, with the lessor's consent, assigned to defendant, who had guaranteed performance by the lessee and was by

him assigned, without the lessor's consent, to one Davis who, also without consent, assigned it to his wife, from whom the lessor afterwards received rent. Held, that so long as Davis' wife continued to tender the rent as it became due, the lessor could not forfeit the lease, or refuse to accept the rent and hold the guarantor therefor.

<sup>10</sup> Nichols v. Palmer, 48 Wis. 110.



be given upon the completion of the improvements, held, in the absence of proof of knowledge of this agreement, a guarantor on the lease was released.<sup>11</sup> Sureties who contract for the payment of rent by two lessees jointly are held discharged by an agreement, without their consent, that one of the lessees might retire from the leased premises and that the lessor would look to the other lessee for the rent.<sup>12</sup> Where a surety signed a lease appearing on its face to be made to himself and the actual lessee jointly, and the lessee afterwards, with the consent of the landlord, assigned the lease without the knowledge or consent of the surety, the assignment not containing any release of liability of the original lessees, held, the surety was not discharged by the assignment.<sup>13</sup> Where a surety becomes jointly liable with his lessee for the payment of rent, he is held not discharged because of an agreement subsequently entered into between the lessor and lessee, and without his knowledge, reducing the rent.<sup>14</sup>

**§ 431. When judgment against principal does not bar suit against surety.**—The recovery of a judgment against the principal alone, where the suit is not on the obligation signed by the surety, or where the suit is on the obligation, and it is several, will not generally bar a subsequent suit for the same cause of action against the surety. Thus, it has been held that the recovery of a judgment against the principal in a lease which he signed alone is no bar to an action against him and a guarantor on a guaranty executed by him and the guarantor jointly. The court said: "I see no impropriety or difficulty in a party being more than once sued for the enforcement of the same duty or obligation, if he have given more than one contract in different forms for its performance."<sup>15</sup> A judgment in assumpsit against an officer for his default, the suit not being on his official bond, is no bar to a subsequent suit in a debt against him and the surety on his

<sup>11</sup> Farrar v. Kramer, 5 Mo. App. 167.

<sup>12</sup> Prior v. Kiso, 81 Mo. 241.

<sup>13</sup> Stein v. Jones, 18 Bradw. (Ill. App.) 543.

<sup>14</sup> Preston v. Huntington, 67 Mich. 139.

<sup>15</sup> White v. Smith, 33 Pa. St. 186, per Thompson, J. In McCullough

v. Hellman, 8 Oreg. 191, it is held that recovery of a judgment against a principal on a note is no bar to an action against him and another on a note given as collateral security for the debt of the principal, unless such judgment had been satisfied.

bond.<sup>16</sup> Two parties indorsed a note as joint guarantors, and judgment was recovered against one of them on the guaranty. Held, this was a bar to a suit on the guaranty against the other guarantor. The court said that upon the recovery against one the entire contract was merged in the judgment, and there could be no recovery thereon against the other. "There is no rule better settled than that a recovery against one on a joint contract of several bars the action against the others, even though the latter were dormant partners unknown to the plaintiff when the original action was brought."<sup>17</sup>

§ 432. **When surety not discharged because compensation of principal changed.**—Where the compensation which shall be paid the principal in an employment is not a part of the contract of the surety for his good behavior therein, a change in the amount of such compensation which does not change the duties of the principal, nor vary the risk of the surety, does not generally discharge the surety. Thus, the bond of an assistant overseer of a parish was conditioned for his good behavior "during the continuance of his said appointment." His salary, when appointed, was £16 a year, but the office was not annual, nor for any definite period. After he had held the office five years, by his own consent and by vote of the authorities, his salary was reduced to £14 a year, and he continued in the office and afterwards made default. Held, the sureties on his bond were liable therefor. The court said: "If the sureties had thought that the amount of the salary was an essential ingredient in the contract they ought to have taken care to have had a stipulation inserted in the condition of the bond that they would be liable only so long as the overseer was continued at the same salary."<sup>18</sup> To a declaration against a bond conditioned for the faithful performance of his duty by W, so long as he should continue in the plaintiff's service in the capacity of their agent at N, and in any other capacity whatsoever, the defendant pleaded that W entered into the plaintiff's employment as such agent at a certain commission or percentage on the business done, and the defendant executed the

<sup>16</sup> Fireman's Ins. Co. v. McMillan, 29 Ala. 147; Comm'rs v. Canan, 2 Watts (Pa.) 107. Contra, see Sloan v. Creasor, 22 Up. Can. (Q. B.) 127. <sup>17</sup> Brady v. Reynolds, 13 Cal. 31, per Field, J. <sup>18</sup> Frank v. Edwards, 8 Wels., Hurl. & Gor. 214, per Parke, B.

bond under the agreement that he should be so paid, and that afterwards the plaintiff, without the defendant's consent, changed the mode of remuneration to a fixed salary. The bond itself said nothing about the salary, and it was held the surety was not discharged.<sup>19</sup> Two cases in the circuit court of appeals appear to justify the statement that where either the surety or the obligee is in such a position, under the suretyship agreement, that he can compel the appropriation of the money to be paid to the principal by the obligee as salary or compensation, to the performance of the obligation for which the surety is bound, a change in the rate of compensation is a change of an essential part of the contract which, if not consented to by the surety, releases him. But where the rate of pay to be received by the principal is not even mentioned in the contract of suretyship and neither surety nor obligee can have anything to say as to how it shall be used after it reaches the hands of the principal, a change of the rate of pay without the surety's consent does not release him.<sup>20</sup>

<sup>19</sup> Bank of Toronto v. Wilmot, 19 Up. Can. (Q. B.) 73.

<sup>20</sup> In Harper v. Nat'l Life Ins. Co. (Pa.), 56 Fed. Rep. 281, 5 C. C. A. 505, 17 U. S. App. 48, Harper was appointed agent in certain territory for appellee company, which advanced to him \$15,000 on his note, and defendants became sureties on his bond conditioned for the payment "when and as required by said company" to appellee of all commissions earned by Harper in excess of \$250 per month, also for the payment of certain renewal interest due to Harper from another insurance company amounting to not less than \$500 per month and for the payment of any other indebtedness due to appellee. Afterwards, without the consent of the sureties, the rates of commission were changed by a supplemental contract between Harper and appellee, the average result of which changes "was rather favorable to the agent unless the new business should be

limited to a particular sub-class of life policies." It was held that the change in commissions did not affect the liability of the sureties. "There is no stipulation in the original agreement, or in the bond, that the agent's compensation should remain fixed and unaltered," said Wales, D. J., speaking for the court. "Commissions were allowed to him in the place of a stated salary in order to stimulate his services in soliciting business for his employer. The condition in the bond that he should comply with all the terms and covenants in the recited agreement, and the further condition that he should pay all balances of indebtedness, are separate and distinct conditions, and neither of these conditions was intended to be governed or affected by the rates of compensation allowed to him at the date of the bond or afterwards." In Mundy v. Stevens, 61 Fed. Rep. 77, 9 C. C. A. 366, 17 U. S. App. 442, 463, the same court held that

§ 433. **Surety for conduct of principal discharged if his duties are changed.**—If the duties which the principal is to perform are varied by agreement between the principal and obligee, after the surety for the conduct of principal has become bound, such surety will generally be thereby discharged. Thus, A became surety for the good conduct of B as agent for the sale of granite for C. Afterwards, by arrangement between B and C, their contract was changed, so that B, instead of being a mere agent, became a conditional purchaser of the stone, if sold for a certain price, and responsible for all bad debts contracted under his own sales. Held, A was not liable for any of B's acts after the new agreement had been made.<sup>21</sup> A surety by bond for the due performance by another of the office of bank "agent," is not responsible for losses occurring after the nature of the agency has been changed, and the agent appointed "cashier," it appearing that the offices were not the same, and that their duties were somewhat different.<sup>22</sup> The bond of the agent of a hat manufac-

certain alterations in a contract between a government contractor and his sub-contractor released one of two sureties who did not consent thereto. In this case the principal contractor for the dredging of the river at Philadelphia sublet his contract with the war department to Stevens and agreed to turn over to Stevens all moneys to become due him from the war department as fast as the same became due and Stevens agreed to do the work and repay to the principal contractor 3 cents for each cubic foot dredged by him and to make such repayments amount to at least \$9,000 per month and to \$179,000 in 18 months. Mundy, the principal contractor, gave the bond in question conditioned for the prompt turning over by him to the sub-contractor of the moneys received from the war department. Thereafter Mundy and Stevens made a supplemental agreement by which the amount to be repaid to Mundy by Stevens was re-

duced to 2½ cents per cubic yard of dredging, and Stevens' engagement that his payment to Mundy should amount to \$9,000 per month was stricken out. The court, Acheson, J., held that, since the effect of these deductions was to make it more difficult by at least \$9,000 a month, for Mundy to keep his engagement to pay all moneys received from the government to Stevens, the surety who was not shown to have consented to the change was discharged. The court distinguished the case from *Harper v. Nat'l Life Insurance Co.*, 56 Fed. Rep. 281, *supra*, saying that the agreement in that case did not appropriate the agent's commissions to the payment of his indebtedness, and the creditor was under no sort of obligation to compel the agent to make such application.

<sup>21</sup> *Gass v. Stinson*, 2 Sumner 453.

<sup>22</sup> *Bank of Upper Canada v. Cover*, 5 Up. Can. K. B. (O. S.) 541. In *Johnson v. Eaton Milling &*

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turing company provided that he should faithfully discharge the duties of his office, and account for and pay over whatever funds he should have in his hands whenever thereto requested. At that time the agent had charge of a store belonging to the company, and his duties were to deliver hats to the proprietors, keep accounts with them, receive their promissory notes, and deliver them to the treasurer of the company, and to sell to other persons, for which services he received a commission, he guarantying the debts on sale by retail. Afterwards it was agreed between the agent and the company that the store should be discontinued, and the agent should deliver the hats in cases to the proprietors from his own store, and he was to be supplied with hats at wholesale prices for retailing on his own account, and was to keep the books and account with the company. Held, the acts of the agent under the new arrangement were not covered by the bond.<sup>23</sup> After surety became liable for the conduct of a clerk in a bank, the clerk, upon having his salary raised, undertook to become liable for one-fourth of the discounts. Held, the surety was not liable for anything occurring after the change in the terms of the clerk's employment.<sup>24</sup> A, being collector of taxes, by writing under seal appointed B his deputy for eight townships, naming them. B gave bond, with C as surety, which recited B's appointment for the eight townships, and provided that B should "continue truly and faithfully to discharge the duties of said appointment according to law." Afterwards, by agreement between A and B, the paper of appointment was changed, and the name of another township interlined, so that the appointment was then for nine instead of eight townships. Held, C was not liable for any

Elevator Co., 18 Colo. 331, 32 Pac. Rep. 825, sureties on the bond of the treasurer of a private corporation were held not liable for defaults made by him as manager. In *Foster v. Franklin Life Ins. Co.*, Tex. Civ. App., Jan'y, 1903, 72 S. W. Rep. 91, the surety on the bond of an insurance agent was held not to be released by his being made district manager, with sub-agents under him. In *Good Roads Ma-*

*chinery Co. v. Moore*, 25 Ind. App. 479, 58 N. E. Rep. 540, the sureties of a sales agent whose contract described his territory as "the state of Indiana and ———," were held discharged by the insertion of Illinois in the blank space without their consent.

<sup>23</sup> *Boston Hat Manufactory v. Messinger*, 2 Pick. 223.

<sup>24</sup> *Bonar v. Macdonald*, 3 H. of L. Cases 226.

of the money collected by B after the change of the appointment.<sup>25</sup>

§ 434. **The same, continued—Whether surety released by principal's change of pay—Instances.**—An insurance company appointed an agent to be paid by certain commissions, with a guaranty by the company that the commissions should amount to a specified sum monthly, the agency to be terminated by either party at three months' notice. The agent gave bond conditioned that he "shall faithfully conform to all instructions and directions which he, as such agent, may at any time receive from" the company. The sureties on the bond knew of the terms of the appointment of their principal when they became bound. Subsequently the agent and the company agreed that the agent should receive increased commissions, but give up all claim on the guaranty. Held, the sureties were not thereby discharged. The new agreement did not affect the identity of the office, nor the duties of the agent. He was not an agent at a fixed salary either before or after the new agreement.<sup>26</sup> Where the directors of a bank, in consequence of a private loss sustained by their cashier, made him a payment of his salary for six months in advance, and he afterwards paid himself a second time by monthly instalments for the same period, the surety on his official bond, who had bound himself for the faithful performance of his duties by the cashier, and to save the bank harmless from any negligence or misconduct on his part, and that he shall render a faithful account of all moneys and effects committed to his charge, will be bound for the deficiency.<sup>27</sup> A bond recited that L had been appointed a railroad clerk "at a yearly salary of £100," and was conditioned for his good behavior, his duty being to sell coal. Afterwards his compensation was changed to a commission of 6d a ton on all coal sold by him, and he made more under that arrangement than £100 a year. Held, the surety

<sup>25</sup> *Miller v. Stewart*, 9 Wheat. 680; *Miller v. Stewart*, 4 Wash. (C. C.) 26.

<sup>26</sup> *Amicable Mutual Life Ins. Co. v. Sedgwick*, 110 Mass. 163. Also see *The Domestic Sewing Machine Co. v. Webster*, 47 Iowa 357. Holding surety discharged by alteration

of compensation of principal, and other circumstances, see *Bagley v. Blark*, 7 Bosw. (N. Y.) 94; *The Canada Life Assurance Company v. Calkins*, 24 N. B. 276. See note 23, preceding section.

<sup>27</sup> *Menard v. Davidson*, 3 La. Ann. 480.



was discharged. The court said: "When the mode of remuneration was altered the agency was different, and the risk of the sureties was materially increased. \* \* The conditon recites that the company have agreed to appoint the principal as their agent at a yearly salary of £100; therefore there was a bargain between the company and the sureties that the agent should have that salary." <sup>28</sup>

§ 435. Same continued—Sureties of bank clerk, bookkeeper, sewing machine and ticket agents—Trustee.—In the case of a surety standing bound for the fidelity or capacity of a principal appointed to a particular office or employment, if the nature of the employment is so changed by the act of the employer that the risk of the surety is materially altered from what was contemplated by the parties at the time of entering into the bond, the surety has a right to say that his obligation does not extend to such altered state of things. Thus, where a bond was given to a bank conditioned for the faithful and honest performance of the principal's duties as assistant book-keeper, and he is subsequently made note teller and discount clerk and becomes guilty of defalcations committed in the latter duties, it was held that the change of employment in the principal's duties involved a material increase of risk to the surety and he was thereby discharged.<sup>29</sup> Where a book-keeper executed a bond with surety to a bank, conditioned that he should faithfully perform the duties and trusts imposed upon him as such book-keeper, and "the duties of any other office, trust or employment relating to the business of said (bank) which may be assigned to him, or which he shall undertake to perform," and was subsequently appointed receiving teller, and while acting in that capacity embezzled funds of the bank, held, that his sureties were not liable.<sup>30</sup>

<sup>28</sup> Northwestern R. R. Co. v. 77, 9 C. C. A. 366, 17 U. S. App. Whinray, 1 Hurl. & Gor. (10 Ex. 442, 463, cited in note 20, preceding Ch.) 77, per Alderson and Pratt, section. BB. See, also, Canada Agr'l Ins. Co. v. Watt, 30 Up. Can. (C. P.) 350, where this same question is discussed, though not decided, viz.: whether the substitution of a commission for a fixed salary discharges the contract of suretyship. And see Mundy v. Stevens, 61 Fed. Rep.

<sup>29</sup> First Nat. Bank of Baltimore v. Gerke, 68 Md. 449.

<sup>30</sup> National Mech. Bkg. Ass'n v. Conkling, 90 N. Y. 116, affirming 24 Hun, 496. But see, contra, Home Savings Bank v. Traube, 75 Mo. App. 199, reversing 6 Mo. App. 221.



In an action against the sureties upon a bond, given to a bank and conditioned for the faithful discharge by "C" of "all his duties as clerk of said bank," and against the misappropriation of any of the funds of the bank "which may come under the care or control of said C as clerk," the evidence showed that C, during the whole term of his employment, performed the duty, to some extent, usually performed by a teller, of paying and receiving money over the bank's counter. It was found that the duties contemplated in the bond embraced the duty of receiving and paying out money. Held, not such a change in the clerk's duties as discharged his sureties.<sup>31</sup> Sureties on the bond of a sewing machine agent are held not responsible for his transactions outside of the territory assigned to him by his contract with the company.<sup>32</sup> But held otherwise if the bond contained a reservation to the company giving them the right to change the character of the employment within the scope of the company's business.<sup>33</sup> Enlarging the duties and responsibilities as well as increasing the compensation of a ticket agent, without sureties' consent, held to discharge them.<sup>34</sup> Taking away the discretionary power of a trustee for the sale of real estate was held to release the sureties on his bond.<sup>35</sup>

**§ 436. When surety discharged if responsibility of the principal varied.**—The sureties of an assistant overseer of a parish are no longer held on their bond for his conduct, if he accepts a new appointment in lieu of the old one, at a different

<sup>31</sup> Rollstone Nat. Bank v. Carleton, 136 Mass. 226.

<sup>32</sup> White Sewing Machine Co. v. Mullins, 41 Mich. 339. And also to the effect that changing the locality of his employment and duties generally discharges his sureties, see Singer Manuf. Co. v. Hibbs, 21 Mo. App. 574; Wheeler & Wilson Mfg. Co. v. Brown, 65 Wis. 99; The Fond du Lac Harrow Co. v. Bowles, 54 Wis. 425.

<sup>33</sup> The Home Sewing Machine Co. v. Layman, 88 Ill. 39. Upon the liability of sureties for a building contractor where the power to make alterations in the contract is reserved, see Wehr v. German Evan.

Luth. St. Mat. Cong., 47 Md. 177; Western Bldg. Ass'n v. Fitzmaurice, 7 Mo. App. 283.

<sup>34</sup> Mumford v. Railroad, 2 B. J. Lea (Tenn.), 393.

<sup>35</sup> In McCartney v. Ridgway, 160 Ill. 129, 159, 43 N. E. Rep. 826, affirming 57 Ill. App. 453, a trustee was appointed to sell real estate at public or private sale for cash or credit "as he may deem best," and defendants became sureties on his bond. Afterwards a new agreement was made between the trustee and the beneficiaries by which his discretionary power was taken away. Held, that the sureties, not consenting, were released.

compensation, and which is incompatible with the first appointment.<sup>36</sup> It has been held that the sureties in a cashier's bond, in which they undertake to save the bank harmless from every loss that may arise from the cashier's mistakes, as well as from losses arising from his frauds, inattention or negligence in the performance of his duties, are exonerated by a subsequent increase of the capital stock of the bank, after the additional capital has been paid in. The court said: "It is an established rule of law that a party to a contract like that of these defendants shall not be bound beyond the extent of the engagement which appears from the terms of the contract and the nature of the transaction to have been in his contemplation at the time of entering into it, and that his liability cannot without his consent be extended or enlarged, either by the obligee or by operation of law."<sup>37</sup> The bond of an agent of a life insurance company was conditioned for the faithful performance by him of all the duties of his appointment, as the same should be prescribed by the board of directors, and that he should account for such money as should come to his hands by virtue of his office. The company in connection with its business engaged in banking, which by its charter it had no right to do, and the agent received money in the banking branch of the business and made default. Held, the surety on the bond was not liable for such default. The surety had a right to suppose that nothing would be done which the charter did not permit.<sup>38</sup> The chief clerk at a railway station gave bond with surety, conditioned for his good behavior. Afterwards, by act of parliament, other lines were added under the management of the company, to which the clerk was bound

<sup>36</sup> *Malling Union v. Graham*, Law Rep. 5 Com. Pl. 201.

<sup>37</sup> *Grocers' Bank v. Kingman*, 16 Gray, 473, per. Metcalf, J. Contra, see *Morris' Canal & Banking Co. v. Van Vorsts' Adm'rs*, 1 Zab. (N. J.) 100. And supporting the text: *Lionberger v. Krieger*, 88 Mo. 160, affirming 13 Mo. App. 313.

<sup>38</sup> *Blair v. Perpet. Ins. Co.*, 10 Mo. 559. In *Citizens' Ins. Co. v. Claxton*, 13 Ont. (Can.) 382, the bond of a general insurance agent recited his appointment for the province of

Ontario with \$75 a month salary and 35 per cent commission on his and his subagents' business, and the securities waived notice of default "and all other benefits of sureties, consenting to be bound as fully in all respects as said principal party." Without their consent the principal's business was removed and confined to Toronto, and his commissions taken away. Held, this was a new contract into which the sureties did not enter, and they were liable for prior defaults only.

to account. Held, the duties of the clerk were not changed and the sureties remained liable.<sup>39</sup> A bond to a railroad company recited that the principal had been "appointed by the said company as ticket and freight agent at Ellicott's Mills," and was conditioned for the faithful performance of the duties of said office so long as he should hold the same. At that time Ellicott's Mills was a second-class station, but the company subsequently made it a first-class station. At first-class stations a greater rate for freight was paid than at second-class ones, but the duties of the ticket and freight agent were the same at both. Held, the surety in the bond was not discharged.<sup>40</sup> Query, whether sureties on official bonds are released by the enactment of a statute preventing removal from office except for just cause upon written charges filed with the appointing officer and opportunity for defense.<sup>41</sup>

**§ 437. Discharge of surety of cashier, of surety on distiller's bond, and of surety when obligees subsequently become incorporated.**—Fifteen years before a bank charter would have expired by limitation a cashier was appointed and gave a general bond for his good behavior. Afterwards, and before the time limited for the expiration of the charter, it was extended by act of the legislature for twenty years. The cashier continued to act as such, and was guilty of a default after the charter would have expired if the extension had not been granted. Held, the sureties were liable for such default.<sup>42</sup>

<sup>39</sup> *Railway Co. v. Goodwin*, 3 Wels., Hurl. & Gor. 320.

<sup>40</sup> *Strawbridge v. The Baltimore & Ohio R. R. Co.*, 14 Md. 360; *Williams, J., in Shackamaxon Bank v. Yard*, 150 Pa. St. 358, 24 Atl. Rep. 635, 636. In *Harrisburg Savings & Loan Assn. v. United States Fidelity & Guaranty Co.*, 197 Pa. St. 177, 46 Atl. Rep. 910, defendant became surety on the bond of plaintiff's general manager, who had "supervision of the affairs of the association" and was required to "perform such duties in the detail work of the association as shall be prescribed from time to time by the board of directors." After the giving of the bond the manager was

entrusted with the collection of about \$600 dues every day and became a defaulter to the amount of nearly \$4,000. Held, that the trial court properly left it to the jury to say whether or not such handling of the moneys amounted to an enlargement of the manager's duties as understood when the bond was given.

<sup>41</sup> *Laffan v. United States*, 122 Fed. Rep. 333.

<sup>42</sup> *Exeter Bank v. Rogers*, 7 N. H. 21, adhered to in *Hall v. Brackett*, 62 N. H. 509; and to similar effect, see *City Nat. Bank v. Phelps*, 97 N. Y. 44, and *People v. Backus*, 117 N. Y. 196. In *National Exchange Bank v. Gay*, 57 Conn. 224, it is held no defense to guarantors on a

A bank cashier gave a bond, conditioned that he would "well and truly perform the duties of cashier." The bank was guilty of a default, by which its charter became null and void, and the bank dissolved, but the legislature afterwards revived and continued the charter in force, as if no forfeiture had taken place. Held, the sureties were not liable for any act of the cashier after the forfeiture of the charter. They may have contemplated that such forfeiture would take place when they became bound.<sup>43</sup> The cashier of a branch bank was, by vote of the directors of the parent bank, suspended, and notice to that effect was sent to the president of the branch bank, and received by him two days afterwards, and he notified the cashier thereof the next day. Held, the sureties of the cashier were liable for his acts until the time he was notified of his suspension.<sup>44</sup> An insurance agent, having given bond for the performance of his duties as such, subsequently resigned his agency in writing, and it was accepted in writing, but he continued to be employed by the insurance company. Held, the sureties on the bond were not liable for any default of the agent happening after his resignation.<sup>45</sup> A bond was given by principal and surety to twelve persons and their successors, as governors of the society of musicians, conditioned that the principal should account with them and their successors, governors, etc., as their collectors. Afterwards the society was incorporated, and it was held that the surety was not liable for any default of the principal occurring after the incorporation.<sup>46</sup> A distiller's bond to the United States, which fol-

note in an action on the guaranty by the bank to whom the guaranty was given, that the corporate existence of the bank was prolonged for a number of years after the expiration of its limitation contained in the original charter. A guaranty given to a state bank is held not terminated by the change of the domestic corporation into a national bank and by the consequent change of the corporate name. *City Nat. Bank v. Phelps*, 86 N. Y. 484, affirming to this point, 16 Hun 158. In *Westervelt v. Mohrenstecher*, 76 Fed. Rep. 118, 22 C. C. A. 93, 40 U. S. App.

221, the sureties of a national bank cashier, upon a bond given when he was first appointed for part of a year, were held liable for defaults occurring during four years he held office.

<sup>43</sup> *Bank of Washington v. Barrington*, 2 Pen. & Watts (Pa.) 27.

<sup>44</sup> *McGill v. Bank of United States*, 12 Wheat. 511; *Bank of United States v. Magill*, 1 Paine 661.

<sup>45</sup> *Amicable Mutual Life Ins. Co. v. Sedgwick*, 110 Mass. 163.

<sup>46</sup> *Dance v. Girdler*, 4 Bos. & Pul. 34.

lowed the notice as to the place where a distillery was to be carried on, and recited that it was to be carried on "at the corner of Hudson street and East Avenue," does not bind the sureties for business carried on "at the corner of Hudson and Third streets," in the same town, even though the principal had no distillery at the first-named place, and the two places were only about four blocks apart. The United States had a lien on the land upon which the distillery was situated, and the sureties might have been willing to be responsible for a distillery at one place and not at another.<sup>47</sup> It has been held to be no defense to the sureties on a distiller's bond, that after they became bound, and without notice to them, the capacity of the distillery was declared to be greater than when they became bound.<sup>48</sup> Certain persons organized a private banking company and provided for procuring a charter "at as early a date as possible after the election of directors." The directors subsequently merged the banking association into a corporation chartered as an insurance and trust company, and continued to do a banking business contrary to that charter of the corporation. The corporation became insolvent and made an assignment. In an action by the assignee against sureties on a bond given the directors of the unincorporated association, it was held that since the incorporation of the association was subsequent to the execution of the bond the sureties thereon were discharged.<sup>49</sup>

**§ 438. When change in membership of a firm releases surety therefor.**—There are cases holding that where the principal associates another with him in the performance of his contract, the surety for its performance not consenting thereto is not released.<sup>1</sup> But the weight of authority is that the surety who is bound for the performance of the engagement of a firm is released if there is any change in its membership unless he agrees to remain bound.<sup>2</sup> Defendants became sureties for

<sup>47</sup> *United States v. Boecker*, 21 Wall. 652. *v. Burgdorf*, 13 App. Cas., D. C., 506; *Van Horne v. Van Dyke*, 96

<sup>48</sup> *United States v. Woodman*, 1 Wis. 30; *Wells v. Mehl*, 25 Kas. 205. <sup>2</sup> *Byers v. Hickman Grain Co.*, 112

<sup>49</sup> *Bensinger v. Wren*, 100 Pa. St. 500. *Iowa* 451, 84 N. W. Rep. 500. To the same effect, *Schoonover v. Os-*

<sup>1</sup> *Kuhn v. Abat*, 14 Martin La. borne, 108 Iowa 453, 79 N. W. Rep. (N. S. 2) 168; *Vermont Marble Co.* 263.

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the bank account of the Hickman Grain Co., a partnership composed of three men. Five days later one of the partners withdrew from the firm, and, without notice of the change to the bank, the other two under the same firm name opened the account. Held, that the surety was not liable for a deficit thereafter occurring. In an Alabama case, defendants were sued by a brewing company as sureties on a bond conditioned that Handley would pay for all beer sold to him by plaintiff. On the trial it appeared that before any beer was sold to him he took a partner; the partner procured defendants to sign the bond, and defendants knew that both men were to be associated in the business as Handley & Co. It was held that the sureties were not liable for any beer sold to the partners, and parol evidence was not admissible to show that they had consented to be so liable, because its effect would be to vary the terms of the writing.<sup>3</sup>

**§ 439. Dealing by creditor with principal, which amounts to a departure from the contract, discharges surety—Acceleration of payments.**—Any dealings with the principal by the creditor, which amount to a departure from the contract by which the surety is bound, and which by possibility might materially vary or enlarge the latter's liabilities without his consent, generally operate to discharge the surety. Thus, three notes were indorsed by sureties, and the principal at the same time executed to the payee a chattel mortgage, by the terms of which the mortgaged property was to be sold only on default of the principal in paying the notes at maturity. The first note coming due and being dishonored, by consent of all parties a new one was substituted in its place. After the maturity of the dishonored note, but before the new one or any of the others came due, the creditor, with the assent of the principal, sold the property and applied the proceeds to pay the substituted note and the note next due. Held, the sureties were discharged by the sale of the property.<sup>4</sup> If, at the time a surety becomes liable for a debt, the principal without his

<sup>3</sup> Crescent Brewing Co. v. Handley, 90 Ala. 486, 7 So. Rep. 912.

<sup>4</sup> Mayhew v. Boyd, 5 Md. 102. Where a surety executes a note in pursuance of an agreement between the principal and payee that the

note shall be applied to a specified purpose, and afterwards, without the surety's consent, such note is applied to another and different purpose, held, surety discharged. Johnston v. May, 76 Ind. 293.



knowledge gives the creditor a separate agreement to pay a high rate of interest, it has been held that this discharges the surety.<sup>5</sup> A surety for the completion of work to be performed by the principal, where, by the terms of the contract, the principal is to be paid by instalments, is discharged if the principal is paid faster than the contract provides. The surety is thereby deprived of the inducement which the principal would have to perform the contract in due time. "There must be an assent by the surety to the creditor's dealing with the principal debtor otherwise than in the manner pointed out by the contract; and it is no answer to say that it is for the advantage of the surety, or that he has sustained no prejudice."<sup>6</sup> Where the surety consents to the acceleration of payments his liability is not affected thereby.<sup>7</sup>

**§ 440. The same continued—Surety released by conduct amounting to departure from the contract—Obligee's failure to require stipulated settlements, etc.—Where a surety entered**

<sup>5</sup> *Shaver v. Allison*, 11 Grant's Ch. 355; *Brown v. Proffit*, 53 Miss. 649. *Contra*, *Coats v. McKee*, 26 Ind. 223.

<sup>6</sup> *General Steam Navigation Co. v. Rolt*, 6 J. Scott (N. R.) 550, per *Crower and Willes, JJ.* To same effect, see *Calvert v. London Dock Co.*, 2 Keen, 638, which case is cited and followed in *Prairie State Nat'l Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412, 17 Sup. Ct. Rep. 142, affirming 27 Ct. Claims 185; *Bragg v. Shain*, 49 Cal. 131; *Truckee Lodge v. Wood*, 14 Nev. 293; *Carson Opera House Ass'n v. Miller*, 16 Nev. 327. Sureties on a building contractor's bond of indemnity against mechanics' liens are held discharged by a departure from the terms of the contract respecting payments, though no injury be shown. *Simonson v. Grant*, 36 Minn. 439. See on this subject, generally, *Ryan v. Morton*, 65 Tex. 258. In *Board Commissioners Morgan County v. Branham* (C. C., Ind.), 57 Fed. Rep. 179, plaintiff county being obliged under its contract for a

public building to pay not exceeding \$7,480 when 85 per cent of the work was done, paid over \$10,000 when the work was only one-third done. Held, that the sureties were discharged, citing text. To same effect, see *Welch v. Hubschmitt Building & Woodworking Co.*, 61 N. J. Law 57, 38 Atl. Rep. 824; *Kiessig v. Alsbaugh*, 91 Calif. 231, 27 Pac. Rep. 662; *Cowdery v. Hahn*, 105 Wis. 455, 81 N. W. Rep. 882, 76 Amer. St. Rep. 923; *Simonson v. Thori*, 36 Minn. 439, 31 N. W. Rep. 861.

<sup>7</sup> In *Herrell v. Donovan*, 7 App. Cas. (D. C.) 322, the surety on the bond of a building contractor was also a subcontractor. With his consent his principal was paid in full sooner than the terms of the contract provided. It was held that he was "of course" precluded from claiming a mechanics' lien against the building unless he had been released as surety, and that such advance payments, with his consent, did not release him.



into a bond, conditioned that his principal should insure, and keep insured, certain buildings on land mortgaged by him to the creditor, and afterwards the positions of the buildings were altered by the obligee, the out-buildings being brought nearer to the house, and the risk thus increased, it was held that the surety was thereby discharged.<sup>8</sup> A having purchased three thousand shares of stock, B executed a guaranty to save A harmless from any loss on the purchase occurring within thirty days, and this guaranty was renewed from time to time. A purchased other large amounts of the same stock and mixed the three thousand shares therewith till their identity was lost, and made sales of stock from time to time. The transactions resulted in a loss, and it was held that A, having rendered it impossible to ascertain whether there was a loss on the three thousand shares, could not recover anything from B on the guaranty.<sup>9</sup> A principal debtor placed in the hands of his creditor certain claims against third parties, to be collected and applied to the payment of his debts. There was a surety for such part of the debt of the principal as might remain after the claims placed in the hands of the creditor had been collected and applied to the payment of the debts. If the claims had been collected in full they would have paid the debt of the principal. The creditor compounded the claims for less than the amount due on them, and there was no evidence whether the claims were good or bad. Held, the surety was discharged, but the court declined to say what would have been the law if it had been proved that money was made by the compromise.<sup>10</sup> A guaranty to be accountable for a certain amount to be advanced to the principal does not bind the guarantor where, without his consent, it is delivered to a creditor of the principal in payment of a less sum than due from the principal to such creditor, and such creditor advances the principal a sum which, together with the debt, equals the sum authorized by the guaranty.<sup>11</sup> A became surety on a promissory note, due on demand, to secure a floating balance due, or to become due, a bank from B. Afterwards the bank, with the consent of B., credited him with the amount of the note.

<sup>8</sup> Grieve v. Smith, 23 Up. Can. (Q. B.) 23.

<sup>9</sup> Strong v. Lyon, 63 N. Y. 172.

<sup>10</sup> American Bank v. Baker, 4 Met. (Mass.) 164.

<sup>11</sup> Wright v. Johnson, 8 Wend. 512.

Held, the note had been diverted from the purpose for which it was given, and the surety was thereby discharged.<sup>12</sup> If a surety agrees to make good the deficiency arising from a sale of goods at a given place, which are consigned to the correspondent of the person to whom the security is given, who has the whole control of the venture, a sale by the consignee at another place releases the surety.<sup>13</sup> Other cases are stated in a note.<sup>14</sup>

<sup>12</sup> *Archer v. Hudson*, 7 Beav. 551.

<sup>13</sup> *Ludlow v. Simond*, 2 Caines' Cases in Error 1. A surety who agrees to become liable for a debt due on a certain day is not liable if a shorter credit is given. *Walrath v. Thompson*, 6 Hill 540. A surety for the acts of a firm is not liable for the acts of one partner after the other is dead. *Connecticut Mut. Life. Ins. Co. v. Bowler*, 1 Holmes 263. A surety for the losses of a partnership which is to continue five years is entirely discharged if the partnership is carried on a year longer than the stipulated time. *Small v. Currie*, 5 De G., M. & G. 141. An agreement to guaranty a bill for a sum certain does not bind the guarantor for anything if a bill is taken for a greater sum. *Phillips v. Astling*, 2 Taunt. 206. A letter of credit which authorized the drawing of bills at sixty days will not render the signers liable for bills drawn at ninety days. *Brickhead v. Brown*, 5 Hill (N. Y.) 634; *Brickhead v. Brown*, 2 Denio 375. "Surety of the peace is discharged by the death of the king, for 'tis to observe the peace of that king, and when he is dead 'tis not his peace." *Anon., Brookes' New Cas.* 172. Holding that novation is never presumed, but must clearly result from the agreement of the parties, see *Gillet v. Rachal*, 9 Rob. (La.) 276.

<sup>14</sup> In *Fidelity Mutual Life Assn.*

*v. Dewey*, 83 Minn. 389, 86 N. W. Rep. 423, the fidelity bond of the Minnesota manager of a Philadelphia insurance company provided that the principal "shall remit to the said first party [the company] at the beginning of every week." The company permitted the principal to remain in its employ without at any time requiring such weekly remittances. Held, that the surety was discharged. Citing and following *Morrison v. Arons*, 65 Minn. 321, 68 N. W. Rep. 33, where sureties on a like bond were held released by the employer's failure to insist on monthly settlements, which were required by the terms of the contract of employment. In *Tradesmen's National Bank v. National Surety Co. (N. Y.)*, 62 N. E. Rep. 670, affirming 66 N. Y. Supp. 1146, the bond of a selling agent of flour recited that the course of business was for the agent to make no collections, but to deliver all invoices of goods sold to a certain bank for collection. The evidence showed that collections were in fact made by the agent and paid over to the bank at stated intervals. Held, that this was such an alteration of the contract as discharged the surety. In *Queal v. Stradley*, Iowa, May, 1902, 90 N. W. Rep. 588, the bond of a building contractor was conditioned that payments should be made only upon written certificate of the architect or upon receipted bills and waiv-

§ 441. When surety is released by alteration resulting from an order of court, increasing alimony, modifying injunction, etc.—When a change is made by an order of court in the obligations due from the principal to the beneficiary, the surety for the performance of such obligations, not consenting thereto, is released from liability for future defaults of the principal. A divorced husband was adjudged to pay his former wife a certain sum, at stated periods, as alimony, and gave a bond with surety for such payment. Afterwards, on the wife's petition, and without the consent of the husband or surety, the decree was changed by the court, so as to require the payment of a larger sum at different times. Held, the surety was discharged. The court said: "The surety's liability is limited by the original judgment, and that, if not destroyed, has been very materially altered without his consent. \* \* This case is not taken out of the general rule \* \* by the fact that the defendant entered into the agreement with knowledge that the court had power to alter the judgment for alimony. Any person who becomes surety for the performance of an obligation does so with knowledge that such obligation may lawfully be altered by the principals. Nevertheless, if they do alter it without his consent, he is discharged; and so it must be if a secured judgment be altered without the consent of

ers. The owner made payments without such certificate receipts or waivers. Held, that the sureties were discharged. In *Stillman v. Wickham*, 106 Iowa 597, 76 N. W. Rep. 1008, the sureties on a building bond conditioned for strict performance were held released by alterations in the building made without special agreement minuted on the contract as the contract required. In *Mutual Loan & Banking Co. v. Hope*, 112 Ga. 729, 38 S. E. Rep. 63, defendants guaranteed that certain real estate which was mortgaged by O'Neal to plaintiff would bring the amount of whatever debt O'Neal might owe company at time of sale should said O'Neal fail to pay her notes at maturity, and her property

be brought to sale to pay the same. Thereafter the bank released its claim to part of the mortgaged land and the rest was sold to Stewart, who assumed O'Neal's debt and was thereafter sued with O'Neal as the real debtor. Held, that whether the guarantors consented to the release or not, they were discharged from all liability. The court said that there was nothing to show that either of the defendants consented to be responsible as surety or guarantor of the debt of Stewart and it appeared that the bank was perfectly willing to release O'Neal [though she was not in fact released] and look to Stewart alone, who was perfectly solvent, for the payment of the debt.

the surety.”<sup>15</sup> Where an injunction is modified by the court the sureties on the injunction bond who do not consent to the modification are not liable for damages subsequently accruing.<sup>16</sup>

§ 442. When surety is released in part by alteration of part of severable contract.—Where a surety is bound by one bond for the performance by the principal of two distinct things, and the contract is varied as to one of the things to be performed, the surety is discharged as to the matter concerning which the contract has been changed, but is not discharged from that as to which it has not been changed.<sup>17</sup> In other words, where a contract is severable and, without the surety’s consent, one or more parts of it, which are severable from the rest, are altered by the principal and the creditor without the surety’s consent, the surety is released as to the altered portion and remains bound as to the rest. Thus, in a California case, defendant as surety, mortgaged land to secure the note of Parsons and the White River Lumber Company and also to secure performance of a lease of machinery to Parsons. The terms of the lease were altered without defendant’s consent by the substitution of other machinery than that specified. Held, that the mortgage was released thereby as to the lease, but remained in force as to the note, which, the court found, was entirely distinct from the lease.<sup>18</sup>

<sup>15</sup> Sage v. Strong, 40 Wis. 575, per Lyon, J.

<sup>16</sup> Tyler Mining Co. v. Last Chance Mining Co., 90 Fed. Rep. 15, 32 C. C. A. 498, 61 U. S. App. 193, See, also, Jacksonville R. R. v. Hooper (Fla.), 85 Fed. Rep. 620, 29 C. C. A. 382, 52 U. S. App. 579, in which case a divided court held that a supersedeas bond was not released by an agreement for compromise, the conditions of which were never fully performed.

<sup>17</sup> Harrison v. Seymour, Law Rep. 1 Com. Pl. 518. To same effect, see Skillett v. Fletcher, Law Rep. 1 Com. Pl. 217; affirmed, Skillett v. Fletcher, Law Rep. 2 Com. Pl. 469. Holding surety discharged, under

special circumstances, by change of contract extending time, see Skip v. Edwards, 9 Mod. 438; Farmers’ & Mechanics’ Bank v. Kercheval, 2 Mich. 504. The guarantor of a debt to be paid in bills on New York is not liable if the mode of payment is changed to bills on London. Edmonston v. Drake, 5 Pet. 624. Holding guarantor discharged, under peculiar circumstances, by alteration of the contract, see Colemard v. Lamb, 15 Wend. 329. A note performance of a contract is discharged if the contract is materially changed. Brigham v. Wentworth, 11 Cush. 123. Note 33, § 445.

<sup>18</sup> Parke & Lacy Co. v. White River Lumber Co., 110 Calif. 658,

**§ 443. Surety released by alteration of contract from liability for future defaults only.**—An alteration in the contract between principal and creditor, it would seem, does not release the surety from liability under his contract of suretyship for defaults that had already taken place at the time of the alteration. Thus the court's modification of a restraining order without the consent of the sureties on the injunction bond released the sureties from all damages accruing subsequent to such modification, but left them liable for all damages suffered by the obligee theretofore.<sup>19</sup> Sometimes, however, the original contract is merged in the new one. When it is the liability of the surety for past as well as future defaults is at an end.<sup>20</sup> The acceptance by the employer of an employee's resignation to take effect at a future date has been held to release the employee's sureties from the date on which the resignation is to

43 Pac. Rep. 202. See, also, *McLaughlin Carriage Co. v. Oland* (1901), 34 Nova Scotia Rep. 193, at 199, citing *Croydon Commercial Gas Co. v. Dickerson* (1876), 2 C. P. Div. 46, in which case the principal, who had agreed to buy tar and pay for it monthly, was given time as to a payment falling due in July. Held, that the surety remained bound for the August and September payments, distinguishing *Eyre v. Bartrop*, 3 Madd 221, Tu. L. C. 901, where an annuity contract was held to have been wholly altered and the surety thereby released. See also *Rainbow v. Juggins* (1880), 5 Q. B. Div. 138; *Wulff v. Jay*, L. R. 7 Q. B. 756.

<sup>19</sup> *Tyler Mining Co. v. Last Chance Mining Co.*, 90 Fed. Rep. 15, 32 C. C. A. 498, 61 U. S. App. 193. In this case the trial court assessed the damages at \$9,418, with interest from September 5, 1891, the date of the injunction, of which \$600 (\$506) was to cover damages suffered up to October 9, 1891, on which day the injunction was modified so as to permit the parties to work the disputed

mines and deposit the proceeds in a specified bank under the supervision of an officer of the court. Held, that the sureties were liable for the smaller sum only. Citing *Miller v. Stewart*, 9 Wheat. 680, in which case the sureties on the official bond of a tax collector for eight townships were held released from further liability when the principal was made collector for a ninth township also. In that case, however, no money was collected until after the alteration was made. See, also, *Bonar v. MacDonald* (1850), 34 H. of L. Cases 233, in which case it is not clear whether the losses were sustained before the alteration or only thereafter.

<sup>20</sup> *In Weed Sewing Machine Co. v. Winchel*, 107 Ind. 260, plaintiff's sales agent was in default when a new contract was entered into between him and plaintiff, by which his notes were taken for the amount of the shortage. Held, that the new contract merged and superseded the other and that the sureties were not liable for any part of the defalcation.

take effect, even though the employee keeps on at the same work thereafter.<sup>21</sup>

§ 444. **Miscellaneous cases holding surety discharged by alteration of contract.**—The principals in a bond obligated themselves to the United States to open a ship canal three hundred feet in width and twenty feet in depth and keep it open the same width and depth a number of years after the acceptance of the work by the secretary of war. The principals finished the work eighteen feet deep, and the United States accepted it in that condition. The principals did not keep the canal open to a depth of eighteen feet, and it was held the sureties in the bond were not liable for such default.<sup>22</sup> A submission to arbitration provided that before the making of an award the parties claiming damages should release all their causes of action on certain suits then pending. Bonds, with surety, were given for the performance of the award. An award was rendered before any release had been made, and it was said that the sureties were not liable therefor, even though the principal had waived the making of the release.<sup>23</sup> Where a surety became responsible for the rent of a piano, and for its return by the principal upon request, and the owner sold the piano to the principal, taking as security a bill of exchange on England, with the understanding that if the bill was dishonored the sale should be void, it was held the surety was discharged.<sup>24</sup> If a contractor and the owner of a building in course of erection, without the consent of a surety for the contractor, make an agreement by which the building is to be built one story higher than originally agreed, the surety is discharged.<sup>25</sup> A surety signed a bond conditioned for the payment by C of certain sums specified in a deed. By the terms of the deed C agreed to keep a certain mill insured and have

<sup>21</sup> In *Amicable Mutual Life Insurance Co. v. Sedgwick*, 110 Mass. 163, the principal, an insurance agent, on February 19 resigned his position, his resignation to take effect October 30 next. Between February 19 and October 30 he became in default \$409.90. He continued in the service of defendant without any new arrangement until May following, when his defalcation

had increased to \$615. Held, that his sureties were liable for \$409.90, with interest.

<sup>22</sup> *United States v. Corwine*, 1 Bond 339.

<sup>23</sup> *Burt v. McFadden*, 58 Ill. 479.

<sup>24</sup> *O'Neill v. Carter*, 9 Up. Can. (Q. B.) 470.

<sup>25</sup> *Zimmerman v. Judah*, 13 Ind. 286; *Judah v. Zimmerman*, 22 Ind. 388.



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the policy of insurance assigned to the creditor as additional security for the payments to be made by C. Afterwards, as the result of an arbitration between the creditor and C, the contract was changed so that no insurance was provided for, and it was held the surety was thereby discharged.<sup>26</sup> By agreement between a clerk and his employer the service was terminable at one month's notice, and a surety became bound for the clerk's behavior. Afterwards, by agreement between the clerk and employer, the service was made terminable at three months' notice, and it was held the surety was not thereby discharged.<sup>27</sup> A contract provided for the delivery of a crop of strawberries as they should ripen, and they were to be paid for on delivery. A surety became bound for the performance of the contract on the part of the purchaser. The berries were delivered from time to time without being paid for on delivery. Held, this was not such a change of the contract as discharged the surety. The seller might have demanded payment for each parcel when he delivered it, but was not obliged to do so.<sup>28</sup>

§ 445. Real or apparent alterations that do not release the surety—Indemnified surety not released.—There is a class of dealings between principal and creditor which often amount to alterations of the contract for which the surety is bound, but yet are held not to release the surety. Some of them have been already noted.<sup>29</sup> The contract of builders provided that they should not enclose the building "unless notified in writing to complete the work, on or before October 1, 1895." They finished the building without any such written notification, upon the owner's verbal direction. Held, that the sureties on

<sup>26</sup> Titus v. Durkee, 12 Up. Can. (C. P.) 367.

<sup>27</sup> Sanderson v. Ashton, Law Rep. 8 Exch. 73.

<sup>28</sup> Kirby v. Studebaker, 15 Ind. 45. Alteration of contract of agency without sureties' knowledge or consent generally releases them. Victor Sewing Machine Co. v. Schefler, 61 Calif. 530; Roberts v. Donovan, 70 Calif. 108; Osborne v. Van Houten, 45 Mich. 444.

<sup>29</sup> For instance, London &c. Bank v. Parrott, 125 Calif. 472, 58 Pac.

Rep. 164 (note taken for guaranteed overdraft); United States Glass Co. v. Mathews (W. Va.), 89 Fed. Rep. 828, 32 C. C. A. 364, 61 U. S. App. 542 (memorandum on margin of lease); Morrill v. Baggott, 157 Ill. 240, 41 N. E. Rep. 639, affirming 57 Ill. App. 530 (agreement by landlord to give tenant \$700 credit for work); Harper v. National Life Insurance Co., 56 Fed. Rep. 281, 5 C. C. A. 505, 17 U. S. App. 48 (change in commissions of insurance agent).



their bond, conditioned that they "should well and faithfully perform all of the conditions contracted to be performed by them as by the terms of said contract stipulated," were not released by the waiver of written notice. The court said it made "no material change in the contract."<sup>30</sup> In another case Doyle, having agreed to do the brick work on a certain building as sole contractor under plaintiff, abandoned it and waived his right to three days' notice to which his contract entitled him, before his principal contractor could give the work to somebody else. Thereupon plaintiff finished the work, using white enameled brick where buff brick had been specified and a different form of terra cotta. Held, that notwithstanding such waiver and such changes of detail, of which they had no notice, the sureties remained liable for the excess over Doyle's contract price which it cost plaintiff to finish the work.<sup>31</sup> Defendants guaranteed the ultimate payment for materials furnished to a corporation of which they were directors by the plaintiff and thereupon plaintiff sold its goods on six months' credit, although its credit limit theretofore had been four months. Held, that this was not a change that discharged the guarantors.<sup>32</sup> A selling agent's surety covenanted to be bound if his principal did not, on the expiration of his contract, pay all notes taken from purchasers of goods. His employer extended the time as to one note, so that it fell due, notwithstanding the extension, before the agent's contract expired. Held, that the surety was not thereby released, because the employer, at the expiration of the contract, when the surety's liability accrued, had not parted with any of his rights to proceed against the agent and the surety was at full liberty to avail himself of them.<sup>33</sup> By virtue of a provision

<sup>30</sup> *Grafton v. Hinkley*, 111 Wis. 46, 86 N. W. Rep. 859; citing *Benjamin v. Hilliard*, 23 How. (U. S.) 149, 165, 166, 16 L. Ed. 518; *Harper v. National Life Ins. Co.*, 56 Fed. Rep. 281, 284, 5 C. C. A. 505; *Fertig v. Bartles* (C. C., N. J.), 78 Fed. Rep. 866.

<sup>31</sup> *George A. Fuller Co. v. Doyle* (C. C., Mo.), 87 Fed. Rep. 687.

<sup>32</sup> *Cambria Iron Co. v. Keynes*, 56 Ohio St. 501, 47 N. E. Rep. 548.

<sup>33</sup> *McLaughlin Carriage Co. v. Oland*, 34 Nova Sco. 193 at 199, citing *Smith, L. J.*, in *Rouse v. Bradford Banking Co.*, 1894, L. R. 2 Ch. D. 32, at 75. In *McMahon v. Paris*, 87 Ga. 660, 13 S. E. Rep. 572, it was held to constitute no defense in a suit against the sureties on an administrators' bond that by agreement with the widow and children of the deceased, the administrator had fought all claims of

in the California Code a guarantor remains liable, notwithstanding alteration of the principal's contract to the extent that he has been indemnified by the principal.<sup>34</sup>

**§ 446. Pleading—Instruction—Burden of proof—Right to open and close.**—An allegation that a note which plaintiff had signed as surety for another was after its execution fraudulently altered, so as to make it a note for a larger specified sum, "either by the administrator to whom it was executed or by the principal in the note, and that this was done without the knowledge of the surety," was held sufficiently specific.<sup>35</sup> In an action on a guaranty it was held not error to instruct the jury that if the terms of the agreement guarantied were altered in any respect without the consent of the guarantors, in the time of payment, or in the proportionate part payable in the first payment, or in the matter of interest, or if any alteration was made which impaired or suspended the guarantor's remedy against the principal, the guarantor would be exonerated.<sup>36</sup> In an action against a surety on a note, the burden of proof to support the plea of alteration is upon the surety.<sup>37</sup> The surety who, before any evidence has been introduced, admits the execution of the contract and sets up a defense of alteration has the right to open and close.<sup>38</sup>

creditors, taken advantage of laws made after the war relating to ante-war debts, and failed for many years to make reports and had thus held the assets, until he became insolvent, all without the sureties' consent. It was the duty of the sureties to see that their principal made regular returns to the court and faithfully administered his trust.

<sup>34</sup> *Ehrman v. Rosenthal*, 117 Calif. 491, at 497, 49 Pac. Rep. 460, sec. 2824 Calif. Civil Code. This is true also at common law. Compare *Louisiana Soc'y &c. v. Moody*, 52 La. Ann. 1815, 28 So. Rep. 224.

<sup>35</sup> *Humblen v. Knight*, 60 Tex. 36.

<sup>36</sup> *Moline Plow Co. v. Gilbert*, 3 Dak. 239.

<sup>37</sup> *Truesdell v. Hunter*, 28 Ill. App. 292. In *University of Illinois*

*v. Hayes*, Iowa, Oct., 1901, 87 N. W. Rep. 664, held, that the burden of proof is on the surety to show that he did not consent to the erasure of the name of a surety preceding him on the bond.

<sup>38</sup> In *Abel v. Jarrett*, 100 Ga. 733, 28 S. E. Rep. 453, the surety admitted the execution of the note, but claimed release because the creditor had extended the time of payment without his consent. The trial court allowed him to open and close the argument. Held, that this was error, because he had not admitted facts which would constitute a prima facie case on the part of plaintiff in time to relieve the plaintiff from the necessity of proving them. The court said (p. 736): "In order to entitle the defendant

in a civil action, arising ex contractu, to the opening and conclusion of the argument before the jury, by virtue of an admission that the plaintiff has a prima facie right to recover, the defendant must, before the introduction of any evidence, admit facts authorizing, without further proof, a verdict in the plaintiff's favor for the amount claimed in the declaration. It is too late after the plaintiff has made out a prima facie case, for the defendant to make any admission which will deprive the plaintiff of the right to open and conclude. The general rule is that the order of argument follows the burden of proof; and whoever opens the case with the evidence, if he has the right to so open, has the same right in the argument." See note 50, § 415, supra. A surety cannot obtain the right to open and close by assuming the burden of proof when it does not belong to him. In *Perpetual Building & Loan*

*Assn. v. United States Fidelity & Guarantee Co.*, 118 Iowa, 729, 92 N. W. Rep. 686, an action on the fidelity bond of the secretary of plaintiff association, the execution of which seems to have been admitted, the court said that the burden of proof as to all issues, except that of giving immediate notice of defalcation to defendant was upon the defendant. "On that," said the court, "the defendant assumed the burden of proof in order to obtain the right to open and close. On what theory it was allowed this option we are not advised. As plaintiff has not appealed, the propriety of allowing it cannot be considered. We may remark, however, parenthetically, that possibly one party may have as good right to retain the burden in order to open and close as the other to elect to assume it in order to acquire something the law has not conferred."

## CHAPTER XVI.

### OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY MIS- REPRESENTATION, CONCEALMENT, FRAUD OR NON- COMPLIANCE WITH THE TERMS UPON WHICH HE BECAME BOUND.

- § 447. Surety discharged if creditor misrepresents the transaction to him.
448. Same continued—Instances.
449. Conditions how construed—Condition for secrecy—Conditions as to remedies must be observed.
450. When surety discharged if condition that another shall sign is not complied with.
451. If the condition upon which the surety signs is not complied with he is not bound.
452. Misrepresentation of unexecuted intention does not release surety unless such representation is made part of the contract.
453. Condition upon which a surety is bound need not be expressly stated but may be gathered from the entire contract—Absolute and conditional guaranties.
454. When parol evidence competent to show terms upon which surety signed.
455. Parol evidence, continued.
456. Surety not discharged by fraud of principal unless creditor have notice.
457. Surety on note not discharged if creditor have no notice of condition on which he signed.
- § 458. When surety on bond liable if condition that another shall sign is not complied with—Effect of forgery.
459. Liability of surety signing conditionally — Miscellaneous cases — Criminal recognizance.
460. When surety who signs instrument in blank bound by act of principal in filling blank—Equitable suit to cancel bond.
461. When name of surety in body of obligation is notice to obligee of condition that he should sign.
462. When surety discharged because the signature of another surety is forged.
463. Forgery in renewal note does not release surety on original note—Requisites of plea of discharge by forgery.
464. Liability of one whose signature as surety is forged or unauthorized—Estoppel by silence.
465. When failure of consideration to principal is a defense for surety.
466. When surety not discharged by false representation of third person.
467. Miscellaneous cases holding surety discharged by non-compliance with the terms upon which he signed.

- § 468. When surety discharged by fraud—Fraudulent misuse of partnership credit—Other cases.
469. Estoppel — Usury — Other cases holding surety not discharged.
470. Miscellaneous cases holding surety not discharged—Performance of principal's contract made impossible.
471. Conditions may be waived by the surety—If not waived performance must be averred and proved or excused.
472. When surety discharged by concealment of material facts by individual or corporation obligee.
473. The same, continued—Cases holding creditor under no obligation to disclose facts without inquiry by surety.
- § 474. When surety discharged by concealment of material facts.
475. When surety discharged by concealment of material facts—Miscellaneous cases.
476. When surety discharged by concealment of fact that principal is a defaulter—Bank statement as representation to surety.
477. Continuing servant in employ after dishonesty discovered—Negligence in discovering default—Notice of default.
478. Same, continued — Liability of surety where corporation obligee allows principal's default to continue and increase without notice to surety.
479. When surety of employee of corporation not discharged because by-laws of corporation not complied with.

**§ 447. Surety discharged if creditor misrepresent the transaction to him.**—If any material part of the transaction between the creditor and his debtor is by the creditor, or with his knowledge or consent, misrepresented to the surety, the misrepresentation being such that but for the same having been made, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased, the surety is in such case generally held to be not bound by his obligation.<sup>39</sup> Thus,

<sup>39</sup> *Municipal Council of Middlesex v. Peters*, 9 Up. Can. (C. P.) 205. The supreme court of Iowa lay down what they conceive to be the true rule as to the duty of a creditor, who is about to accept personal security for a debt due him, to inform the surety of facts within his knowledge which would have the effect to increase the risks of the surety, in *Monroe v. Anderson Bros. Mfg. &*

*Ry. Co.*, 65 Iowa 692, distinguished in *Bank of Monroe v. Gifford*, 72 Iowa 750. It is held unnecessary to prove that the creditor when he made the misrepresentation knew at the time he made it that it was false. *Molsom Bank v. Tinley*, 8 Ont. (Can.) 293. Contract of suretyship induced by fraudulent misrepresentations of payee and mortgagee held void in *Marchman v. Robertson*, 77

a forthcoming bond recited that the property had been levied on and appraised according to law, when it had not, in fact, been appraised according to law. This was known to the creditor but not to the surety, and it was held it was a sufficient fraud on the surety to avoid the bond as to him.<sup>40</sup> A retiring partner, in order to induce a surety to indemnify him against the partnership debts, represented to him that they did not amount to over \$500, when they were in fact \$1,500, and it was held the surety was not bound.<sup>41</sup> It has been held that a guarantor that a note "is good" may show as a defense that the creditor misrepresented the legal effect of the words to him, upon the principle that if one of the parties to a contract is ignorant of a matter of law involved therein, and the other knows him to be so, and takes advantage of the circumstance, he is guilty of a fraud, against which the court will relieve.<sup>42</sup> A party having a mill for sale made false representations concerning the same to the purchaser and his surety, upon which they relied. Held, the falsity of the representations was a good defense to the surety, even though the purchaser had not rescinded the contract. The principal was less able to perform his contract by reason of the falsity of the representations, and the surety was thereby discharged.<sup>43</sup> If a surety is induced to execute a bond, upon a false representation by the obligee that the principal is not indebted to him, the surety is not bound.<sup>44</sup> A covenanted to convey to B certain property free from incumbrances, except such as were set forth in a schedule, in consideration of B and C, a surety, doing certain things. It turned out that the property was charged with another incumbrance which A had forgotten, and

Ga. 41. Where the creditor represents to the surety that he holds collateral, as an inducement to the surety to become bound, when in fact he holds none, surety held discharged. *Wooley v. Louisville Banking Co.*, 81 Ky. 527. In an action against a surety on a note who claims to have become such because of fraudulent representations, it is held error to exclude the representations in question. *Johnson v. Lawson*, 29 Ill. App. 146.

<sup>40</sup> *Frisch v. Miller*, 5 Pa. St. 310. See, also, *State v. Dunn*, 11 La. Ann. 549.

<sup>41</sup> *Fishburn v. Jones*, 37 Ind. 119.

<sup>42</sup> *Cooke v. Nathan*, 16 Barb. (N. Y.) 342.

<sup>43</sup> *Mendelson v. Stout*, 5 J. & S. (N. Y. Super. Ct.) 408. But see *John A. Tolman Co. v. Butt*, Wis., Feb., 1903, 93 N. W. Rep. 548, where evidence of an earlier default was held not admissible.

<sup>44</sup> *Blest v. Brown*, 3 Giffard 450.

of the existence of which C had no knowledge, and it was held that C was not bound.<sup>45</sup>

§ 448. **Same continued—Instances.**—A note being due, the creditor refused to extend the time of payment, but said that if a certain person would, as surety, indorse, and the principals would sign, a new note, payable to a bank, he would also indorse it and get the money from the bank, and the extension would thus be procured. Such a note was so signed and indorsed, but the creditor did not indorse nor negotiate it, but sued it himself, the above being merely a scheme to get the surety to become liable. Held, the surety was not liable.<sup>46</sup> Where one is induced to sign a note as surety by the representation of the creditor that the note is to be used in payment for goods to be furnished by the creditor to the principal, and the note is used to pay a pre-existing debt of the principal to the creditor, the person so signing is not bound as surety.<sup>47</sup> A creditor represented to a surety that he was about to make an advance of £300 in cash to a debtor, to enable him to satisfy a creditor who was pressing for payment, when in fact he was the creditor who desired payment and credited most of the sum to the principal. Held, the surety was not discharged because the misrepresentation did not amount to a fraud on him.<sup>48</sup> Certain corn factors supplied flour on credit to a baker upon his executing to them, with surety, a bond, the condition of which, after reciting that the baker had entered into a contract for the supply of bread to the army, was that the bond should be void if the baker should deliver to the corn factors his bills on the government as he drew them, and if he and the surety should make good the amounts to become due the corn factors. The corn factors supplied flour, but not of the quality specified in the government contract, which was vacated on that account. Held, the corn factors could not, as against the surety, allege ignorance of the terms of the contract, and that the surety was discharged. The contract being referred to in the bond, it was the same as if the corn factors had represented to the surety that they would supply such flour as the contract called for.<sup>49</sup>

<sup>45</sup> Willis v. Willis, 17 Simons 218.

<sup>48</sup> Pledge v. Buss, Johnson (Eng. Ch.) 663.

<sup>46</sup> Armstrong v. Cook, 30 Ind. 22.

<sup>47</sup> Ham v. Greve, 34 Ind. 18.

<sup>49</sup> Blest v. Brown, 4 De Gex, Fish. & Jones 367.



**§ 449. Conditions how construed—Condition for secrecy—Conditions as to remedies must be observed.**—A bond was signed not to be delivered until the principal got “four or five other good men” to sign it. The principal delivered it without any other sureties. The bond contained a stipulation that “each one signing this bond is bound according to the purport of it without any regard to any understanding that any person should also sign this instrument.” With regard to this the court said: “We do not think this provision in the paper is of any force or operation in respect of the question being considered. It was a part of the bond itself. If the pleas of Richardson and Miller state the facts as to the bond being delivered only in escrow, on a condition that was never performed, the bond nor any part of it was executed by said defendants. This stipulation itself, therefore, never became binding. \* \* It was not their contract. They made no contract with plaintiff.”<sup>50</sup> While the surety is at liberty to name the conditions upon which only he will become bound, the court construes them reasonably with a view to carrying out the provisions of the contract.<sup>51</sup> The selling agent of a building and loan association indorsed upon its certificate of stock his guaranty thereof with the condition that if the purchaser “should let or cause this guaranty to be known to any one, then this guaranty shall be null and void and of no effect.” The purchaser deposited the certificate in a bank for collection. Held, that, if he acted in good faith and without unnecessary publicity, the cashier’s knowledge of the guaranty so obtained did not release the guarantor.<sup>52</sup> The condition upon which the surety consents to be bound may relate to the remedy and may prescribe a certain mode of

<sup>50</sup> *White Sewing Machine Co. v. Saxon*, 121 Ala. 399, 25 So. Rep. 784. Holding a surety not bound when the obligation signed by him is delivered on terms different from those stipulated by him, see *Lovett v. Adams*, 3 Wend. 380. In *Haman v. Howe*, 27 Gratt. (Va.) 676, sureties on an injunction bond were held estopped from showing that it was conditioned otherwise than the injunction order required; they were held liable although the clerk certi-

fied that the bond was approved in open court on a day on which the court did not sit.

<sup>51</sup> Where surety signs on condition that he is not to be sued before a certain time, it is held that, in case he is sought to be held liable before the expiration of that time, he may plead in bar that the action is premature: *Franklin Savings Inst. v. Reed*, 125 Mass. 365.

<sup>52</sup> *Howland v. Currier*, 69 N. H. 202, 44 Atl. Rep. 106.

procedure upon default. If it does and the obligee accepts it in that form, he is, seemingly, restricted to that mode of procedure to the exclusion of all others.<sup>53</sup>

**§ 450. When surety discharged if condition that another shall sign is not complied with.**—If the surety signs the obligation upon the condition that another shall also sign it as surety before it shall be binding on him, and this condition is agreed to by the creditor, or is known to him when he takes the obligation, the surety is not generally liable unless the condition is complied with.<sup>54</sup> But where a principal was in-

<sup>53</sup> In *City of Philadelphia v. Keithler*, 173 Pa. St. 610, 34 Atl. Rep. 295, the official bond of the register of the Philadelphia city water department provided that if any default should happen on the part of the principal, the amount thereof should be ascertained by the city controller, whose statement thereof under oath should be final and conclusive on the sureties. The principal made default. The city entered judgment by confession for the penalty of the bond, but failed to file a statement under oath by the controller of the amount of the default. Held, fifteen years later, that the judgment must be set aside. Sterrett, J., said that it was the plain duty of the city to pursue the mode of ascertaining and determining the amount of damages resulting from breaches of the bond which had been specifically agreed upon by the parties and fully set forth in the bond itself, "but, instead of doing that, resort was had to other and entirely different methods, which neither the principal obligor nor his sureties appear to have ever assented to. \* \* It was the manifest duty of the city to comply with the plain and imperative requirements of the stipulation. \* \* Its failure to do so is fatal to the validity of the judgment. \* \* "

<sup>54</sup> *Cowan v. Baird*, 77 N. C. 201; *Clements v. Cassilly*, 4 La. Ann. 380; *Crawford v. Foster*, 6 Ga. 202; *Miller v. Stem*, 12 Pa. St. 383; *Hill v. Sweetser*, 5 N. H. 168; *United States v. Hammond*, 4 Biss. 283; *Read v. McLemore*, 34 Miss. 110; *King v. Smith*, 2 Leigh (Va.) 157; *Smith v. Doak*, 3 Tex. 215; *Dunn v. Smith*, 12 Smedes & Mar. (Miss.) 602; *Goff v. Bankston*, 35 Miss. 518; *Jordin v. Loftin*, 13 Ala. 547; *Bivins v. Helsey*, 4 Met. (Ky.) 78; *Evans v. Bremridge*, 2 Kay & Johns. 174; *Evans v. Bremridge*, 8 De Gex, Macn. & Gor. 100; *Coffman v. Wilson*, 2 Met. (Ky.) 542; *Corporation of Huron v. Armstrong*, 27 Up. Can. (Q. B.) 533; *Guild v. Thomas*, 54 Ala. 414; *Smith v. Kirkland*, 81 Ala. 345; *Evans v. Daughtry*, 84 Ala. 68; *Belleville Savings Bank v. Bornman*, 124 Ill. 200; *Deering Harvester Co. v. Peugh*, 17 Ind. App. 400, 45 N. E. Rep. 808; *Allen v. Marney*, 65 Ind. 398; *Markland Mining & Mfg. Co. v. Kimmel*, 87 Ind. 560; *Diefenthaler v. Hall*, 96 Ill. App. 639; *Davis v. Bryant*, 23 Ind. App. 376, 55 N. E. Rep. 261. Contra, *Moss v. Riddle*, 5 Cranch 351. In *Hubble v. Murphy*, 1 Duvall (Ky.) 278, and in *Murphy v. Hubble*, 2 Duvall (Ky.) 247, it was held that, where a note was signed and left with the payee upon condition that

duced to sign a note by the false representation of the payee that he would get a certain party to sign it as surety, it was held that this was no defense for the principal, because the principal would in no event have a right to look to the surety for contribution, and his liability was not altered by the fact that no surety was obtained.<sup>55</sup> The officers authorized to accept a sheriff bond agreed to accept certain parties who signed it, and one H, as sureties. Those who signed executed the bond in blank, and gave it to the sheriff to get the signature of H, but H did not sign it, and it was delivered and accepted without his signature. It did not appear that the sureties told the officers that they would not be bound unless H signed, but simply that the officers agreed to accept them and H. Held, the sureties were liable on the bond.<sup>56</sup> Where an administration bond was signed by certain sureties in expectation that others would sign, and the bond was approved without further signatures, it was held the bond was valid and binding on the sureties who signed.<sup>57</sup> Where a surety becomes such upon condition that a person named in the obligation shall also sign as surety, and the latter's name is erased before approval, held, the surety signing was released.<sup>58</sup>

**§ 451. If the condition upon which the surety signs is not complied with he is not bound.**—It is a general rule that if the condition, known to the creditor, upon which the surety agrees to become bound, is not complied with, the surety is discharged. Where a creditor had obtained judgment against the principal and issued execution thereon, and certain sureties

it should not be valid unless another signed it as surety, the surety was bound, notwithstanding the condition was not complied with, on the ground that evidence of such an agreement contradicted the note, and that an obligation could not be delivered to the obligee as an escrow. But where there was such an agreement, and the bond was not to be delivered to the obligee till another had signed as surety, the same court held that the surety was not liable unless such other surety signed. *Garvin v. Mobley*, 1 Bush (Ky.) 48; *Candle v. Ford*, Ky. Ct. App., Feb.,

1903, 72 S. W. Rep. 270; *Dils v. Bank of Pikeville*, 22 Ky. Law Rep. 1451, 60 S. W. Rep. 715, in which case are reviewed *Smith v. Moberly*, 49 Ky. 266, 52 Am. Dec. 543; *Jones v. Shelbyville Fire & Marine Ins. Co.*, 58 Ky. 58, and *Hubble v. Murphy*, 62 Ky. 279, *supra*.

<sup>55</sup> *Beesley v. Hamilton*, 50 Ill. 88.

<sup>56</sup> *Police Jury v. Haw*, 1 La. (Miller) 41.

<sup>57</sup> *State ex rel. v. Gregory*, 119 Ind. 503.

<sup>58</sup> *King v. The State*, 81 Ala. 92; *Hessell v. Johnson*, 63 Mich. 623.

were induced to sign a note for the amount by the promise of the creditor that he would assign the execution to them, and he did not assign it, but brought suit on the note, it was held the sureties were discharged.<sup>1</sup> A and B agreed that B should make and deliver to A certain quantities of brick, for which \$500 were to be paid by A to B on a certain day as a condition precedent to the delivery of the brick, and C became surety that B would perform his contract. A by B's consent failed to pay the \$500 at the day specified, but afterwards paid it to B, who accepted it. Held, the surety was discharged.<sup>2</sup> A guaranties to B the debt of C, upon condition "that no application shall be made to A on B's part for the amount guarantied or any portion thereof, but on the failure of B's utmost efforts and legal proceedings to obtain the same from C." No proceedings were had against C till four years after the guaranty was given, and it was held the guarantor was discharged.<sup>3</sup> A and B entered into covenants to be performed by each, by which A contracted to purchase and deliver to B one thousand sheep, which B agreed to receive and pay for at a certain price. The contract, which was within the Statute of Frauds, was signed by A and by two others as his sureties, but not by B, and it was held the sureties were discharged.<sup>4</sup> A purchased land from B and gave a bond for part of the purchase money, with C as surety, and also gave B a mortgage on the land to secure the payment of the bond. Before C signed, B impressed him with the idea, if he did not tell him, that the sum for which he became surety would be paid by the cutting and selling of timber from the land. A commenced to cut timber from the land and B procured an injunction against his so doing. Held, the surety was thereby discharged.<sup>5</sup> A agreed to become surety for B in a joint and several bond to C, and B was to give a counter bond of indemnity to A. The bond to C was executed by A only, but B executed the

<sup>1</sup> Jones v. Keer, 30 Ga. 93; Brown v. Torrance, 30 Sup. Ct. Can. 311; Hathaway v. Chaplin, 21 Sup. Ct. Can. 23.

<sup>2</sup> Cunningham v. Wrenn, 23 Ill. 64.

<sup>3</sup> Holl v. Hadley, 4 Nevile & Man. 515. Holding that a surety is discharged where creditor fails to perform his agreement that he will,

within three years, enforce payment of a note due on demand, see Lawrence v. Walmsley, 12 J. Scott (N. S.) 799. See, also, on this subject, Sheldon v. Reynolds, 14 La. Ann. 703.

<sup>4</sup> Swope v. Forney, 17 Ind. 385.

<sup>5</sup> Lynch v. Colegate, 2 H. & J. (Md.) 34.

counter bond to A. Held, A was released, as he had only agreed to become bound in a bond which B also should execute.<sup>6</sup> But it has been held that a surety who executed a bond on the faith of its being executed by the principal, also, cannot be released from his obligation on the ground that the principal has never executed it, if the principal has executed another instrument concerning the same matter, on which the surety (having paid and been subrogated to the same) may sue him and rank as a specialty creditor.<sup>7</sup> A creditor who obtains a guaranty upon the representation that he is accepting a composition from his debtor, when in fact he is being paid in full, cannot, on grounds of public policy, hold the guarantor.<sup>8</sup> A composition agreement, signed by certain creditors, contained a condition that it should not be binding unless it was signed by all the creditors. Composition notes were, under the agreement, delivered to the plaintiff, indorsed by the defendant as surety. The agreement was not signed by all the creditors, but that fact was not known to the defendant when he signed the notes. Held, the agreement and the notes were a part of one transaction, and the surety was not liable on his indorsement.<sup>9</sup> Other instances are stated in a note.<sup>10</sup>

<sup>6</sup> *Bonser v. Cox*, 4 Beav. 379.

<sup>7</sup> *Cooper v. Evans*, Law Rep. 4 Eq. Cas. 45.

<sup>8</sup> *Clark v. Ritchie*, 11 Grant's Ch. 499. To similar effect, *Pendlebury v. Walker*, 4 Younge & Coll. (Exch.) 424.

<sup>9</sup> *Doughty v. Savage*, 28 Conn. 146. To contrary effect, see *Whittemore v. Obear*, 58 Mo. 280.

<sup>10</sup> Defendant guaranteed payment of a certain percentage of all liens against certain buildings provided all the claimants should agree to release their claims for such percentage. Held, that he was not liable until every claimant had complied with the requirement. *Slingluff v. Andrew Volk Builders' Supply Co.*, 89 Md. 557, 43 Atl. Rep. 759. In *Folz v. Amweg*, 191 Pa. St. 157, 43 Atl. Rep. 204, bond was conditioned that if a building contractor shall as soon as he receives a second pay-

ment of \$37,807.42, pay to plaintiff \$20,000, the bond should be void. The contractor abandoned the job. The second payment never became due. Held, that the obligors on the bond were not liable. In *Gillett v. McAllister*, 1 Colo. App. 168, 27 Pac. Rep. 1013, a charcoal dealer guaranteed the grocery account of a firm of charcoal burners to the extent of \$800 per month, provided they furnished him that much charcoal per month. Held, that the \$800 for December, 1887, could not be recovered without showing that \$800 of charcoal had been delivered that month. See, also, *Tyrer v. Chew*, 7 App. Cas. (D. C.) 175; *Coughran v. Bigelow*, 164 U. S. 301, 41 L. Ed. 442, 17 Sup. Ct. Rep. 117; *Nipp v. Parrish*, 63 Fed. Rep. 677, 11 C. C. A. 398, on demurrer to a plea in an action on guaranty of payment of loans.

§ 452. **Misrepresentation of unexecuted intention does not release surety unless such representation is made part of the contract.**—A distinction has been taken between a misrepresentation of an existing fact and of an unexecuted intention, and the latter has been held not to be such a fraud as will discharge a surety. A retiring partner represented to a surety that, if he would become responsible to him for the payment of the partnership debts, he would forever retire from the business and in no manner compete with the surety and the remaining partner, who were going into the same business; but immediately after the surety became bound the retiring partner entered into the same business. Relying upon the above distinction, the court held the surety bound, notwithstanding the representations were made for the purpose of deceiving the surety.<sup>11</sup> Where a guaranty was for the honesty of a tax collector, and the misrepresentation relied upon to discharge the guarantor was that the collector's accounts would be examined every week, and such had been the course pursued, and it was expected it would be, but there was a failure in that regard, the above distinction was recognized and the guarantor held liable.<sup>12</sup> An application for a policy of guaranty for the acts of the secretary of a literary institution contained the following interrogatory and answer: State "the checks which will be used to secure accuracy in his accounts, and when and how often they will be balanced and closed?" Answer: "Examined by finance committee every fortnight." A loss was occasioned by neglect to examine the accounts in the manner stated. Held, the sureties were nevertheless liable. The court said that, in view of all the circumstances, the answer was not expected to be on the part of the guarantor or expected to be on the part of the person to whom the guaranty was given, "anything more than a declaration of the course intended to be pursued; and if the answer was made bona fide and honestly," the guarantor was not discharged.<sup>13</sup> Where the parties agree that the statement of unexecuted intention shall form part of the contract a failure to perform it releases

<sup>11</sup> Gage v. Lewis, 68 Ill. 604.  
Recognizing the same distinction,  
see Municipal Council of Middlesex  
v. Peters, 9 Up. Can. (C. P.) 205.

<sup>12</sup> Towle v. Nat. Guardian Assurance Society, 3 Giff. 42.

<sup>13</sup> Benham v. Assurance Co., 7 Wels., Hurl. & Gor. 744, per Pollock, C. B.



the surety.<sup>14</sup> And such agreement need not be express. It may be inferred from the notice and terms of the transaction.<sup>15</sup>

**§ 453. Condition upon which a surety is bound need not be expressly stated but may be gathered from the entire contract**

<sup>14</sup>In *Rice v. Fidelity & Deposit Co. of Maryland*, 103 Fed. Rep. 427, 43 C. C. A. 270, action on a bond indemnifying plaintiffs from loss through the fraud or dishonesty of their employee, the employers stated in writing that checks on their funds drawn by Perry, the employee, would invariably be countersigned by their bookkeeper, Gribble, and that that statement should be taken as a condition precedent and as the basis of the bond applied for. Thereafter Perry was allowed to draw money without Gribble's signature. Held, that the defendant could not be held liable under its guaranty. It was argued that plaintiff's statement was a mere representation of an unexecuted intention and that a failure to comply with it was not such fraud as would prevent a recovery, but the court held that it amounted to a warranty. "The crucial distinction between a representation and a warranty," said Sanborn, J., p. 275, "is that the one is not, and the other is, a part of the contract between the parties, and that the truth of the one is not, and the truth of the other is, a condition precedent to a recovery upon the policy or bond to which they relate. In the cases cited by the plaintiff in error which we have been reviewing, there was no agreement of the parties that the declarations which they contained were parts of their contracts, no binding agreement that they should be true, no contract that their truth should constitute a condition precedent to a recovery upon them. In the case at bar, the parties expressly agreed in writing that the statement

of the employers was a part of their contract; that it should be not only the basis of the bond but a condition precedent, without compliance with which there could be no recovery upon the obligation. The conclusion is irresistible that under this agreement the declaration in this case was of the nature of a warranty, and not of a representation, and our conclusion is: A written statement made by employers to the obligor in a bond of indemnity against the dishonest acts of their employee to the effect that they will invariably apply certain checks to his action, which the parties expressly agree, by the statement itself and by the bond, shall be the basis of the latter, and a condition precedent to a recovery upon it, is of the nature of a warranty, and not of a representation and a failure to comply with the promise it contains is fatal to an action upon the bond." (Citing: *American Credit Indemnity Co. v. Wood*, 19 C. C. A. 264 (to which is attached a note on guaranty, credit, fidelity and title insurance); S. C., 73 Fed. Rep. 81, and *American Credit Indemnity Co. v. Carrollton Furniture Mfg. Co.*, 36 C. C. A. 671, 95 Fed. Rep. 111.

<sup>15</sup>Thus in *Stone v. Compton*, 5 Bing. N. C. 142; *Id.*, 6 Scott, 846, it is held that a surety is discharged if the agent of the creditor represents to him that more money is to be advanced the principal than is advanced, and part of the amount for which the surety becomes bound is an old debt due from the principal to the creditor.



—**Absolute and conditional guaranties.**—The condition upon which the surety agrees to be bound need not be stated formally in express terms. It is enough if the intention to impose conditions can be gathered from any or all of the writings that go to make up the contract. The Chesapeake Railway guaranteed payment of bonds of the Ohio Valley Railway on condition that the guarantor should be permitted to remain in control of the Ohio Valley Railway. The same contract provided that on a single default of interest on the bonds the Western Contract Company might take possession of the Ohio Valley Railway. There was such default. The Western Contract Company took possession of the Ohio Valley Railway. Held, that it thereby released the Chesapeake Railway Company from its contract of guaranty as to all bonds held by it, the Western Contract Company, but not as to those held by third parties. The court, by Taft, J., said: “Under the contract the reciprocal benefits to the parties were concurrent—control of the road on one side, receipt of interest on the other. Any power reserved in the contract given to one to withdraw one of these concurrent benefits forever would seem, upon its exercise, to be consistent only with the release of the corresponding obligation of the other party.”<sup>16</sup> In many cases the meaning of the parties is so obscure that the courts have difficulty in determining whether the liability of the guarantor is absolute or conditional.<sup>17</sup>

<sup>16</sup> *United States Trust Co. v. Western Contract Co.*, 81 Fed. Rep. 454, 36 C. C. A. 472, 54 U. S. App. 67.

<sup>17</sup> In *Beardsley v. Hawes*, 7 Conn. 40, 40 Atl. Rep. 1043, on a note signed by Mary E. Hawes and Sarah E. Hawes, defendants wrote and signed the following: “Note to be paid by the Misses Hawes. We sign the above note for security for payment thereof which we herely guarantee for a valuable consideration received.” The court held that the undertaking in question must be construed to be an absolute, and not a conditional, guaranty. “The words ‘for security for payment thereof,’ do not indicate that the guaranty is

conditional. The purpose of both absolute and conditional guaranties is to secure payment of the note by enabling the payee to collect of the guarantors in the event of the failure of the makers to pay, in case of an absolute guaranty, and of the failure of the payee to collect of the makers by the use of proper diligence, in case the guaranty is conditional. By the words ‘payment thereof which we hereby guarantee,’ the guarantors say in unequivocal terms that they guarantee the payment of the note. There is an entire absence of any words indicating a guaranty of the goodness or collectibility of the note. An absolute guaranty is ‘an unconditional undertak-

**§ 454. When parol evidence competent to show terms upon which surety signed.**—Parol evidence of what took place at or before the time a written instrument, complete in itself, was signed, will, it seems, be received to control the operation of the provisions of the instrument when there was fraud in obtaining it, when a fraudulent use is sought to be made of it, and when application is made to a court of equity to enforce such instrument, in which case the adverse party is allowed to show by parol evidence that the instrument does not contain the true agreement of the parties, or the whole of it.<sup>18</sup> A surety may generally show by parol evidence the consideration upon which he signed the obligation, and that such consideration has failed, without contravening the rule that parol contemporaneous evidence will not be received to affect the operation of a written instrument. Thus, at the time a surety executed a note for \$300 to the creditor he was already surety on another note for the principal for \$233, payable to a third person, and the creditor, in consideration that he would sign the \$300 note, verbally promised to procure his release from the note for \$233, which he failed to do. Held, this agreement might be shown by parol evidence, and that the surety was discharged. The court said: "We perceive no valid reason why the engagement of the surety, who as such executes a written contract, may not be founded upon a consideration variant from that which induced its execution by the principal. And if, as in the case at bar, such consideration be a condition subsequent, to be performed by the creditor, his

ing on the part of the guarantor that the maker will pay the note.' A conditional guaranty is 'an undertaking to pay if payment cannot by reasonable diligence be obtained from the principal debtor.' " In *Silver v. Kent* (C. C., E. D. Pa.), 105 Fed. Rep. 840, a written agreement to collect certain claims, which the signers held as security for an attachment note, "and to pay" the note, at a certain date, to the holder thereof, was construed to be an absolute guaranty and not a guaranty conditioned on the collection of the

claims mentioned. Affirmed in *Kent v. Silver*, 108 Fed. Rep. 365, 47 C. C. A. 404.

<sup>18</sup> *Dwight v. Pomeroy*, 17 Mass. 308; *Phyfe v. Waddell*, 2 Edwards' Ch. 47; *Tyson v. Passmore*, 2 Pa. St. 122; *Taylor v. Gilman*, 25 Vt. 411; *Oliver v. Oliver*, 4 Rawle (Pa.) 141; *Coger's Ex'rs v. McGee*, 2 Bibb (Ky.) 321; *Snyder v. Klose*, 19 Pa. St. 235; *Wood v. Dwarris*, 11 Exch. 493; *Cathcart v. Robinson*, 5 Pet. 264; *Best v. Stow*, 2 Sandf. Ch. 298; *Benton County Savings Bank v. Bodicker*, Iowa, May, 1902, 90 N. W. Rep. 822.

failure to perform it would evidently operate as a fraud upon the surety, and upon that ground release him from all liability upon his engagement. \* \* And it is plainly competent for the surety to set up and prove such failure of consideration, because it has often been adjudged that such defense is not in conflict with the legal effect of the contract."<sup>19</sup> In consideration that a surety would sign a note, the creditor at that time verbally promised him that the note should be secured by a chattel mortgage which secured an old note. The creditor afterwards released the chattel mortgage, and it was held that the parol agreement might be shown, and that the surety was discharged. The court said: "It was competent for the parties to make the contract alleged, and, if it formed the only consideration for the making of the note by the \* \* (surety), parol evidence is admissible to prove that fact, and also that the consideration has failed when the action is by a holder with notice. Such evidence is no infringement of the rule, before referred to, excluding parol evidence to vary or contradict a written contract."<sup>20</sup>

§ 455. **Parol evidence, continued.**—Parol evidence is held competent to show that a guarantor of a draft or note became such on condition that it was not to be taken unless another named person also signed the same and that such condition was not complied with.<sup>21</sup> It has been held that the indorser of a note may prove by parol that he indorsed it merely as surety, and that the agreement, when he indorsed it, was that it was to be paid out of claims in his hands due the principals. In such case the court said: "The evidence offered was neither to contradict nor to explain a written instrument, but to prove a collateral fact or agreement in relation to it."<sup>22</sup> The payee of a promissory note verbally promised the surety, as an inducement for him to sign it, that as soon as the note

<sup>19</sup> *Campbell v. Gates*, 17 Ind. 126, per Davidson, J.

<sup>20</sup> *Port v. Robbins*, 35 Iowa 208, per Miller, J.

<sup>21</sup> *Belleville Savings Bank v. Bornman*, 124 Ill. 200.

<sup>22</sup> *Dwight v. Linton*, 3 Rob. (La.) 57, per Morphy, J. For other cases holding parol evidence of the agreement upon which the surety signed

competent, see *Matheson v. Jones*, 30 Ga. 306; *Thomas v. Turcott*, 53 Barb. (N. Y.) 200; *Stewart v. Davis' Ex'r*, 18 Ind. 74; *Briggs v. Law*, 4 Johns. Ch. 22; *Watts v. Shuttleworth*, 5 Hurl. & Nor. 235. Holding that such evidence must be clear, see *Tiffany v. Crawford*, 1 McCarter (N. J.) 278.

became due he would immediately proceed to collect it from the principal. The note became due and remained so a year, and the creditor neither sued the principal nor notified the surety, and the principal became insolvent. Held, the surety was discharged. The court said that the creditor, by his assurances to the surety, "has lulled him into a false security, has induced him to omit to do what he would otherwise have done, viz.: pay the debt and secure himself by attaching \* \* (the principal's) property, or otherwise obtaining security, and has thus subjected him to the loss of the whole debt." He is equitably estopped to claim anything from the surety.<sup>23</sup> But where a surety signed a note in consideration of a parol contemporaneous agreement by the payee that he would continue the principal in his employ till he could, by his earnings, pay the note, it was held that the surety could not show a breach of this agreement as a defense to the note, on the ground that the verbal agreement varied the legal effect of the note.<sup>24</sup> In an action against a surety on a lease, it has been held not competent for him to show a verbal agreement, contemporaneous with the execution of the lease, that it might be surrendered at the will of the tenant, for this would be to change a lease for a definite time into one at will.<sup>25</sup> Upon the same ground that parol evidence is inadmissible to vary a written instrument it has been held that the surety on an official bond cannot show, in a suit at law upon the bond, his contemporaneous verbal agreement with the obligee that he should be liable for certain official acts only of the principal.<sup>26</sup> Where the facts are undisputed the question whether

<sup>23</sup> *Hickok v. Farmers' & Mechanics' Bank*, 35 Vt. 476, per Aldis, J. Holding that part parol evidence of a contemporaneous agreement to diligently prosecute the principal in a note cannot be given, see *Huey v. Pinney*, 5 Minn. 310; *First Nat. Bank of Monmouth v. Whitman*, 66 Ill. 331; *Thompson v. Hall*, 45 Barb. (N. Y.) 214.

<sup>24</sup> *Tucker v. Talbott*, 15 Ind. 114. See, also, *Trentman v. Fletcher*, 100 Ind. 105.

<sup>25</sup> *Brady v. Peiper*, 1 Hilton (N. Y.) 61. To similar effect, see *Brush*

*v. Raney*, 34 Ind. 416; *Weare v. Sawyer*, 44 N. H. 198.

<sup>26</sup> In *Bates v. Smith*, Ky., Feb., 1902, no official report, 66 S. W. Rep. 714, 23 Ky. Law Rep. 2134, in a sheriff's suit on his deputy's official bond, one of the sureties alleged that he had become surety on condition, agreed to by the sheriff, that the deputy should be allowed to collect taxes only in a certain election district and that therefore he was not liable for misappropriation of taxes collected by him in another district. The trial court allowed the

a guaranty is conditional or absolute is for the court, but where the evidence is contradictory it is for the jury to determine subject to the instruction of the court as to the law.<sup>27</sup>

**§ 456. Surety not discharged by fraud of principal unless creditor have notice.**—If the principal, by fraud, induces the surety to become bound, but the obligee has no notice thereof, such fraud will, as a general rule, be no defense to the surety.<sup>28</sup> Where the principal represented to the surety that he could and would use the money to be obtained on a note profitably in a business operation, and the principal delivered the note to the payee in payment of an existing debt, the payee having no knowledge of the representations made to the surety, it was held that the surety could not avail himself, as a defense, of the fraud practiced upon him by the principal.<sup>29</sup> Where certain parties were led to execute an administration bond as sureties by the misrepresentation of others, it was held to be no defense as against one who was in no way connected with the deception.<sup>30</sup> A being about to purchase a medical practice from B, told him he could get C to be his surety for 300l., and A finally purchased the practice, and gave B his and C's bond for 300l., and gave B his individual bond for 125l. additional. C did not know of the giving of the latter bond, but supposed the practice was sold for 300l. Held, if A alone practiced the deception on C it did not discharge him, but if

defense. Reversed by the supreme court on the ground that there was nothing either in the words of the bond or in the statute so limiting the duties or the liability of the deputy or his surety. *Silver v. Kent* (C. C., E. D. Pa.), 105 Fed. Rep. 840, affirmed in *Kent v. Silver*, 108 Fed. Rep. 365, 47 C. C. A. 404.

<sup>27</sup> *New Home Sewing Machine Co. v. Simon*, Wis., Feb., 1902, 89 N. W. Rep. 144. Same case on prior appeals, 104 Wis. 120, 80 N. W. Rep. 71, 107 Wis. 368, 83 N. W. Rep. 649.

<sup>28</sup> *Coleman v. Bean*, 1 Abb. Rep. Om. Cas. (N. Y.) 394; *Graves v. Tucker*, 10 Smedes & Mar. (Miss.) 9; *Ladd v. Board of Trustees*, 80

Ill. 233; *Griffith v. Reynolds*, 4 Gratt. (Va.) 46; *Western N. Y. Life Ins. Co. v. Clinton*, 66 N. Y. 326; *Wallace v. Wilder*, 13 Fed. Rep. 707; *Rothermal v. Hughes*, 134 Pa. St. 510; *Davis Sewing Machine Co. v. Buckles*, 89 Ill. 237. See, also, on this subject, *Xander v. Commonwealth*, 102 Pa. St. 434; *Jones v. Swift*, 94 Ind. 516.

<sup>29</sup> *Quinn v. Hard*, 43 Vt. 375. See, also, *Lucas v. Owens*, 113 Ind. 521. In *Riley v. Johnson*, 8 Ohio, 526, precisely the opposite was held, on the ground that the payee, having taken the note for a precedent debt, was not a bona fide holder.

<sup>30</sup> *Casoni v. Jerome*, 58 N. Y. 315.

B participated in the misrepresentations the bond was void.<sup>31</sup> Whether the creditor, when he took the obligation, had notice of the condition upon which the surety signed it is usually a question of fact for the jury.<sup>32</sup>

**§ 457. Surety on note not discharged if creditor have no notice of condition on which he signed.**—If a surety executes a negotiable promissory note, and leaves it with the principal, upon condition that the principal shall get another to sign it before it is delivered, and the principal delivers it to the payee without complying with the condition, and the payee takes it without any notice of such condition, express or implied, the surety cannot avail himself of such condition, and is liable on the note.<sup>33</sup> The same rule holds good with reference to any other condition upon which a surety signs such note, and of which a bona fide holder has no notice. Thus, where a note was indorsed by a surety for the purpose of paying an-

<sup>31</sup> *Spencer v. Handley*, 5 Scott (N. R.) 546.

<sup>32</sup> *Hardwick Savings Bank & Trust Co. v. Drenan*, 71 Vt. 289, 44 Atl. Rep. 347.

<sup>33</sup> *Deardorff v. Foreman*, 24 Ind. 481; *Babbitt v. Shryer*, 70 Ind. 513, 517; *Whitcomb v. Miller*, 90 Ind. 384; *Ward v. Hackett*, 30 Minn. 150; *Merriam v. Rockwood*, 44 N. H. 81; *Passumpsic Bank v. Goss*, 31 Vt. 315; *Smith v. Moberly*, 10 B. Mon. (Ky.) 286; *Dixon v. Dixon*, 31 Vt. 450; *Ferrell v. Hunter*, 21 Mo. 436; *Findley v. State Bank*, 6 Ala. 244; *McCrea v. Murphy & Son*, 90 Ill. App. 434, citing and following *Anderson v. Warne*, 71 Ill. 20; *Seaton v. McReynolds*, Tex. Civ. App., Feb., 1903, 72 S. W. Rep. 874; *Hood v. Paddock-Howley Iron Co.*, 53 Ill. App. 229; *United States v. Boyd*, 8 App. Cas. (D. C.) 440, action on an official bond; *Jacobs v. Hogan*, 73 Conn. 740, 49 Atl. Rep. 202, action on a liquor license bond; *Seitz Brewing Co. v. Ayres*, 60 N. J. Eq. 190, 46 Atl. Rep. 535, action on guaranty of a lease; *Cooper v.*

*De Mainville*, 1 Colo. App. 16, 27 Pac. Rep. 86, citing cases, action on an appeal bond; *Lewiston v. Gagne*, 89 Me. 395, 36 Atl. Rep. 629, action on the bond of a tax collector. Contra, where the note was non-negotiable, see *Ayres v. Milory*, 53 Mo. 516; *Daniels v. Gower*, 54 Iowa 319. In *Goodwin v. Kent*, Pa. St., Nov., 1901, 50 Atl. Rep. 290, the surety on a note was held released because the note was given by the principal to defraud his creditors and without consideration of which facts the surety had no notice before he signed it. In *Benton County Savings Bank v. Boddicker*, Iowa, May, 1902, 90 N. W. Rep. 822, the evidence was held sufficient to show notice to a bank that two sureties had signed a bond on condition that others also should sign it. *Feigen-span v. Wilson*, N. J. Sup., June, 1902, 52 N. E. Rep. 233, in which case the surety on a liquor salesman's bond was held liable, although its execution was procured by the fraud of his son, who was in no way connected with the obligee.



other note on which the indorser was liable, it was held to be no defense against a bona fide holder without notice that the principal had misapplied the proceeds of the note.<sup>34</sup> The same thing was held where the guarantor of a note became liable upon the understanding that the note should be discounted at a particular bank, but the holder had no notice of that fact when he took the note.<sup>35</sup> Where a surety signed a note only on condition that the principal should indemnify him by mortgage before the note should be delivered, and it was not done, it was held that this was no defense against a bona fide holder without notice, notwithstanding the fact that the note was payable to A or bearer, and was sold to B.<sup>36</sup> Where the payee of a promissory note filled it up and gave it to the principal to obtain the name of a surety thereon, and the principal applied to a person who could not read or write, and asked him to sign the note as surety, stating to him that it was for a smaller sum than that expressed in the note, and he thereupon authorized the principal to sign his name to the note, without asking that it be read, and the note was then delivered to the payee, who had no notice of the fraud, it was held the surety was liable.<sup>37</sup> Where a principal falsely represented to a surety that the creditor would take a note for one-half the debt in full payment thereof, and the surety signed such a note, and it was delivered to the creditor, who did not know of the misrepresentation, it was held the surety was liable.<sup>38</sup> A was principal and B and C sureties in a note. The creditor agreed to extend the time if A would get D to sign the note in place of B. A took the note to D, and falsely represented to him that C had agreed to remain on the note if D would sign it in place of B. The name of B was then stricken out, and D signed the note, relying on these representations. Held, C was discharged, and A and D were bound. A was not the agent of the creditor, and if D relied upon his representations he must suffer by it.<sup>39</sup> A receiver was directed to sell real and personal property and take notes for the deferred payments with sureties and also to reserve a lien on the real

<sup>34</sup> Stoddard v. Kimball, 4 Cush. 604; Stoddard v. Kimball, 6 Cush. 469.

<sup>37</sup> Craig v. Hobbs, 44 Ind. 363.

<sup>38</sup> Booth v. Storrs, 75 Ill. 438.

<sup>39</sup> Farmers' & Traders' Bank v.

<sup>35</sup> Sweetser v. French, 2 Cush. 309. Lucas, 26 Ohio St. 385.

<sup>36</sup> Gage v. Sharp, 24 Iowa 15.



estate for the unpaid purchase money. He failed to reserve such lien. Defendants became sureties on the notes without informing him that their suretyship was conditioned upon his reserving such lien. Held, that they were not released by his failing to reserve it.<sup>40</sup> It has been held that to escape liability on a replevin bond on the ground of conditional delivery, it is not enough to show notice of the condition in the sheriff, the defendant in the replevin must also have had notice.<sup>41</sup>

**§ 458. When surety on bond liable if condition that another shall sign is not complied with—Effect of forgery.**—A bond, perfect on its face, apparently duly executed by all whose names appear therein, purporting to be signed, sealed and delivered by the several obligors, and actually delivered by the principal without stipulation, reservation or condition, cannot be avoided by the sureties upon the ground that they signed it on the condition that it should not be delivered unless it should be executed by other persons who did not execute it, when it appears that the obligee had no notice of such condition, and nothing to put him on inquiry as to the manner of its execution, and also that he has been induced upon the faith of such bond to act to his own prejudice.<sup>42</sup> The reason for this course

<sup>40</sup> *Joyce v. Anten*, 179 U. S. 591, 43 L. Ed. 332, 21 Sup. Ct. Rep. 227, affirming *Joyce v. Cockrill*, 35 C. C. A 38, 92 Fed. Rep. 838. In the supreme court, *Brewer, J.*, cited *Wornell v. Williams*, 19 Tex. 180, in which case an administrator failed to take mortgage security, in addition to sureties, for unpaid purchase money, as he was required to do by the order of sale, and it was held that the sureties were not thereby discharged. The Texas court said that if they relied on the taking of such mortgage security it was their duty to see to it that the administrator complied with the order, and having failed to do that, they could not load the consequences of their failure on to the estate.

<sup>41</sup> In *Richardson v. Peoples National Bank*, 57 Ohio St. 299, 48 N. E. Rep. 1100, the surety on a re-

plevin bond signed it and gave it to the sheriff upon an agreement with the sheriff that it should not be delivered unless the principal should, within five days, furnish indemnity. The indemnity was never furnished. Held, that the surety was bound nevertheless because the defendant had no knowledge of the condition upon which the bond came into the sheriff's hands.

<sup>42</sup> *State v. Pepper*, 31 Ind. 76, overruling *Pepper v. The State*, 22 Ind. 399; *Dair v. United States*, 16 Wall. 1; *Webb v. Baird*, 27 Ind. 368; *Nash v. Fugate*, 24 Gratt. (Va.) 202; *State v. Garton*, 32 Ind. 1; *York Co. M. F. Ins. Co. v. Brooks*, 51 Me. 506; *Hunt v. The State*, 53 Ind. 321; *Readfield v. Shaver*, 50 Me. 36; *Gwyn v. Patterson*, 72 N. C. 189; *State v. Peck*, 53 Me. 284; *Graves v. Tucker*, 10

of decision has been thus well expressed: "The principal obligor, naturally the chief actor, presents \* \* (the bond) for the acceptance of the obligee; the instrument is in the regular course of delivery; the appearance which the signers of it have created by their acts is that of an absolute authority in the principal obligor to deliver the instrument as and for what it purports on its face to be, the deed of those who have affixed their names and seals to it. \* \* We regard the case as one where the surety must run the risk of the fraud of his own agent. We deem it the duty of the signer of an instrument under such circumstances to see to it that the authority he has delegated is not abused, and that it is not just nor reasonable to allow him to take advantage of its abuse to defeat his obligation."<sup>43</sup> There seems to be an excep-

Smedes & Mar. (Miss.) 9; Whitaker v. Crutcher, 5 Bush (Ky.) 621; State v. Potter, 63 Mo. 212; Millett v. Parker, 2 Met. (Ky.) 608; Hall v. Smith, 14 Bush (Ky.) 604; Carroll Co. v. Ruggles, 69 Iowa, 269; Micklewait v. Noel, 69 Iowa, 344; Taylor Co. v. King, 73 Iowa 153; Butler v. United States, 21 Wall. 274; Cutler v. Roberts, 7 Neb. 4; Probate Ct. v. St. Clair, 62 Vt. 24; Lyttle v. Cozard, 21 W. Va. 183; Lewis v. Board Comm'rs, 70 Ga. 486; State v. Churchill, 48 Ark. 426; Wolff v. Schaeffer, 74 Mo. 154. See, also, on this subject, Canal & Banking Co. v. Brown, 4 La. Ann. 545; Singer Mfg. Co. v. Drummond, 40 Hun (N. Y.) 260; Brown v. State, 18 Tex. App. 326; Clark v. Bryce, 64 Ga. 486; Guild v. Thomas, 54 Ala. 414; Forrest v. White Sewing Machine Co., Tex. Civ. App., Feb., 1902, 67 S. W. Rep. 340; Sidney Road Co. v. Holmes, 16 A. C. R. Queen's Bench Rep., Ont., 258; County of Huron v. Armstrong, 27 U. C. R. Qu. Bench. Rep., Ont., 533; Township of Oxford v. Gair, 15 Ont. Rep. 362; Board of Education of Preston Independent School District No. 45 v. Robinson, 81 Minn. 305,

84 N. W. Rep. 105; Clarke v. Williams, 61 Minn. 12, 62 N. W. Rep. 1125; Merchants Exchange Bank v. Luckow, 37 Minn. 543, 35 N. W. Rep. 434 (and note), holding that when proof of the conditional signing of the paper is proven the burden is on the plaintiff to show that he is not chargeable with notice thereof. Whitford v. Laidler, 94 N. Y. 145; Ware v. Allen, 128 U. S. 590, 9 Sup. Ct. Rep. 174; Stilwell v. American Surety Co., 70 Ark. 512, 68 S. W. Rep. 1021, holding that a misrecital in the indemnity bond sued on, which was cleared up by the bond attached thereto, did not amount to notice to the obligee of the alleged fraud.

<sup>43</sup> Smith v. Peoria Co., 59 Ill. 412, per Sheldon, J. See precisely to the same effect, Comstock v. Gage, 91 Ill. 328; City of Chicago v. Gage, 95 Ill. 593; Rhode v. McLean, 101 Ill. 467. Holding that notice that he will not be bound by a bond unless others sign it, given by a surety to the mayor of a city, who is also surety on the bond, will not avail the surety giving the notice, see Stevenson v. Bay City, 26 Mich. 44.

tion to this rule in the case of forgery. In an action on an employee's fidelity bond Lane and Hetson, two of the sureties, pleaded that they had refused to execute it unless Gaddis signed it as co-surety. Thereafter Bass, the principal, brought the bond with Gaddis' name appended, whereupon, believing Gaddis' signature genuine, they signed it. The signature of Gaddis was in fact a forgery. Held, that the sureties were not liable. The court said it made no difference that the obligee had no notice of the forgery of Gaddis' name. It was the employer's duty to see to the genuineness of the signatures before it accepted the bond.<sup>44</sup>

**§ 459. Liability of surety signing conditionally—Miscellaneous cases—Criminal recognizance.**—The principle which governs the liability of sureties on bonds conditionally delivered is held to have no application to commercial paper in the hands of an innocent purchaser who acquired it before maturity.<sup>45</sup> A surety who signs a note with an agreement that the maker is not to deliver it to the payee until it is signed by other sureties cannot plead against an innocent payee, without notice of the agreement, the fraud of the maker in delivering it without the additional sureties.<sup>46</sup> And a surety to a bond given by a guardian cannot defend when sued thereon that an agreement that another surety should be procured was not complied with.<sup>47</sup> Where sureties sign an official bond unconditionally they cannot complain that afterwards, by an agreement between the principal and town clerk, there was to be other security and that none was procured.<sup>48</sup> A surety upon an executor's bond is held estopped from setting up an undisclosed condition as

<sup>44</sup> *Southern Cotton Oil Co. v. Bass*, 126 Ala. 343. Holding that when a surety signed upon the express condition that another, whose name was forged to the bond, should also sign, the surety was not liable, even though the obligee had no notice of the condition, see *Linn County v. Farris*, 52 Mo. 75. Holding the surety liable where the obligee had no notice of the condition, see *State v. Baker*, 64 Mo. 167. See, also, *State v. Hewitt*, 72 Mo. 603. To the same effect, *Seely v. People*, 27

Ill. 173, Caton, J., followed in *Cornell v. People*, 37 Ill. App. 490, action on a constable's bond. Also § 462 post.

<sup>45</sup> *Marks v. First Nat. Bank*, 79 Ala. 550.

<sup>46</sup> *Tabor v. Merchants' Nat. Bank*, 48 Ark. 454.

<sup>47</sup> *Bangs v. Bangs*, 41 Hun (N. Y.) 41. And see, also, *Ordinary v. Thatcher*, 41 N. J. Law, 403.

<sup>48</sup> *Town of Ashkum v. Lake*, 12 Bradw. (Ill. App.) 75.

to delivery.<sup>49</sup> In *scire facias* on a forfeited recognizance taken by a justice of the peace, defendant pleaded that he signed the bond as surety upon the express understanding and agreement between himself and the justice and his co-sureties that the bond should not be approved without the signature of one Marion Parkes and that the justice in violation of his agreement had taken and approved it without Parkes' signature. Held, that the plea was good and that such a bond was a nullity so far as defendant was concerned.<sup>50</sup>

**§ 460. When surety who signs instrument in blank bound by act of principal in filling blank—Equitable suit to cancel bond.**

—A surety who signs a blank instrument and intrusts it to his principal is generally bound to one who takes it without notice, for anything with which the principal may fill the blank. Thus, a party signed a blank appeal bond, with the understanding that it should only be filled up so as to cover the costs of the appeal, but without his knowledge it was filled up so as to cover the debt as well as the costs. Held, the surety was bound by the bond as it read, unless the obligee was cognizant of the fraud.<sup>1</sup> So, where certain sureties signed a note, blank as to date and amount, and delivered it to the principal, and he added seals to the names of the sureties and filled the blank with a much larger sum than he had agreed with the sureties,

<sup>49</sup> *Berkey v. Judd*, 34 Minn. 393.

<sup>50</sup> *People v. Cleaver*, 74 Ill. App. 210, citing *Waugh v. People*, 17 Ill. 561.

<sup>1</sup> *Chalaron v. McFarlane*, 5 La. (Curry) 227. To similar effect, see *McCormick v. Bay City*, 23 Mich. 457; *Inhabitants of South Berwick v. Huntress*, 53 Me. 89; *City of Chicago v. Gage*, 95 Ill. 593; *Cawley v. People*, 95 Ill. 249; *Gary v. State*, 11 Tex. App. 527; *White v. Duggan*, 140 Mass. 18; though see *Smith v. Carder*, 33 Ark. 709. In *Gibbs v. Johnson*, 63 Mich. 671, it is held that the surety by signing a blank instrument and intrusting it with his principal thereby makes the latter his agent to see that the instrument is properly executed, and is accordingly held estopped by his act. A

surety who has signed a bond conditionally cannot escape liability thereon when the face of the bond suggests nothing to the approving officer that a condition was imposed. *Brown v. Probate Judge*, 42 Mich. 501; *Hessell v. Johnson*, 63 Mich. 623. In *Dedge v. Branch*, 94 Ga. 37, 20 S. E. Rep. 657, defendants as sureties, signed a blank form of bond for a tax collector and gave it to the collector, after which the penalty, names of principal and sureties and date were filled in. It was held that they were bound. "To discharge them," said the court, "would, under the circumstances, be neither more nor less than to allow them to perpetrate a fraud on the public."

and delivered it to the payee, who took it without notice, it was held the sureties were liable for the note as the payee took it.<sup>2</sup> A blank note with \$5,000 inserted at the top of the paper, and signed by a firm and two sureties, and by one of the firm placed in the hands of a factor as collateral security for acceptances of drafts to be drawn on him by the firm, and afterwards filled up in good faith by the factor, in accordance with his instructions, with the sum of \$5,000, as agreed upon at the time the note was left with him, was held to be binding on the sureties thereon.<sup>3</sup> Where a surety by parol authorized the principal to fill certain blanks in a bond, and afterwards revoked the authority, and the principal afterwards filled the blanks in the obligee's presence, it was held the surety was not bound, even though the obligee did not know that the authority had been revoked.<sup>4</sup> It has been held that a bill in chancery will not lie to cancel a bond on the ground of forgery and fraud on the part of the principal in the delivery of it when the principal is about to default because both defences can be made in a suit at law.<sup>5</sup> In another case it was held that a surety who had been induced by fraud on the part of the obligee to execute a bond conditioned to indemnify the obligee against loss by reason of defects in the title to certain land, might maintain his bill to cancel the bond and need not wait until he was sued.<sup>6</sup>

<sup>2</sup> Fullerton v. Sturges, 4 Ohio St. 529.

<sup>3</sup> Carson v. Hill, 1 McMullan, Law (S. C.) 76.

<sup>4</sup> Gourdin v. Read, 8 Rich. Law (S. C.) 230, recognized and followed in Mills v. Williams, 16 S. C. 593.

<sup>5</sup> In Pechstein v. Smith, 14 App. Cas. (D. C.) 27, the sureties on the bond of a contractor for carrying the U. S. mail, filed a bill against the attorney general and the contractor stating that the proposal of the contractor had been accepted and that he had failed to fulfil his part and was about to be declared a defaulting bidder, whereupon the sureties on the bonds would become liable and exposed to a multiplicity of

suits, stating further that the bonds had been delivered in blank to the principal and by him filled and delivered, and were, as to the sureties, false, forged and fictitious, and praying that they be delivered up and canceled. Held, that the bill stated no ground for equitable relief because a single suit would determine whether the bond was valid or not and the defense of forgery could be made in an action at law. Citations: Town of Venice v. Woodruff, 62 N. Y. 462; Globe Insurance Co. v. Reals, 79 N. Y. 202; Town of Grand Chute v. Winegar, 15 Wall (U. S.) 373.

<sup>6</sup> In Craig v. McKnight, Tenn., May, 1902, 69 S. W. Rep. 322, the

§ 461. When name of surety in body of obligation is notice to obligee of condition that he should sign.—If a surety signs an obligation, in the body of which another is also named as surety, upon condition that he shall not be bound unless such other also signs and delivers the bond to the principal, who delivers it to the obligee without complying with the condition, the surety is not usually bound. The fact that the instrument is not executed by all those named in it as obligors is sufficient to put the obligee upon inquiry and charge him with notice of the condition.<sup>7</sup> If the instrument in its body

court held that his co-obligors were proper parties because if he did not join them he might afterwards have to defend their suits for contribution.

<sup>7</sup> Ward v. Churn, 18 Gratt. (Va.) 801; Warfel v. Frantz, 76 Pa. St. 88; Pawling v. The United States, 4 Cranch, 219; Sharp v. The United States, 4 Watts (Pa.) 21; State Bank v. Evans, 3 J. S. Green (N. J. Law) 155; Hall v. Parker, 37 Mich. 590; Hessell v. Johnson, 63 Mich. 623; Cutler v. Roberts, 7 Neb. 4; Hall v. Smith, 14 Bush (Ky.) 604; Allen v. Marney, 65 Ind. 398; State v. Churchill, 48 Ark. 426; The Markland M'n'g & M'f'g Co. v. Kimmel, 87 Ind. 560. In State v. Wallis, 57 Ark. 64, 20 S. W. Rep. 811, two persons named as sureties in a bond failed to sign it, but one of them signed an affidavit, on the same sheet, as to his property. It was held that those facts were sufficient to give notice that the others who signed as sureties, signed it on condition that those two would also sign it, and, upon the other sureties testifying that they had been told that those two persons would sign it, and thereupon had agreed to sign it themselves, it was held that they were released. The court said that such evidence was not incompetent. "It was not designed to vary the

terms of a written instrument, but to show that there never was a complete execution of such instrument." In this state a statute (1891) cuts off the surety's defense that the paper was signed on an unperformed condition that others should sign it as co-sureties. In Whitaker v. Richards, 134 Penn. St. 191, it is held that in the absence of a stipulation that a bond shall not be delivered until certain others shall have signed, the bond, although prepared for the signatures of other sureties who have not signed, will nevertheless be binding on those who do so sign. Holding that in such a case possession of the obligation is prima facie evidence that those who signed delivered it, see Grim v. School Directors, 51 Pa. St. 219. Holding that in such a case it was not, from the mere fact that one did not sign, to be implied that the bond was incomplete, and not binding on those who did sign it, see Keyser v. Keen, 17 Pa. St. 327, and In re Gleeson's Estate, 192 Pa. St. 279, 43 Atl. Rep. 1032. In Davis v. Bryant, 23 Ind. App. 376, 55 N. E. Rep. 261, an appeal bond contained the names of parties therein referred to as sureties who did not sign it. Held, that this alone did not invalidate the bond as to the sureties who did sign it. There was evidence from



purports to be signed by the principal, but is not so signed, this is sufficient notice to the obligee that it is imperfect, and the sureties may show as a defense that they signed upon condition that the principal also should sign.<sup>8</sup> But it has been held that the mere fact that there is one more seal to an obligation than the number of names signed to it is not sufficient to charge the obligee with notice that another was to sign it.<sup>9</sup> The record of a county court recited that a sheriff-elect and his sureties, naming them, came into court and executed the sheriff's bond. One of the sureties named was in court to sign the bond but through inadvertence did not sign it. Held, none of the sureties were liable, as each had a right to suppose that all named in the order would sign and that no other bond would be approved.<sup>10</sup> A bond in its body purported to be made by A as principal, and B, C and D as sureties, and was signed by all of them except C. The bond was signed by B on condition that he should not be bound unless C signed, but there was no such condition as to D. Held, that B was not bound because of the condition, and D was not bound because A was not. The court said: "The bond purports to be the joint bond of all the parties. The presumption from the face of it is that \* \* \* (D) intended to be bound along with the other parties by whom it was executed and not severally."<sup>11</sup> A forthcoming bond contained in its body the names of the principal and two sureties. The principal and one of the sureties named signed the bond in the presence of the sheriff, who was the obligee, and the bond was then and there delivered to the sheriff, who had no notice of any condition. Held, the surety could not sustain the defense that he agreed to become liable only on condition that the other named surety should sign. Having executed the bond in the presence of the obligee and seen it delivered to him without saying anything, the law

which the trial court concluded that the sureties signing consented to the filing of the bond without the signatures of the others. In *Davis v. Jones*, 123 Ala. 647, it was held on motion to require further security for costs that the bond filed was not vitiated by the fact that there were persons named in it as sureties who did not sign it.

<sup>8</sup> *Wild Cat Branch v. Ball*, 45 Ind. 213.

<sup>9</sup> *Simpson's Ex'r v. Bovard*, 74 Pa. St. 351.

<sup>10</sup> *Fletcher v. Leight*, 4 Bush (Ky.) 303.

<sup>11</sup> *Ward v. Churn*, 18 Gratt (Va.) 801, per Jones, J.



will hold that he intended to create an absolute obligation.<sup>12</sup> H as principal and D as surety executed a bond to secure the payment of rent. T was named in the bond as surety but did not sign it. T was not present when the bond was executed, and D told the obligee that T could not then conveniently attend but would sign at any time. T, on being applied to, refused to sign, and D knew of the refusal and made no objection. Held, D was liable on the bond, although the court said it might have been otherwise if D, upon the refusal of T, had notified the obligee that he was not willing to remain bound.<sup>13</sup> Where an appeal bond names certain persons as sureties, it is held to be presumed that each one contemplates that the rest will join in its execution; and one who sues thereon has the burden of explaining the omission of any one to do so.<sup>14</sup>

**§ 462. When surety discharged because the signature of another surety is forged.**—When the name of one of several persons purporting to sign an instrument is forged, and sureties sign upon the supposition that such signature is genuine, the liability of the sureties in such case will depend upon circumstances. A surety signed a bond to which the name of another was then forged, supposing the forged signature was genuine. The forged signature was afterwards entirely erased, and the bond delivered to the obligee, who had no notice of the forgery or erasure. The court held the surety bound, and said that “It was his neglect that he was ignorant of the genuineness of the signatures which preceded his own. He imposed no condition limiting the legal effect of his signature. \* \* A subsequent surety is not to be discharged because the name of a prior one has been forged. His own signature is an implied assertion of the genuineness of those which preceded it, for it is not to be presumed that a man would affix his name to a bond when the prior names were forged.”<sup>15</sup> So it has been held that a party who signs a note as

<sup>12</sup> *Johnson v. Weatherwax*, 9 Kan. 75.

<sup>13</sup> *Sidney Road Co. v. Holmes*, 16 Up. Can. (Q. B.) 268.

<sup>14</sup> *Woodin v. Durfee*, 46 Mich. 424. And it is also held that if any surety denies its execution on oath and testifies that his supposed signature is

a forgery and the justification of the sureties a fraud, the plaintiff is under stronger obligation to show that the surety signed and delivered the bond with full knowledge of the facts. *Woodin v. Durfee*, 46 Mich. 424.

<sup>15</sup> *York Co. M. F. Ins. Co. v.*

surety in effect affirms the genuineness of the preceding signatures, and cannot avoid liability by showing that they are forged, unless the creditor knew of the forgery when he took the note.<sup>16</sup> An agreement in writing to "guaranty the payment of a note signed by A and payable to B, and by him indorsed, and also indorsed by C and D," and further described by its amount, date and time, which agreement is made after a note is shown purporting to correspond with the description, and actually indorsed by C and D, but on which the names of A and B are forged, though this is not known to the guarantor nor the holder, binds the guarantor to pay that note, if there is no other note in circulation at the time of the guaranty answering the description. The court said: "The defendant guarantying the payment of this particular note, and thereupon the plaintiff concluding his agreement to purchase the note, both parties being equally innocent as to any fraud, misrepresentation or concealment, the court are of opinion that upon the non-payment of the same at maturity by the parties whose names were borne thereon, the defendant under his guaranty became liable to pay the same to the plaintiff."<sup>17</sup> Where a surety signed a sheriff's bond in the presence of the county court, the bond then being in possession of the court, and the principal then represented to him that a certain person whose name appeared on the bond had signed it, when in fact such signature was a forgery, it was held the surety was not bound, on the ground that, the bond being in the custody of the court, the surety had good reason to suppose that all the signatures

Brooks, 51 Me. 506, per Appleton, C. J. To similar effect, see Franklin Bank v. Stevens, 39 Me. 532; Stern v. People, 102 Ill. 540; Helms v. The Wayne Agr'l Co., 73 Ind. 325; The Wayne Agr'l Co. v. Cardwell, 73 Ind. 555; Colquitt v. Simpson, 72 Ga. 501; Mathis v. Morgan, 72 Ga. 517; Stoner v. Millikin, 85 Ill. 218; Lombard v. Mayberry, 24 Neb. 674; Hall v. Smith, 14 Bush (Ky.) 604; Wheeler v. Baer, 7 Ind. App. 381, 34 N. E. Rep. 591; Hunter v. Fitzmaurice, 102 Ind. 449, 2 N. E. Rep. 127; Schmidt v. Archer, 113 Ind. 365, 14 N. E. Rep. 543.

<sup>16</sup> Selser v. Brock, 3 Ohio St. 302. Holding that a surety who signs after the forged name of another surety is liable, if he did not rely on such forged signature as genuine, see The State v. Pepper, 31 Ind. 76. For cases particularly holding that if a surety signs an obligation after the names of others he thereby guaranties the genuineness of such signatures, see Lombard v. Newberry, 24 Neb. 674; Hall v. Smith, 14 Bush (Ky.) 604.

<sup>17</sup> Veazie v. Willis, 6 Gray 90, per Dewey, J.

were genuine.<sup>18</sup> In holding that a surety who signed the bond of a master in chancery, supposing that the forged signature of a preceding surety was genuine, was not liable, the court said: "By a fraud practiced upon the defendant by means of the commission of a high crime, he was made to assume a different and greater liability than he intended or supposed he was assuming when he executed the bond. \* \* In this case he acted upon an apparent fact, which, without the commission of a great crime by others, must have been true, and the commission of this crime the highest degree of caution might not suggest, and he cannot be charged with even slight neglect in not having discovered the forgery."<sup>19</sup> The same

<sup>18</sup> Chamberlain v. Brawer, 3 Bush (Ky.) 561.

<sup>19</sup> Seely v. The People, 27 Ill. 173, per Caton, C. J. See, also, Pepper v. The State, 22 Ind. 399. But see Stoner v. Millikin, 85 Ill. 218, wherein it was held that where a person, when asked to sign a note as surety, refuses unless another person will first execute the same, and the principal maker forges the name of such other person, and thereby induces the person to sign, and procures money of an innocent person who has no notice of the fraud, the fact of the forgery and the fraud will not release the surety so executing the same. Departing from Seely v. The People, *infra*, so far as it conflicts with the rule therein laid down. Subsequently, in Cornell v. People, 37 Ill. App. 490, debt on a constable's official bond, it was held error to reject evidence offered to show that the names of the first two sureties were forged and that the third, and responsible, surety signed on the false representation by the principal only, that the two preceding signatures were genuine. Citing and following Seeley v. People, 27 Ill. 173, *supra*, in which case the court said that where either the innocent obligee or the surety must

suffer through somebody's fraud, the loss should be borne by the obligee rather than the surety because of "that reasonable degree of favor which the law extends to sureties." To the same effect; Southern Cotton Oil Co. v. Bass, 126 Ala. 343, § 458, *supra*, note 5. In Worcester Coal Co. v. Utley, 167 Mass. 558, 46 N. E. Rep. 114, where the guarantor's defense was that the supposed guaranty had been forged, it was held proper to ask plaintiffs' manager and treasurer whether they had any reason to suppose the guaranty sued on was not genuine. In Linn County v. Farris, 52 Mo. 75, 14 Am. Rep. 389, defendant signed the official bond of a county treasurer and gave it to the principal to deliver as soon as the signature of one Leavill was procured. Leavill's signature was forged and the bond was duly filed by the principal. Held, the surety was not bound because there was no delivery. In Sharp v. Allgood, 100 Ala. 183, 14 So. Rep. 16, a like ruling was made as to a surety on a note. Contra, Grossman's Appeal, Pa. St., no official report, 11 Atl. Rep. 725, holding that the surety on a note bound where he signed on condition that the signature of another should be procured and such

rule has been held applicable where the signature of a partnership as co-surety was unauthorized.<sup>20</sup>

**§ 463. Forgery in renewal note does not release surety on original note—Requisites of plea of discharge by forgery.**—A renewal of a loan by the use of a forged note, held not to discharge a surety for the original loan.<sup>21</sup> A bank holding a note signed by defendants as principal and surety respectively, took a renewal note of the principal to which the name of the same person as surety was forged and marked the old note paid. Held, that the surety remained liable.<sup>22</sup> A surety's special defence to a suit on a joint and several liquor license bond was that it "was never signed or executed by said William Hammersley as principal, or by any one having authority to sign for him." Held, insufficient on demurrer, because there was no averment that the surety did not have knowledge thereof at the time he signed the bond.<sup>23</sup> Judgment having been entered under warrant of attorney, on the official bond of a tax collector, a surety filed her affidavit that she had not signed the bond. Held, that where the signature is denied a court of law will frame an issue of fact to be tried by a jury as to whether the surety signed the paper or not,

signature was forged. To the same effect is *Hunter v. Fitzmaurice*, 102 Ind. 449, 2 N. E. Rep. 127. In *Wheeler v. Traders' Deposit Bank*, 21 Ky. Law Rep'r, 1416, Feb., 1900, 55 S. W. Rep. 552, 49 L. R. A. 315, the maker of a note procured defendant to sign it as surety and discounted it at plaintiff's bank. Held, that the surety was not released by the fact that the signature of one of three co-makers was a forgery. The court said: "The note purported to be a complete instrument, and the bank had no notice of any wrong, and it was the fault of Wheeler [the surety] in trusting Stacy [the maker] and he must suffer. The bank did not practice any fraud upon Wheeler, but the party whom he trusted did. When one of two innocent persons must suffer, the

one whose negligence contributed to the loss must bear it." See the note to this case in 49 L. R. A. 315.

<sup>20</sup> *Schmidt v. Archer*, 113 Ind. 365, 14 N. E. Rep. 543.

<sup>21</sup> *Lovinger v. First Nat. Bank*, 81 Ind. 354.

<sup>22</sup> *Lyndonville Nat'l Bank v. Fletcher*, 68 Vt. 81, 34 Atl. Rep. 38.

<sup>23</sup> *Jacobs v. Curtiss*, 67 Conn. 497, 35 Atl. Rep. 501. In this case the surety's further plea that he signed the bond at the request of Barrows and upon the representation to him and belief by him that Barrows had signed it as principal was held insufficient on demurrer because it did not appear that the surety was unable to read or did not have full opportunity for knowing the contents of the bond.

but where the signature is alleged to have been procured by fraud the surety will be left to his remedy in chancery.<sup>24</sup>

§ 464. **Liability of one whose signature as surety is forged or unauthorized—Estoppel by silence.**—It is held that one whose name has been forged or signed without authority as surety incurs no liability unless he knowingly permits an innocent party to suffer thereby. Defendant, being told by his brother that he had had to use his name on a bond replied, "What did you do that for? Have I not often told you never to use my name on a bond; that I could not make myself liable for your debts?" At that time, apparently, the bond had been approved by the clerk and money that had been tied up in a garnishment proceeding paid out on the strength of it. It was held that the trial court erred in telling the jury that it was defendant's duty to follow up the matter and investigate, and that if he received notice that his name had been signed to a bond and had an opportunity to object and made no objection his silence amounted to a ratification. The court said: "Even if information as to the unauthorized act came to the defendant before the money was paid over, still if all that was said to him and all that he knew about the matter was that his brother had signed his name to 'a bond,' it is clear that he was not, as a matter of law, under any obligation to go out of his way for the protection of others. \* \* His omission to speak would not amount to an estoppel unless he was placed in a situation in which others might reasonably interpret his silence as an admission that the act was authorized; and even then he would not be estopped unless he knew or had good reason to believe that others were about to act upon the faith of the supposed authority."<sup>25</sup> Defendant's

<sup>24</sup> *Duncan v. Richardson*, 1 Marvel (Del.) 372, 41 Atl. Rep. 75.

<sup>25</sup> *Palmer v. McNatt*, 97 Ga. 435, 25 S. E. Rep. 406. Citing *Freeny v. Hall*, 93 Ga. 706, 21 S. E. Rep. 163; *Zell's Appeal*, 103 Pa. St. 103; *McKenzie v. British Linen Co., L. R.* 6 App. Cas. 82; *McCalla v. American Freehold Co.*, 90 Ga. 113, 15 S. E. Rep. 687. In *Maxwell v. Wright*, Ind. App., Oct., 1902, 64 N. E. Rep. 893, *Monroe F. Wright*

executed his note, to which the name of his two brothers were forged. The two brothers did not tell the holder of such forgery until after the maker of the note had disposed of his property and left the state. Held, that they were not estopped from availing themselves of the forgery as a defense. Citing *Kuriger v. Joest*, 22 Ind. App. 633, 52 N. E. Rep. 764, 54 N. E. 414, in which case it was held that the party

name and seal were affixed to a bond by his agent without authority; defendant, with notice thereof, failed to repudiate the signature. Held, that defendant was bound.<sup>26</sup>

**§ 465. When failure of consideration to principal is a defense for surety.**—It has been held that the sureties on a note given for the price of a slave may, in a suit against them in which the principal is not joined, set up as a defense a breach of warranty of the soundness of the slave.<sup>27</sup> But it has been held that a surety for the purchase money of land cannot set up a defect or failure of title where the principal does not desire to avail himself thereof.<sup>28</sup> In a suit against a surety upon a note executed for land sold at administrator's sale, the principal in the note being dead, and neither his administrator nor heirs being parties, it has been held the surety cannot set up the invalidity of the sale as a defense.<sup>29</sup> A party being about to buy a note signed by principal and surety asked the principal if it was all right, and upon being answered that it was, purchased it. In a suit on the note against the surety, the principal being dead, it was held that the surety could not show that the note was without consideration. The principal would have been estopped to show that fact, and the surety stood in no better position.<sup>30</sup> M had been the cashier of the plaintiff's branch bank, and had embezzled the funds thereof. To conceal the embezzlement, he bought from the plaintiffs

whose name has been forged must, to be estopped from defending on the ground of forgery, have fraudulently and purposely kept from the holder of the note the information that his signature thereon was not genuine, and it must appear also that the maker of the note, at the time, had property out of which payment of the note could be enforced.

<sup>26</sup> *Lynch v. Smith*, 25 Colo. 103, 54 Pac. Rep. 634.

<sup>27</sup> *Scroggin v. Holland*, 16 Mo. 419. The same was held in the case of a breach of warranty of a horse in *Mitchum v. Richardson*, 3 Strob. Law (S. C.) 254. In *Stockton Savings & Loan Co. v. Giddings*,

96 Calif. 84, 30 Pac. Rep. 1016, it was held that the surety on a non-negotiable note given for farm machinery may defend on the ground of breach of warranty and failure of consideration.

<sup>28</sup> *Ross v. Woodville*, 4 Munf. (Va.) 324; *Commissioner v. Ex'r of Robinson*, 1 Bailey Law (S. C.) 151.

<sup>29</sup> *Lathrop v. Masterson*, 44 Tex. 527.

<sup>30</sup> *Dillingham v. Jenkins*, 7 Smedes & Mar. (Miss.) 479. To same effect, see *McCabe v. Raney*, 32 Ind. 309. Holding that sureties can make no defense that could not be made by their principal, see *Bcone Co. v. Jones*, 54 Iowa 699.



the banking house and assets of the branch bank, the assets being described in the bill of sale, in accordance with the list of them furnished by M himself, which list was false, and comprised various bonds, bills and notes that did not exist. M gave his notes for the price, with the defendants as sureties, they as well as the plaintiffs being ignorant of the fraud of M. Afterwards M absconded, and his sureties claimed they were not bound because they became sureties on a sale, and their principal had not received the consideration thereof, and to hold them liable would be to make them liable for the defalcation of M, and not for a purchase made by him. The court held the sureties liable, and said that M could not set up want of consideration to defeat the sale, and the sureties were in no better position.<sup>81</sup> It is held that the surety of a tenant cannot set up as a defense damage to the premises, unless the principal is insolvent.<sup>82</sup>

**§ 466. When surety not discharged by false representation of third person.**—A new bond having been demanded of a state treasurer, certain sureties, before signing the same, inquired of the legislature and of the comptroller, and were falsely informed by each, that the treasurer had before conducted himself properly in office. Held, the legislature was the agent of the state in the premises and its representations bound the state, but it was otherwise with reference to the comptroller.<sup>83</sup> It has been held that the cashier of a bank ordinarily has no authority to discharge its debtors without payment, nor to bind the bank by an agreement that a surety shall not be called upon, or that he will have no further trouble about the debt, but that if the cashier informs the surety that the debt is paid, and the surety relies upon the statement, and is prejudiced thereby, he is discharged, because a cashier has authority to receive payment of debts due the bank and to give information concerning the same.<sup>84</sup> A party was properly arrested in a civil suit, and the sheriff falsely represented to him and to one who became his surety that unless he gave a note with surety he would have to go to jail and no bail would

<sup>81</sup> *Union Bank v. Beatty*, 10 La. Ann. 378.

<sup>83</sup> *Sooy ads. State*, 38 N. J. Law 324; *Sooy ads. State*, 39 N. J. Law

<sup>82</sup> *Morgan v. Smith*, 7 Hun (N. Y.) 244; affirmed in 70 N. Y. 537.

135.  
<sup>84</sup> *Bank v. Haskell*, 51 N. H. 116.



be taken. The principal and surety thereupon, relying upon such false representations, signed the note to procure the principal's release, but the money for which the note was given was in fact due the party who caused the arrest. Held, the surety was liable. The misrepresentations were concerning matters of law, and it did not appear the sheriff was authorized by the creditor to make them.<sup>35</sup> In an action against the guarantor of a contract for the purchase of pine lands, it was held no defense that the guarantor was induced to enter into the undertaking by the false and fraudulent representations of the agent of the vendor, and in which the vendor did not participate, as to the quantity of good, merchantable timber contained in the tract.<sup>36</sup> And it was held no defense to a surety on an administration bond that he signed under statements of the ordinary which may have been untrue.<sup>37</sup>

**§ 467. Miscellaneous cases holding surety discharged by non-compliance with the terms upon which he signed.**—The issuing of a writ of summons, although returned not served, is a suit brought, and will release the guarantor of a bond who has become bound in consideration of total forbearance.<sup>38</sup> A guarantor for goods to be sold on a credit of eighteen months is not liable if the sale is made on a credit of twelve months, even though the creditor wait six months longer.<sup>39</sup> So where A hired a slave from B for one year, and executed his note to B, with C as surety, for the price agreed to be paid, and the slave, without just cause, voluntarily returned to B before the year was out, and worked for him the remainder of the time, and A and B agreed that the note should be credited with the value of the services for the time the slave did not work for A, it was held that C was entirely discharged.<sup>40</sup> A purchaser of land having given two notes with

<sup>35</sup> Reed v. Sidener, 32 Ind. 373. Holding sureties on forthcoming bond discharged by false representation of constable that the property had been legally levied on, see Bradley v. Kesse, 5 Cold. (Tenn.) 223.

<sup>36</sup> Lumber Co. v. Buchtel, 101 U. S. 633.

<sup>37</sup> Brown v. Davenport, 76 Ga.

799. See further, when surety not discharged by misrepresentation, Shropshire v. Kennedy, 84 Ind. 111.

<sup>38</sup> Caldwell v. Heitshu, 9 Watts & Serg. (Pa.) 51.

<sup>39</sup> Bacon v. Chesney, 1 Starkie, 192.

<sup>40</sup> Hawkins v. Humble, 5 Cold. (Tenn.) 531.

surety for the purchase money, and entered into possession of the land, afterwards brought a suit in chancery to rescind the sale on the ground of fraud, and the sale was rescinded, and a decree made against the purchaser for a certain amount for use and occupation, but it was held that there could be no decree against the surety for the use and occupation.<sup>41</sup> A being indebted to B in more than 3,000l. agreed to take 1,500l. in full payment of the debt, and in consideration of this agreement C gave B a note for 150l. in part payment of the 1,500l. Afterwards A became bankrupt and B proved his full claim of more than 3,000l. against A's estate. Held, C was thereby discharged.<sup>42</sup> The indorser of a promissory note protested for non-payment signed an agreement reciting that the drawer was about making an arrangement with the holder for a renewal of the note, which was to be reduced from five to ten per cent. every sixty days, and consenting that the protested note should be held as collateral security, and that no advantage would be taken of any extension given. The holder received the agreement and extended the time without always exacting the stipulated reduction. Held, the indorser was thereby discharged.<sup>43</sup> A surety covenanted to pay certain advances made by the creditors to the principal on a specified day, or as soon as certain timber should be sold at Quebec. It was the evident intention from the contract that the timber should be conveyed to Quebec and there sold, the money being advanced to get the timber out. Before the appointed time arrived, and while the timber was being conveyed to Quebec, an agent of the creditors obtained from the principal a confession of judgment, and sued out execution thereon and sold the timber, which sold for more than it would have brought in Quebec. Held, the surety was absolutely discharged. The terms upon which he signed had not been complied with, and, whether benefited or injured, he was no longer liable on the contract.<sup>44</sup> But it has been held that a sale by a creditor of collateral securities placed in his hands by the

<sup>41</sup> Elliott v. Boaz, 13 Ala. 535.

by the creditor, see Smith v. Compton, 6 Cal. 24.

<sup>42</sup> Gillett v. Whitmarsh, 8 Adol. & Ell. (N. S.) 966. Holding that when the consideration for a guaranty is traversed it must be proved

<sup>43</sup> Dundas v. Sterling, 4 Pa. St. 73.

<sup>44</sup> Dickson v. McPherson, 3 Grant's Ch. App. 185.

principal, in violation of a stipulation for a particular notice of sale contained in the contract, under which they were pledged, does not per se discharge in toto a surety who is liable for the debt; but by such sale the creditor makes the securities his own to the extent of discharging the surety to an amount equal to their value.<sup>45</sup>

**§ 468. When surety discharged by fraud—Fraudulent misuse of partnership credit—Other cases.**—A creditor obtained the note of a principal by fraud, and this note was afterwards guaranteed by a third person. In a suit against the guarantor, it was held that he might show as defense to himself the fraud upon his principal. The court said that a person who obtained an obligation from the principal by fraud could not wipe out the fraud by obtaining a surety. "Personal defenses do not pass to others \* \* but defenses inherent in the thing, such as, among others, fraud and duress, are available as to sureties."<sup>46</sup> Where a guaranty for the payment of a debt in full was given by one not a creditor, pending negotiations for a composition, and the creditor then signed the composition deed, and part of the other creditors knew, and part did not know, the above facts, it was held that the guaranty was fraudulent as to the creditors who did not know the facts,

<sup>45</sup> Vose v. Florida R. R. Co., 50 N. Y. 369, followed in Dunn v. Parsons, 40 Hun (N. Y.) 77. Holding that a surety on a non-negotiable note payable to a bank is not liable if the note is discounted, and the proceeds diverted from the object intended by the surety, see Farmers' & Mechanics' Bank v. Hathaway, 36 Vt. 539. Holding that a guaranty covered a future, and not a past, indebtedness, see Pritchett v. Wilson, 39 Pa. St. 421. Holding that a note signed by a surety for one purpose cannot be diverted to another, see Lee v. Highland Bank, 2 Sandf. Ch. 311. Upon the subject of the discharge of a surety because another surety signed without his knowledge, see Taylor v. Johnson, 17 Ga. 521.

Y.) 166. But see Henry v. Daley, 17 Hun (N. Y.) 210, wherein it was held that in an action to recover the amount provided to be paid by a contract of sale brought by a vendor against the surety for the vendee, the surety could not counter-claim damages for a breach of warranty by the vendor, or set up that the contract was procured through fraud, as such defense was personal to the vendee. That it is a sufficient defense for the surety on a building contractor's bond, that his principal signed the contract, by reason of false representations as to the specifications, and repudiated it as soon as he discovered such falsity, see Macey, Henderson & Co. v. Heger, 195 Pa. St. 125, 45 Atl. Rep. 675.

<sup>46</sup> Putnam v. Schuyler, 4 Hun (N.

and void.<sup>47</sup> A creditor for a private debt due him by one member of a firm took a note to which the firm name was signed by such member without the knowledge or consent of the other partner. A surety signed the note, supposing it to be the note of the firm, and it was held that as the partner who did not sign the note was not bound, the surety who supposed he was becoming responsible for both partners was not bound.<sup>48</sup> The sureties on a bond given to secure the performance of a contract for the supply of rations for the troops of the United States, which provides "that all advances made for and on account of the supplies to be furnished pursuant" to the contract shall be duly accounted for, are not responsible for any balance of advances in the hands of the contractor at the expiration of the contract made to him, not on account of the particular contract exclusively, but on account of that and other contracts as a common fund for supplies, where accounts for the supplies, expenditures and funds had all been throughout blended indiscriminately by both parties, and no separate portion had been designated for this particular contract.<sup>49</sup> Where one partner is induced to become surety on the note of his co-partner under the belief that the proceeds are to be used for partnership purposes and the money is actually used in gambling, with the knowledge of the payee, he is not liable in a suit by the payee.<sup>50</sup> Fraud vitiates all

<sup>47</sup> *Coleman v. Waller*, 3 *Younge & Jer.* 212. For miscellaneous cases wherein surety held to be discharged by fraud, see *Anderson v. Bellenger*, 87 *Ala.* 334; *Conger v. Bean*, 58 *Iowa* 321; *Holliday v. Poole*, 77 *Ga.* 159. See, on this subject, also, *Burnap v. Robertson*, 75 *Ga.* 689; *Citizens' Bank v. Barnes*, 70 *Iowa* 412; *Shropshire v. Kennedy*, 84 *Ind.* 111.

<sup>48</sup> *Hagar v. Mounts*, 3 *Blackf. (Ind.)* 57. Holding that in such case the surety is bound if the note is under seal, see *Harter v. Moore*, 5 *Blackf. (Ind.)* 367.

<sup>49</sup> *United States v. Jones*, 8 *Pet.* 399. Holding that a surety on a note given for the pretended purchase money of goods is not liable

when there is in fact no sale, see *Trammell v. Swan*, 25 *Tex.* 473.

<sup>50</sup> In *Benson v. Dublin Warehouse Co.*, 99 *Ga.* 303, 25 *S. E. Rep.* 645, Fortson, as maker, and Benson, as endorser, of two promissory notes having been sued by the payee therein, Benson filed special pleas setting up that the notes were for money loaned by plaintiff to Fortson to enable him to speculate in "futures" in cotton, the money being in fact "placed" by the payee, the plaintiff. Held, that the trial court erred in striking the pleas from the record. Lumpkin, J., expressed the court's ruling in the following propositions: "1. Where a promissory note is executed by one person, and another,

parts of an inseparable contract.<sup>51</sup> Whether fraudulent acts of the officers of a corporation are the acts of the corporation, has been held a question of fact for the jury.<sup>52</sup>

who is not the payee and whose indorsement is neither essential nor proper to the transmission of title to the note, signs his name upon the back of it, he becomes liable thereon either as joint principal or as a surety, but does not, by thus signing his name, enter into such a contract of indorsement as will cut him off from setting up against the payee the defence that the note was founded upon an illegal consideration, and therefore void. 2. A promissory note given for money which had been advanced by the payee to the maker to be used 'as margins in speculating in cotton futures' and which the lender had, in fact, 'placed' for this purpose, is void; and its payment cannot, either as against a principal or a surety thereon, be enforced by suit. 3. Borrowing money to be used in speculating in 'cotton futures' is not within the scope of legitimate partnership business. Therefore, where a member of a partnership, without the knowledge of a co-partner, borrows money in the partnership name and uses it for this purpose and such co-partner, in ignorance of the truth, joins the other in executing to the lender a promissory note for such money, honestly believing that the note is being given in settlement of a lawful partnership debt, he is not liable on such note to the lender, if it be shown that the latter took the same with full knowledge of all the facts."

<sup>51</sup> *Morrison, Plummer & Co. v. Schlessinger*, 10 Ind. App. 665, 38 N. E. Rep. 493, in which case plaintiff corporation exacted from

its debtor a guaranty of payment in full of all past and future indebtedness to it as the price of its assent to a composition agreement by which other creditors, who had no notice of the arrangement, received but 33 1-3 cents on the dollar. Held, that the guaranty as to past indebtedness was void and as to future indebtedness was likewise void because the two parts of the contract rested upon the same consideration and were inseparable.

<sup>52</sup> *Fidelity and Deposit Co. v. Courtney*, 186 U. S. 342, 22 Sup. Ct. Rep. 833, 46 L. Ed. 1193, was an action by the receiver of the German National Bank of Louisville to recover on the fidelity bond of McKnight, its president, for an alleged defalcation exceeding \$18,000, and the chief defense was that defendant's cashier, in behalf of the bank, had certified to appellant that the president "had performed his duties in an acceptable and satisfactory manner, and we know of no reason why the guarantee bond should not be continued" when he knew that the president had kept the bank open evenings after banking hours and had procured the cashing of checks and notes, the proceeds of which were used to bribe aldermen. Held, that the trial court properly left it to the jury to determine whether or not "the bank" had knowledge of the alleged fraudulent purposes for which the money was drawn. If "the bank" had such knowledge and condoned the offense and concealed the facts from the surety, there could be no recovery on the bond. The court distinguished the case at bar from the *Schardt* case

§ 469. **Estoppel—Usury—Other cases holding surety not discharged.**—At the time a note was executed by principal and surety, the principal secretly agreed with the creditor to pay, and afterwards did pay, usurious interest, which was indorsed generally on the note as payment. Held, the surety was not discharged, because the agreement to pay usury was void, and in no way worsted the condition of the surety.<sup>1</sup> Where usury, which the principal had contracted to pay, was included in the amount for which a note on its face was given, it was held that an omission to disclose that fact to a surety would not discharge him.<sup>2</sup> Where a constable's bond was executed by certain sureties, upon the understanding that it should not bind them unless it should be executed by other named sureties, but the sureties who signed permitted the constable to act under the bond, which was never signed by the other sureties, it was held that the sureties who signed were estopped from denying their liability.<sup>3</sup> Where the name of P, one of several sureties, is affixed to a bond, under an authority which the other sureties have at the time an opportunity of examining, and all is done that was contemplated to render the bond effectual, they cannot, in the absence of fraud, claim exemption from liability because the authority is defective and insufficient to bind P. Having had an opportunity to examine the authority, they cannot be permitted to say they failed to do it.<sup>4</sup> A surety cannot resist

(Guarantee Co. of N. Y. v. Mechanics Bank, 183 U. S. 402), in which "all the information which had been held imputable to the bank had been communicated to the president of the bank," and affirmed a judgment against the surety company.

<sup>1</sup> Richmond v. Standclift, 14 Vt. 258; Davis v. Converse, 35 Vt. 503; Mitchell v. Cotten, Ex'r, 3 Fla. 134. To contrary effect, see Burks v. Wonterline, 6 Bush (Ky.) 20. Compare Morrison, Plummer & Co. v. Schlessinger, 10 Ind. App. 665, 38 N. E. Rep. 493, cited note 51, § 468. In Denton v. Butler, 99 Ga. 264, 25 S. E. Rep. 624, Spence gave his note

to the South Georgia Bank with Denton endorsing it as surety. It contained a waiver of homestead exemption and, without Denton's knowledge, provided for usurious interest. By statute, the usury made the waiver of homestead void and so, increasing the sureties risk, was held to release the surety.

<sup>2</sup> Samuel v. Withers, 16 Mo. 532. Holding that subsequent agreement by principal on foot of instrument to pay interest does not discharge surety, see Tremper v. Hemphill, 8 Leigh (Va.) 623.

<sup>3</sup> Robertson v. Coker, 11 Ala. 466; May v. Robertson, 13 Ala. 86.

<sup>4</sup> McLure v. Cloclough, 17 Ala. 89.



the payment of notes for the purchase money of land, upon the ground that the creditor has not paid a prior mortgage on the land which he has agreed to pay.<sup>5</sup>

§ 470. **Miscellaneous cases holding surety not discharged—Performance of principal's contract made impossible.**—A guarantor of a note cannot, in the absence of fraud upon him, show in defense of a suit on the guaranty that those who were sureties upon the note were discharged by the statute of limitations at the time he made the guaranty.<sup>6</sup> A bargained with B to remove a building, and C guarantied to pay for the removing, as follows: "If he does not pay you for so doing, I will see you paid, not to exceed \$200." A commenced to remove the building, but was, through the fault of B, stopped by the authorities, and the building was burned. Held, A might recover against C on the guaranty for the work which had been done.<sup>7</sup> A guaranty was as follows: "If you give A credit we will be responsible that his payments shall be regularly made." A had before been dealing with the creditor on credit, and after the guaranty was made a little longer credit was, at his request, given him; and these last credits were a little longer than the usual course of trade. Held, the guaranty was for a dealing on terms which should be agreed upon between the parties, and the guarantor was liable.<sup>8</sup> M as principal, and A, F and P as sureties, executed a promissory note to raise money to pay a note on which P was sole surety of M, and the note was delivered to P in order that he might get it discounted. Before getting the note discounted, P paid the debt on which he was sole surety

<sup>5</sup> Lyon v. Leavitt, 3 Ala. 430.

<sup>6</sup> Worcester Mech. Sav. Bank v. Hill, 113 Mass. 25.

<sup>7</sup> Mellen v. Nickerson, 12 Gray 445. In Vann v. Lunsford, 91 Ala. 576, 8 So. Rep. 719, Painter having agreed to remove a house from a lot, which Painter owned, to another lot which the purchaser owned, defendants, as sureties, signed a bond conditioned that Painter would perform his contract. Removal of the house was prevented by Lane, who held a mortgage on the ground where it stood

and refused to permit a removal unless a specified sum was paid on his mortgage. Held, that the sureties were not liable. The court said (p. 585) that to hold the obligors in the bond responsible for the loss sustained by reason of Lane's superior title would be placing a construction on the contract not authorized by its terms. For further illustration of the same principle see § 173, and notes.

<sup>8</sup> Simpson v. Manley, 2 Crompt. & Jer. 12; Id., 2 Tyrw. 86.



out of his own funds. Held, P was not then bound to cancel the note, nor surrender it to his co-sureties, but might thereafter use it as originally intended.<sup>9</sup>

§ 471. Conditions may be waived by the surety—If not waived performance must be averred and proved or excused.—It is perfectly clear that a surety may waive performance of the condition upon which he agreed to be bound.<sup>10</sup> But the principal cannot waive it for him without his consent. Defendants were sureties on a bond conditioned that their principals would convey certain land to plaintiff upon his paying them certain installments of the price at certain times. Plaintiff delayed paying an installment which was due Oct. 1, 1890, until Oct. 12, 1890, when it was accepted by the vendors. The obligatory part of the bond was made conditional on the performance by the vendees of their part of the contract. Held, that their failure to make the payment on the day stipulated discharged the sureties, and that the principals' subsequent acceptance of the money and waiver of their right of forfeiture did not renew their liability.<sup>11</sup> If it has not been waived, performance of a condition precedent to the surety's liability must be averred and proved before there can be a recovery against him.<sup>12</sup>

<sup>9</sup> Flanagan v. Post, 45 Vt. 246.

<sup>10</sup> Globe Savings & Loan Co. v. Employers Liability Assurance Corporation, 13 Manitoba Law Rep. 531.

<sup>11</sup> Coughran v. Bigelow, 164 U. S. 301, 41 L. Ed. 442, 17 Sup. Ct. Rep. 117.

<sup>12</sup> In Tyrer v. Chew, 7 App. Cas. (D. C.) 175, defendant Tyrer had bought certain land for the construction of a railroad and Chew had filed a bill in chancery to set aside the conveyance to him. To get rid of that litigation a contract was made between Tyrer and Chew by which Chew stipulated that a decree should be entered under which Tyrer should obtain title to the land and in consideration thereof Tyrer should give Chew his bond, with security, conditioned that if

the railroad should not be built within two years Tyrer would either reconvey the land or pay \$2,000. The road was never built and when a suit on the bond was tried it appeared that the decree stipulated for had never in fact been entered, though, it was argued, either party might have procured its entry at any time by exhibiting the contract. It was held that the entry of the decree was a condition precedent to a recovery on the bond, the performance of which condition it was necessary to aver and prove before the obligee could recover, and a judgment in favor of the obligee was therefore set aside. Citing Sergeant Williams' Note 3 to *Hol-dipp v. Otway*, 2 Saund. 108.

§ 472. **When surety discharged by concealment of material facts by individual or corporation obligee.**—If in the contract of suretyship there is any fraudulent concealment on the part of the obligee as to a material part of the transaction to induce the surety to become a party he is not bound. But, to be material, it must be a concealment of some fact or circumstance immediately affecting the liability of the surety, and bearing directly upon the particular transaction to which the suretyship attaches.<sup>13</sup> And in the case of a bank cashier, where the bond covered defaults prior as well as subsequent to its execution, it was held that concealment by the agents of the bank that its books had been badly kept, that no bonds had been previously given, and that the directors had been negligent, etc., did not discharge the surety, because he did not become responsible for those matters, and they were not material to the risk assumed. But knowledge that the cashier was a defaulter, and concealment of that fact, would discharge the surety.<sup>14</sup> In order that the surety may be discharged by the concealment of material facts, it must appear that the information was fraudulently withheld from him.<sup>15</sup> But it has been held that the mere non-communication by the creditor to the surety of material facts within the knowledge of the creditor which the surety should know, although not wilful or intentional on the part of the creditor, or with a view to any advan-

<sup>13</sup> In order that a failure to communicate a fact to a surety, in respect to the subject-matter of the proposed contract, should have the effect of a fraud upon him, and vitiate the contract, it must be a fact which necessarily must have the effect of increasing the responsibility of the surety or operating to the prejudice of his interest. *Comstock v. Gage*, 91 Ill. 328. See also *Fidelity & Deposit Co. v. Courtney*, 186 U. S. 342, 46 L. Ed. 1192, 22 Sup. Ct. Rep. 833, note 52, § 468.

<sup>14</sup> *Franklin Bank v. Stevens*, 39 Me. 532; *Sooy ads. State*, 39 N. J. Law (10 Vroom) 135, 539. As to what concealment will discharge a surety, see *Franklin Bank v. Cooper*,

36 Me. 179; *Taylor v. Lohman*, 74 Ind. 418; *Farmers' Nat. Bank v. Van Slyke*, 49 Hun (N. Y.) 7; *Corporation of the Village of Ganandque v. Stunden*, 1 Ont. (Can.) 1; *Davies v. London & Provincial Marine Ins. Co.*, Law Rep. 8 Ch. Div. 469. For an extended discussion and collation of authorities as to what misrepresentations or failures to disclose facts and circumstances by a creditor will release a security from his liability, see opinion of Green, P. J., in *Warren v. Branch*, 15 W. Va. 21, 26, et seq.

<sup>15</sup> *Municipal Corp. of East Zora v. Douglas*, 17 Grant's Ch. 462; *Peers v. Oxford*, 17 Grant's Ch. 472; *North British Ins. Co. v. Lloyd*, 10 Wels., Hurl. & Gor. 523.

tage to himself, will discharge the surety. The fraud on the surety consists in the situation in which he is placed, and not on what is passing in the mind of the creditor.<sup>16</sup> It has been held that, where a creditor is about to take a note with a surety from a principal whom he knows to be insolvent, the mere fact that the creditor does not voluntarily and without solicitation announce to the proposed surety the insolvency of the principal will not release the surety, although if the surety had applied to the creditor and been misinformed it would have been otherwise. The court said: "The creditor in such case may suppose that the proposed surety is as well advised of the pecuniary condition of the principal as he is himself, and, knowing his condition, is willing to help him by becoming his surety."<sup>17</sup> A corporation obligee, no less than an individual obligee, may release a surety by fraudulent concealment of material facts or by other misconduct.<sup>18</sup>

<sup>16</sup> *Railton v. Mathews*, 10 Cl. & Finn. 934. But see *Niagara District Fruit Growers' Stock Co. v. Walker*, 26 Can. Sup. Ct. 629, in which case Stewart was appointed selling agent of plaintiff in 1891, 1892, 1893 and 1894, for seven months, beginning July 20 each year. He gave a separate bond on each occasion, always with the same surety. At the signing of the 1894 bond he was in default to the knowledge of plaintiff, his employer. It was held, reversing 23 Ont. App. Rep. 681, that the employer was under no obligation to disclose the fact of such default to the surety and that the surety for 1894 was liable for embezzlements occurring during that year. Citing *Wythes v. Labouchere*, 3 DeG. & I. 593; *Hamilton v. Watson*, 12 Cl. & F. 109; *Roper v. Cox*, 10 L. R. Irish 200; *Home Insurance Co. v. Holway*, 55 Iowa 571, S. C. 39 Am. Rep. 179, and note at 186; *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85. Compare notes to the following section.

<sup>17</sup> *Ham v. Greve*, 34 Ind. 18, per Worden, J. To a contrary effect, see *Small v. Currie*, 2 Drewry 102. In *Roper v. Sangamon Lodge No. 6*, 91 Ill. 518, it is held that if a person, knowing another to be utterly insolvent, propose to credit him if he will procure sureties, he is not guilty of fraud by failure to inform the surety of the insolvency of his principal; otherwise if he use any artifice to throw the surety off his guard or deceive him.

<sup>18</sup> In *Connecticut General Life Ins. Co. v. Chase*, 72 Vt. 176, 47 Atl. Rep. 725, plaintiff's superintendent of agencies was allowed to make good a shortage in his accounts and was continued in his employment upon condition of giving a new bond. Held, that if the sureties were allowed to sign the new bond in ignorance of the previous misconduct of their principal, they were not liable on the bond. Citing *Sooy v. State*, 39 N. J. Law 136, *supra*. See also *Saint v. Wheeler & Wilson Mfg. Co.*, 95 Ala. 362, 10 So. Rep. 539; *Taylor v.*

**§ 473. The same, continued—Cases holding creditor under no obligation to disclose facts without inquiry by surety.**—A party who is about to take a bond of indemnity from a surety is not obliged to explain to him the meaning or effect of the bond, unless inquiry is made of him. If he in any manner mislead the surety as to the effect of the bond, or has reason to believe he is laboring under a mistake as to its effect, and does not correct it, equity will prevent advantage being taken of any bond so procured. But when none of these things exist, and

Bank of Kentucky, 2 J. J. Marsh (Ky.) 564, both cited in note 49, § 478; First National Bank of Nashville v. United States Fidelity & Guaranty Co., Tenn., July, 1903, 75 S. W. Rep. 1076. In National Bank of Asheville v. Fidelity & Casualty Co., 89 Fed. Rep. 819, 32 C. C. A. 355, 61 U. S. App. 506, the president of plaintiff bank, knowing that his cashier had left town and that \$5,000 of the bank's money was missing, without disclosing those facts, paid the premium and obtained from defendant a renewal of the cashier's fidelity bond from a date prior to his departure. Held, that the jury were justified in finding a verdict discharging the surety. The court said that though, in this class of bonds, the surety is not discharged because the employer might, by the exercise of diligence, have known the state of his accounts, or might, with more care, have sooner discovered the dishonesty or prevented the loss, yet his concealment of facts which would lead a reasonable man to the conclusion that the cashier was a defaulter or his concealment of strongly suspicious facts which would lead a reasonable man to make inquiries or look at entries which would at once disclose the defalcation, would discharge the surety if such concealment was made with the fraudulent intent to

induce the surety to enter the suretyship. In Frank Fehr Brewing Co. v. Mullican, Ky., Feb., 1902, no off'l report, 66 S. W. Rep. 627, 23 Ky. Law Rep. 2100,—in July, 1898, defendants became sureties for a beer salesman. Four months later their principal, being in default \$1,661.36, to secure payment thereof, assigned to the brewery a nearly paid life insurance policy for \$3,000. Five weeks later the brewery, answering an inquiry of the sureties, informed them that their principal owed only for his last shipment, \$291.50, and "shipment gone forward to-day, \$167," and said, "we feel that everything is O. K." Held, that the sureties were released. Citing Burks v. Wonterline, 69 Ky. 20; Groves v. Lebanon National Bank, 73 Ky. 23, 19 Am. Rep. 50; Connecticut Mutual Life Insurance Co. v. Scott, 81 Ky. 540; First National Bank of Stanford v. Mattingly, 92 Ky. 650, 18 S. W. Rep. 940; Belleville Building & Loan Association v. Jeckel, 104 Ky. 159, 46 S. W. Rep. 482; Franklin Bank v. Cooper, 36 Maine 179, supra, per Shepley, C. J., in which case the president and part of the directors of plaintiff bank, knowing of a deficiency in the cashier's accounts, accepted defendant's intestate as a surety on his bond without disclosing the existence of such deficiency. Held,

the surety has an opportunity to examine the bond and submit it to counsel, he cannot escape responsibility by the fact that the obligee did not explain it to him.<sup>19</sup> An obligation to a banker by a third party to be responsible for a cash credit to be given one of the banker's customers is not avoided by the fact that immediately after the execution of the obligation the cash credit is employed to pay off an old debt due the banker, and this though it was the intention so to apply it when the surety became bound, and this intention was not communicated to him, he making no inquiry. The court said that a surety is not entitled, without inquiry, to be informed of all previous dealings between the creditor and principal, "because no bankers would rest satisfied that they had a security for the advance they made if, as it is contended, it is essentially necessary that everything should be disclosed by the creditor that it is material for the surety to know." The test as to whether the disclosure should be made voluntarily is, "whether there be a contract between the debtor and the creditor to the effect that his position shall be different from that which the surety might naturally expect."<sup>20</sup> Where it was agreed between principal and creditor that a guaranty for part of the debt should

that the surety was not bound. In *American Surety Co. v. Pauly*, 170 U. S. 133, at 150, 155, 42 L. Ed. 977, 18 Sup. Ct. Rep. 552, this case is distinguished from the case of the president of a national bank who falsely certifies to the good character of its cashier and thereby procures an incorporated surety company to become surety on his bond so that the president and cashier might work together to defraud the bank. In that case the representations by the president were held not to be the representations of the bank and the surety was held liable. See § 479, note.

<sup>19</sup> *Small v. Currie*, 2 Drewry 102. To similar effect, see *Wythes v. Labouchere*, 3 De Gex & J. 593. The liability of sureties is held not affected by any verbal representations as to the contents or effect of

an instrument when they have had full opportunity to see and judge for themselves: *McCormick v. Hubbell*, 4 Mont. 87. Where there has been no misrepresentation or concealment on the part of the obligee as to any fact that it was important for the sureties to know, held no defense that they were ignorant of the extent of the obligation assumed. It was their duty to inquire before assuming the obligation: *Phoenix Mut. Life Ins. Co. v. Holloway*, 51 Conn. 310.

<sup>20</sup> *Hamilton v. Watson*, 12 Cl. & Finn. 109, per Lord Campbell. Compare *Fassnacht v. Emsing Gagen Co.*, 18 Ind. App. 80, 46 N. E. Rep. 45, in which case it was held a sufficient defense by a surety on a note that the payee had included in it a pre-existing debt of the principal and represented to the surety

be surrendered upon a new guaranty being executed, and this fact was not communicated to the party signing the new guaranty, it was held that he was not thereby discharged. The court said that the concealment, in order to discharge the guarantor, must be fraudulent. If it were otherwise, "it would be indispensably necessary for the bankers to whom the security is to be given to state how the account has been kept, whether the debtor was punctual in his dealings, whether he performed his promises in an honorable manner; for all these things are extremely material for the surety to know. But unless questions be particularly put by the surety to gain this information, \* \* it is quite unnecessary for the creditor to whom the suretyship is given to make any such disclosure."<sup>21</sup> Where a guaranty in terms covered present as well as future indebtedness and no inquiry was made, held that the creditor was under no obligation to disclose an existing indebtedness.<sup>22</sup>

**§ 474. When surety discharged by concealment of material facts.**—It has been held that "one who becomes surety for another must ordinarily be presumed to do so upon the belief that the transaction between the principal parties is one occurring in the usual course of business of that description, subjecting him only to the ordinary risks attending it, and the party to whom he becomes a surety must be presumed to know that such will be his understanding, and that he will act upon it unless he is informed that there are extraordinary circumstances affecting the risk. To receive a surety known to be acting upon the belief that there are no unusual circumstances

that the note was to secure payment for goods sold to the principal at the time of its execution.

<sup>21</sup> *North British Ins. Co. v. Lloyd*, 10 Exch. 523, per Pollock, C. B.

<sup>22</sup> In *New York Life Insurance Co. v. Macomber*, 169 Mass. 580, 48 N. E. Rep. 776, an insurance agent's bond was in terms conditioned for the payment of present as well as future indebtedness. The insurance company "knew or had the means of knowing" that he was indebted to it at the time of the execution of the bond. The surety made no inquiry. Held, the surety

was not released because of the fact that the principal was indebted to the obligee when the bond was executed. The court, Holmes, J., said, "The case is not within the judgment of the majority in *Lee v. Jones*, 17 C. B. (N. S.) 482, even if the plaintiff's knowledge would have been material, which is open to question as the bond expressly contemplates a present debt." Citing: *Wilmington, Columbia & Augusta R. R. v. Ling*, 18 So. Car. 116, 122; *Watertown Insurance Co. v. Simmons*, 131 Mass. 85.



by which his risk will be materially increased, well knowing that there are such circumstances, and having an opportunity to make them known, and withholding them, must be regarded as a legal fraud, by which the surety will be relieved from his contract.''<sup>23</sup> It was agreed between the vendors and the vendee of iron that the latter should pay 10s. per ton beyond the market price, which sum was to be applied in liquidation of an old debt due to one of the vendors. The payment for the goods was guaranteed by a third person, but the bargain between the parties was not communicated to him, and it was held that this was a fraud upon him which relieved him from liability.<sup>24</sup> If there is a secret valid agreement between the creditor who is selling property and the buyer, whereby a longer time is to be given than that mentioned in the contract seen and signed by the sureties, and such agreement is concealed from the sureties, they will be thereby discharged.<sup>25</sup> It was agreed between a creditor and principal debtor, as a condition to the creditor signing a composition deed of the principal, that the principal should assume and include in the indebtedness, which was the basis of the compromise, a debt due the creditor from another party, for which the principal was not liable, and that he should give his notes, which he did, for the balance of the debt not covered by the composition notes. This arrangement was concealed from a surety who indorsed the composition notes. Held, he was not liable upon such indorsement. The court said: "It is a clear and well settled principle that a security given by a surety is voidable on the ground of fraud, if there is, with the knowledge or assent of the creditor, such a misrepresentation to, or concealment from, the surety of the transaction between the creditor and his debtor, that but for the same having taken place, either the suretyship would not have been entered into at all, or, being entered into, the extent of the surety's liability might be thereby increased.''<sup>26</sup> Where, before the bond of a bank cashier was entered into, the officers of the bank knew that the cashier had lost money at gambling, and required a larger bond from him in consequence, and did not communicate these facts to the surety, it was held that the

<sup>23</sup> *Franklin Bank v. Cooper*, 36 Me. 179, per Shepley, C. J.

<sup>25</sup> *Peck v. Druett's Adm'r*, 9 Dana (Ky.) 486.

<sup>24</sup> *Pidcock v. Bishop*, 3 Barn. & Cress. 605; *Id.*, 5 Dow. & Ry. 505.

<sup>26</sup> *Doughty v. Savage*, 28 Conn. 146, per Storrs, C. J.



surety was not thereby discharged. The court said: "In this case the undisclosed information related not to the business which was the subject of the suretyship, and not to the conduct of the cashier as cashier, but to his general character. It did not follow that because he gambled he would fail in his duty as cashier."<sup>27</sup>

**§ 475. When surety discharged by concealment of material facts—Miscellaneous cases.**—Concealment or failure to disclose has been held to be fraudulent only when it is the duty of the person having knowledge of the facts to disclose them.<sup>28</sup> Where a company failed to disclose a material fact which directly affected the liability of a surety on the bond of the secretary of the company, and which fact it was the duty of the company to disclose, held a fraud upon the surety which discharged him.<sup>29</sup> And when security is required from one who is known to the obligee to be dishonest, it is held to be

<sup>27</sup> *Atlas Bank v. Brownell*, 9 R. I. 168, per Potter, J. See, also, *La Rose v. The Logansport Nat. Bank*, 102 Ind. 332, and also *Home Ins. Co. v. Holway*, 55 Iowa 571, wherein it was held that the fact that an insurance company did not notify the sureties who signed the bond of an agent that such agent had been delinquent in making remittances under a former agency did not release the sureties from liability. It should be observed in this case, however, that the sureties became such at the request of the agent and without the solicitation or knowledge of the company, See *Phoenix Ins. Co. v. Findley*, 59 Iowa 591. In *Connecticut Gen'l Life Ins. Co. v. Chase*, 72 Vt. 176, 47 Atl. Rep. 825, 53 L. R. A. 510, the evidence failed to show whether the surety had knowledge of an arrangement by which the principal was retained in the obligee's employment and given time to make up a shortage and the case was re-

versed pro forma so that evidence might be taken upon that point.

<sup>28</sup> *Domestic Sewing Machine Co. v. Jackson*, 15 B. J. Lea (Tenn.) 418. But the mere non-communication of material facts held not to vitiate a contract of guaranty unless it be fraudulent. *Roper v. Cox*, Law Rep. Irish (10 Q. B., C. P. and Ex. Div.) 200. In this case the surety on a guaranty for the payment of rent pleaded that at the date of the guaranty his principal was indebted in a large sum for arrears of rent of which he (the surety) was ignorant; that the plaintiff did not, prior to the guaranty, communicate to him these facts, but concealed them; and that had they been communicated he would not have executed the guaranty. Held, the plea was bad on demurrer.

<sup>29</sup> *Harrison v. Lumbermen & Mechanics' Ins. Co.*, 8 Mo. App. 37. To like effect, see *Home Savings Bank v. Traube*, 6 Mo. App. 221.

his duty to so inform the surety.<sup>30</sup> Where a sewing machine agent executed a bond with surety to the company, conditioned to cover any indebtedness existing at the date of the bond, or which might thereafter be incurred, and it appeared that the surety made no inquiry of the company to ascertain the origin, nature and extent of the agent's indebtedness before executing the bond, and the company made no disclosures, held that, in the absence of fraud, the surety was not exonerated from liability for a default occurring under the bond because the company failed to inform him of the agent's default prior to the execution of the bond.<sup>31</sup> In an action by a railroad company against the sureties on the bond of a station agent, who was in arrears to the company when the bond was executed, and who continued to default in several subsequent settlements, held, no error in instructing the jury "that if the plaintiffs knew when the bond was given that their agent was in default and indebted to them in his pre-existing agency, and yet concealed this fact, and held him out to the sureties as trustworthy, either expressly or impliedly, such conduct would be a fraud upon the sureties and would make void the bond as to them."<sup>32</sup>

**§ 476. When surety discharged by concealment of fact that principal is a defaulter—Bank statement as representation to surety.**—If the party who takes a bond for the conduct of the principal in an employment knows at the time that the principal is then a defaulter in said employment and conceals the fact from the surety, such concealment is a fraud upon the

<sup>30</sup> *Screwmen's Benevolent Ass'n v. Smith*, 70 Tex. 168. The duty of disclosing information to a surety who seeks the same as to a contemplated liability extends to every material fact within the knowledge of the obligee, and if he conceals any facts which, if known, would have deterred the surety from assuming the liability, held to be a fraud. *Remington Sewing Machine Co. v. Kezertee*, 49 Wis. 409.

<sup>31</sup> *Howe Machine Co. v. Farrington*, 82 N. Y. 121.

<sup>32</sup> *Wilmington, Columbia & Augusta R. R. Co. v. Ling*, 18 S. C.

116. In *John A. Tolman Co. v. Butt*, Wis., Feb., 1903, 93 N. W. Rep. 548, a traveling salesman was in default to plaintiff \$1,600, when defendant became guarantor of his fidelity. He afterwards increased his default \$1,200. Held, that evidence of the earlier default was not admissible in a suit upon the guaranty in the absence of any showing that the guarantor "was induced to sign the guaranty by reason of any fraud, misrepresentation or deceit on the part of the plaintiff," the obligee.

surety and discharges him.<sup>33</sup> But where the officers of a bank knew that a teller, while in the employ of another bank, had been suspected of embezzlement, and did not inform the surety of such teller of this fact, who signed in ignorance thereof, it was held that he was not thereby discharged. The court said that, being a mere rumor, it need not be communicated, but it would have been different if the charge had assumed positive criminal form.<sup>34</sup> The teller of a bank was a defaulter at the time sureties entered into a new bond for the faithful performance of his duties, but the bank did not know the fact and did not practice any wilful concealment on the surety. Held, the surety was not discharged, though the court said that if the surety had requested the bank to examine the account, or if the bank had made any false representations on which the surety relied, it would have been different.<sup>35</sup> The same thing was held in a similar case where the officers of the bank had been grossly negligent in discovering frauds committed by a book-keeper who was afterwards promoted to the office of cashier and gave bond with surety for his good behavior as such.<sup>36</sup> An agent for the sale of coal on commission, who by agreement was bound to turn over his receipts to his employers within a specified time, was largely in arrear and was re-

<sup>33</sup> Franklin Bank v. Cooper, 39 Me. 542; Cashin v. Perth, 7 Grant's Ch. & App. Rep. 340; Smith v. Bank of Scotland, 1 Dow 272; Third Nat. Bank v. Owen, 101 Mo. 558; Wilmington, Columbia & Augusta R. R. Co. v. Ling, 18 S. C. 116; Drabek v. Grand Lodge, 24 Ill. App. 82; Guardian Fire & Life Assurance Co. v. Thompson, 68 Cal. 208; State v. Dunn, 11 La. Ann. 549; Sooy ads. State, 39 N. J. Law (10 Vroom) 135; State v. Rushing, 17 Fla. 226; Frownfelter v. State, 66 Md. 80; Howe Sewing Machine Co. v. Farrington, 82 N. Y. 121; Home Ins. Co. v. Holway, 55 Iowa 571; Bourne v. Mount Holly Nat. Bank, 45 N. J. Law 360. See on this subject, Roper v. Trustees Sangamon Lodge, No. 6, 91 Ill. 518, and Cawley v. People, 95 Ill. 249. Contra,

Aetna Life Ins. Co. v. Mabbett, 18 Wis. 667.

<sup>34</sup> State v. Atherton, 40 Mo. 209. A failure to disclose to sureties a previous indebtedness of their principal, when not requested to do so, held no evidence of fraud. Domestic Sewing Machine Co. v. Jackson, 15 B. J. Lea (Tenn.) 418.

<sup>35</sup> Wayne v. Commercial National Bank, 52 Pa. St. 343. See, also, to similar effect, Connecticut Mutual Life Ins. Co. v. Scott, 81 Ky. 540.

<sup>36</sup> Tapley v. Martin, 116 Mass. 275. To precisely similar effect, see Bostwick v. Van Voorhis, 91 N. Y. 353. Negligence of directors of a bank in failing to discover a defalcation of their bookkeeper, held no defense to an action on the bond in Chew v. Ellingwood, 86 Md. 260.

quired by his employers to find security, and a surety became bound for him to the extent of £100.. The agreement of suretyship recited the terms of dealing between the employer and the agent, but the fact of the indebtedness was concealed from the surety. Held, the surety was discharged on the ground that under the circumstances the recitals in the agreement amounted to an active misrepresentation.<sup>37</sup> The cashier of a bank, not having executed a bond, was guilty of fraud and embezzlement of the funds of the bank, the discovery of which might have been easily effected by the use of slight diligence on the part of the directors. They however published, in accordance with law, a statement of the condition of the bank, from which it appeared that its affairs were being prudently and honestly administered, and from which the public had a right to believe the cashier was trustworthy. Afterwards certain persons who had seen the report became sureties on the official bond of the cashier and were sought to be charged thereon for his subsequent embezzlements. Held, the sureties had a right to believe that the directors, before publishing the statement, investigated the condition of the bank, and being misled by the misrepresentations of the published statement they were released. The court said that a fraud may be perpetrated as well by the assertion of facts that do not exist, ignorantly made by one whom the person acting upon the assertion has a right to suppose has used reasonable diligence to inform himself, as by concealing facts known to exist, which in equity and good conscience ought to be made known.<sup>38</sup>

<sup>37</sup> Lee v. Jones, 14 J. Scott (N. S.) 386; Id., 17 J. Scott (N. S.) 482.

<sup>38</sup> Graves v. Lebanon Nat. Bank, 10 Bush (Ky.) 23. In Lieberman v. First Natl. Bank, 2 Pennewill (Del.) 416, 45 Atl. Rep. 901, the cashier of defendant bank told plaintiff that the teller, who had requested plaintiff to sign his official bond as teller, was a good, reliable, honest man and as paying teller could not take anything, though in fact the teller was at that time an embezzler of the bank's money to the extent of \$4,000, which fact was

unknown to all parties except the teller, and the bank's report, made pursuant to act of congress and sworn to by the cashier, was in fact false in that it failed to show such embezzlement. It was held that the bank was not bound by the cashier's representations, as to the teller's honesty, since it was no part of his duty as cashier to make such statements. Held also, disapproving Graves v. Lebanon National Bank, 10 Bush (Ky.), 23, and following Ashuelot Savings Bank v. Albee, 63 N. H. 152, that the fact that the report was false

**§ 477. Continuing servant in employ after dishonesty discovered—Negligence in discovering default—Notice of default.**—Where there is a continuing guaranty for the honesty of a servant, if a master discovers that the servant has been guilty of dishonesty in the course of the service, and, instead of dismissing continued him in such service without the knowledge or consent of the guarantor, express or implied, he cannot afterwards have recourse to the guarantor to make good any loss which may arise from the dishonesty of the servant during the subsequent service. If the dishonesty had existed before the surety became bound, and the master had concealed it, the surety would not have been liable, and the cases are the same in principle. Moreover, upon discovering the dishonesty, the master had a right to discharge the servant, but by continuing him in the service he lost that right.<sup>39</sup> But it has been held

did not release the surety because such report was not owed to persons considering the question of becoming sureties for the bank's officers, but was made because it was required by statute for the benefit of depositors.

<sup>39</sup> *Phillips v. Foxall*, Law Rep. 7 Q. B. 666; *Sanderson v. Aston*, Law Rep. 8 Exch. 73. The supreme court of Massachusetts in *Watertown Fire Ins. Co. v. Simmons*, 131 Mass. 85, do not agree with the decision in *Sanderson v. Aston*, *infra*, regarding it as in conflict with the general current of authority. The same general effect as the text, see *Enright v. Falvey*, Law Rep. Irish (4 Q. B., C. P. and Ex. Div.) 397; *Roberts v. Donovan*, 70 Cal. 108; *Connecticut Mut. Life Ins. Co. v. Scott*, 81 Ky. 540. Where a municipality became aware of the municipal treasurer's defalcation, but nevertheless continued him in office, it was held the municipality had no recourse against the sureties on his bond. *Corp. of Adjala v. McElroy*, 9 Ont. (Can.) 580. But in *Byrne v. Muzio*, Law Rep. Irish

(8 Q. B., C. P. and Ex.) 396, it was held that the omission of the collector-general of Dublin to suspend a collector of rates, after knowledge of fraud and dishonesty on his part during his service, was not a defense to an action on the guaranty by the sureties, because the doctrine of *Phillips v. Foxall* was inapplicable to a guaranty for the fidelity of an officer appointed and removable by the lord lieutenant; and because the omission to exercise a power of suspension, as distinguished from a power of dismissal, did not terminate the liability of the sureties. See a further discussion on the question of the guaranty of the fidelity of an employee, and the cases of *Phillips v. Foxall* and *Sanderson v. Aston*, *infra*, in *Fearnley v. London Guaranty & Accident Ins. Co.*, Irish Law Rep. (6 Q. B., C. P. and Ex. Div.) 219. In *The Queen v. Black*, 6 Exchq. Rep. of Can. 236 (1899) it was held that fraud cannot be imputed to the crown and that therefore the doctrine of *Phillips v. Foxall*, L. R. 7 Q. B. 666, is not

that the sureties on a bond given to an employer, conditioned that his employee will faithfully account for all moneys and property of the employer coming to his hands, are not discharged from subsequent liability by an omission on the part of the employer to notify them of a default on the part of the employee known to the employer, and a continuance of the employment after such default, if the default was not occasioned by the fraud or dishonesty of the employee. The court, however, intimated that it would have been different if the default had been occasioned by the fraud or dishonesty of the employee.<sup>40</sup> It has been held that the sureties on the bond of a deputy-sheriff are not discharged by the fact that, before the breach complained of, they notified the obligee of the deputy's unfitness for office, and requested his removal, which request was not complied with.<sup>41</sup> The mere fact that the obligee does not promptly notify the surety of a default of the principal

applicable in a suit upon the official bond of a defaulting postmaster. In *British Empire, etc., Assurance Co. v. Luxton*, 9 Manitoba Law Rep. 169, the surety's plea was held good on demurrer, that while the insured agent was acting and before the defaults complained of, the agent had committed during his service divers other defaults of the same kind and for which the employer might lawfully have dismissed him, yet plaintiff, well knowing thereof, omitted to inform defendant thereof and continued the agent in the service, and that the defaults complained of were committed during such continuance. Citing, *Byrne v. Muzio*, 8 L. R. Ir. 410; *Township of Adjala v. McElroy*, 9 Ont. Rep. 580. In the same case a plea was held bad that plaintiff's agent had before the default in question omitted to notify defendant of such other defaults. The court said that the previous defaults might have been trifling, and, besides, the obligee is not

necessarily bound to communicate to the surety every fact material to the risk; non-communication must occur under such circumstances as to be fraudulent towards the surety. Citing *North British, etc. Ins. Co. v. Lloyd*, 10 Ex. 523. In *Anaheim Union Water Co. v. Parker*, 101 Calif. 483, at 494, 35 Pac. Rep. 1048, an action on the official bond of the secretary of plaintiff corporation, the court reversing a judgment against the sureties on other grounds, said (p. 494) that the sureties were not released by the fact that the officers of the company, at the time of taking the bond, "had reason to know and believe" that the secretary was, at that time, in default in his payments to the treasurer of the company, and failed to communicate that fact to the sureties, "unless there was fraud—an actual attempt to conceal, or culpable negligence."

<sup>40</sup> *Atlantic and Pacific Telegraph Co. v. Barnes*, 64 N. Y. 385.

<sup>41</sup> *Crane v. Newell*, 2 Pick. 612.



in an employment is not such a concealment as will discharge the surety from liability for such default. "Mere passiveness on the part of the creditor in not enforcing his remedy will not of itself discharge the surety, nor will failure or neglect to give notice to the surety of the principal's defalcation have that effect."<sup>42</sup> Where a clerk embezzled his employer's money, and the employer did not notify the clerk's surety of such embezzlement for three years, it was held the surety was not thereby discharged from liability for such embezzlement, at least if the surety was acquainted with the circumstances from any other quarter, and if the employer did not industriously conceal it from him."<sup>43</sup> The mere negligence of the officers of a bank in examining or checking the accounts of a clerk or cashier does not amount to a fraud or concealment, and will not discharge his surety.<sup>44</sup> If the president of a bank gives a certificate to one of his clerks on dismissing him from service expressing his satisfaction with the clerk's good conduct, it does not discharge the sureties of such clerk who have not been prejudiced thereby, if it is afterwards discovered that before the giving of such certificate the clerk had been guilty of embezzlement.<sup>45</sup>

**§ 478. Same continued—Liability of surety where corporation obligee allows principal's default to continue and increase without notice to surety.**—Where the employer of a clerk or other agent takes from another a bond of indemnity, the employer is held to impliedly stipulate that he will not knowingly retain such clerk or agent in his employ after a breach of the guaranty justifying his discharge, and if he retains him after such breach the surety will be exonerated.<sup>46</sup> Or if he knows that such clerk or agent has been a defaulter and knowingly holds him out as a trustworthy person, he can have no recourse

<sup>42</sup> Pickering v. Day, 3 Houston (Del.) 474, per Gilpin, C. J.; Planters' Bank v. Lamkin, B. M. Charlton (Ga.) 29.

<sup>43</sup> Peel v. Tatlock, 1 Bos. & Pul. 419.

<sup>44</sup> Black v. The Ottoman Bank, 15 Moore's Priv. Coun. Cas. 472; Atlas Bank v. Brownell, 9 R. I. 168. In Williams v. Lyman, 88 Fed. Rep. 237, 31 C. C. A. 511, 60 U. S.

App. 25, it was held that the negligence of the obligee, a revenue collector, in examining the accounts of his deputy, the principal, until his embezzlements amounted to \$8,000 did not affect the liability of the surety.

<sup>45</sup> Union Bank v. Forstall, 6 La. (Curry) 211.

<sup>46</sup> Estate of Rapp v. The Phoenix Ins. Co., 113 Ill. 390.

against a surety or guarantor who became such in ignorance of the facts.<sup>47</sup> An agent of an insurance company gave bond to the company conditioned for the faithful performance of his duties as agent. The by-laws of the company required that agents should render monthly accounts and pay over balances due the company. After a certain time the agent's indebtedness to the company increased from month to month until it exceeded the penal sum in the bond, when for the first time the sureties were notified. Held, they were not discharged.<sup>48</sup> A freight and ticket agent gave bond with sureties. A rule of the company was that he should settle monthly, but there was no rule that freight and tickets should be paid for in cash. The agent, however, gave credit for freight, which was known to the president of the company. He did not settle his accounts promptly and the deficit continued until he was discharged. In an action against his sureties, held, they were not released from liability even though the company's officers had knowledge of the default, and of which they had no notice.<sup>49</sup>

<sup>47</sup> *Dinsmore v. Tidball*, 34 Ohio St. 411; *Smith v. Josselyn*, 40 Ohio St. 409.

<sup>48</sup> *Watertown Ins. Co. v. Simmonds*, 131 Mass. 85. In *Wilkinson v. Crescent Insurance Co.*, 64 Ark. 80, 40 S. W. Rep. 465, an insurance agent whose contract required him to make monthly reports and remittances, was allowed to remain in arrears from October, 1891, to January, 1894, with full knowledge by his company but no notice to the sureties on his bond. Held, that the sureties on the bond were liable nevertheless. "The inaction of the creditor," said the court, "will not discharge the surety unless it amounts to fraud or concealment, for the surety is bound to inquire for himself \* \* \*" following *Watertown Ins. Co. v. Simmonds*, 131 Mass. 85 supra.

<sup>49</sup> *Richmond & Petersburg R. R. Co. v. Kasey*, 30 Gratt. (Va.) 218. In this connection Mr. L. M. Ackley, editor of this edition, submits

the following suggestions: If an employer retains an employe in the service after knowledge of his dishonesty, and without notice to the sureties on a bond guaranteeing his fidelity, such retention is a fraud on the sureties and discharges them from liability as to all defalcations occurring subsequent to the time when such knowledge reached the employer. *Phillips v. Foxall*, Law Rep., 7 Q. B. 666, is the leading case on this point. It has been held that this doctrine has no application to municipal corporations, on grounds of public policy. *Campbell v. People*, 154 Ill. 595, 39 N. E. Rep. 578, affirming 52 Ill. App. 338, and cases there cited; *People v. Treadway*, 17 Mich. 480; *Armington v. State*, 45 Ind. 10; *Crickett v. State*, 18 Ohio St. 9; *Horan v. People*, 10 Ill. App. 21; *People v. Foster*, 133 Ill. 496, 23 N. E. Rep. 615, reversing 29 Ill. App. 208. Though it was applied to a municipal corporation in the case of New-

**§ 479. When surety of employee of corporation not discharged because by-laws of corporation not complied with.—**  
The by-laws of a corporation requiring accounts or statements

ark v. Stout, 52 N. J. Law 35, at page 53, where the court held that a plea by sureties on a defaulting city treasurer's bond that "the city, and not any officer or department of the city government, contriving and intending to injure the defendants by wilfully neglecting to examine the treasurer's accounts annually, as was their legal duty, and otherwise, permitted, encouraged, induced and were privy to the alleged breach," was good as being, in substance, an allegation that the obligee in the bond intentionally brought about the breach—following Mayor etc. of Newark v. Dickerson, 16 Vroom. (N. J.) 38. The authorities differ as to whether the doctrine of Phillips v. Foxall applies to private corporations. A leading case to the effect that it does not is Pittsburgh, Fort Wayne & Chicago R. R. Co. v. Shaeffer, 59 Pa. St. 356 (1868), which was debt on a railway cashier's fidelity bond. The sureties showed that, in May, 1864, the cashier's regular report to the company showed a shortage of \$4,642.71; in June, \$5,270.59; in July, \$4,085.93; in August, \$2,110.83; in September, \$3,101.83, and in October, \$13,891.27, whereupon the cashier was discharged, and that no notice of his defalcations was given to the sureties until February, 1865. There was no evidence of a conspiracy between the cashier and any other employee of the company. The trial judge properly charged the jury in effect that such conduct of the company discharged the sureties as to all defalcations occurring subse-

quent to the time when the company obtained knowledge of the cashier's dishonesty. Judgment for the defendants was reversed by the Supreme Court. Sharswood, J., cited cases where sureties on the official bonds of a revenue collector and a paymaster employed by the United States government were held liable notwithstanding failure of their superiors to remove them upon discovering their first defaults, and, although those cases are governed by considerations of public policy, held that the same principle applies to private corporations which, he said, "can act only by officers and agents. They do not guarantee to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical returns and payments are for their own security, and not for the benefit of the sureties. The sureties, by executing the bond became responsible for the fidelity of their principal. \* \* The fact that there were other unfaithful officers and agents of the corporation who knew and connived at his infidelity, ought not in reason, and does not in law or equity, relieve them from their responsibility for him. They undertake that he shall be honest, though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution, all their sureties might be discharged. It is impossible that a doctrine leading to such consequences can be sound." Citing to this point, besides the revenue cases referred to, only Taylor

from an employee at stated periods, or providing that his accounts or the affairs of the corporation shall be periodically examined by other officers of the corporation, are generally

v. Bank of Kentucky, 2 J. J. Marsh 564, decided in 1829, where a plea by a surety on a bank cashier's bond that the cashier's defalcations were "known to" and "connived at, as they occurred, by the president and directors of the branch bank at Bardstown," was held bad on demurrer, the court saying (p. 568), "We cannot admit that it charges a fraud, or such a one as should exempt the sureties. The cashier was responsible to the managers of the mother bank. He held his trust at their will. They could remove him at any time. If the law had made it their duty to remove him for any ascertained delinquency, and they knew of any such cause for removal, and not only retained him in service, but winked at his improper conduct, the sureties would not be liable in either a court of equity or of law, for any breach of his bond which might afterwards occur." From which it would appear that the plea was held bad because it did not show that the president and directors of the branch bank had any supervision or authority over the cashier who was accountable to the parent bank only. Thus the Kentucky case is not authority for the position taken by the Pennsylvania court at all but is authority directly to the contrary. The better opinion would seem to be that the corporation stands on the same footing as an individual employer so that after notice to its supervising agent of a defalcation by an employee under his supervision, it cannot hold the surety on his fidelity bond if it retains such employee

without full disclosure to and consent of the surety. An instructive and well considered case on this point is Saint v. Wheeler & Wilson Mfg. Co., 95 Ala. 362 at 376 et seq., 10 So. Rep. 539, in which the collector of a sewing machine company whose fidelity was guaranteed by defendants, being found short in his accounts by his immediate superior, was continued in the employment without notice to his sureties under an arrangement by which part of his salary went to pay the shortage. It was held that without any further evidence of knowledge by the corporation, the sureties were discharged from liability for defalcations occurring subsequent to notice to the collector's supervising officer. To the same effect, upon like facts, see Connecticut General Life Ins. Co. v. Chase, 72 Vt. 176, 47 Atl. Rep. 825, cited in note 18, § 472 supra, and Estate of Rapp v. Phoenix Ins. Co., 113 Ill. 390, where the sureties of Booker & Co., insurance agents, were held released as to all defaults that occurred after the company had retained Booker & Co. as its agents in February, notwithstanding their failure to make a monthly settlement, as required by their contract, for January, "because the company, in retaining in its service J. B. Booker & Co. after notice of the January default, which was just cause for discharging them, violated a duty which it impliedly assumed to Rapp and his legal representatives on accepting the bond." In Confederation Life Assn. v. Brown, 35 Nova Scotia 94 (1902), a life insurance agent was

held to be no part of the contract with the surety of such employee, and if such by-laws are not complied with, that fact will not discharge the surety. The by-laws are directory

required by his contract of employment to remit monthly "by either bank draft, marked cheque, postoffice order or by express." He remitted instead by his own personal checks "which the plaintiff company without remonstrance or objection accepted and in many instances held over for some time to accommodate" him. Under the terms of his contract the company might have dismissed him instantly for disobedience. Held, that the sureties on his bond conditioned for the performance of his contract were discharged. Citing *Kelly, C. B., in Sanderson v. Aston*, L. R. 8 Ex. 73. Same principle: *National Bank of Asheville v. Fidelity & Casualty Co.*, 89 Fed. Rep. 819, 32 C. C. A. 355, 61 U. S. App. 506. *Frank Fehr Brewing Co. v. Mulligan*, Ky., Feb., 1902, no off'l report, 66 S. W. Rep. 627, 23 Ky. Law Rep. 2100; *Franklin Bank v. Cooper*, 36 Me. 179; *First National Bank of Nashville v. United States Fidelity & Guaranty Co.*, Tenn., July, 1903, 75 S. W. Rep. 1076. In *Delbridge v. Lake B. & L. Assn.*, 82 Ill. App. 388, the secretary of a Building and Loan Association commonly received 50 cents per month per share of stock and the by-laws made it the duty of the treasurer "to demand and receive from the secretary at least once in each month all moneys paid into the association." (p. 391.) No such demand was made on the secretary subsequent to March 1, 1894, at which date he settled in full, though he continued to fill the office of secretary until August 22,

1894, the date of his death. His bond was conditioned that he should well and truly perform the duties of his office. In a suit on the bond it was held, *Adams, J.*, that there could be no recovery for any moneys received by the secretary "beyond the end of the month when the first demand should have been made." The association having failed to make demand at the end of March released the sureties from liability growing out of any subsequent misappropriation of receipts (p. 395). Same case, 98 Ill. App. 96. Where the supervising agent conspires with the bonded employee to defraud the employer, notice to him is no longer notice to the company, upon well known principles of the law of agency: *Pauly v. American Surety Co.*, 170 U. S. 133, 42 L. Ed. 977, 18 Sup. Ct. Rep. 552, affirming 38 U. S. App. 254, 72 Fed. Rep. 470, 18 C. C. A. 644, but where the supervising agent is not proved to have joined in such conspiracy, but appears to have been negligent only, the corporation that retains him in its service, it would seem, should stand the consequences, and not the surety. *Pittsburgh etc. R. R. v. Shaeffer*, 59 Pa. St. 356, *supra*, has been cited as authority for the proposition that the duty of a corporation official to obey its by-laws requiring periodical reports is not a duty owing to the sureties. See note 4 to next section. Where the *Shaeffer* case is followed the surety company protects itself by a special proviso that its contract shall be void if the employer

merely,<sup>1</sup> and are made for the benefit of the corporation, and not of the surety, who becomes liable because of his confidence in his principal, and not in consequence of his confidence in the other officers of the corporation. Moreover, if the sureties of one officer of a corporation could be relieved from liability by the neglect of duty of other officers of the corporation, the corporation would be deprived of all remedy.<sup>2</sup> Certain persons were sureties for the repayment by weekly instalments of money borrowed by P of a loan society. One of the rules of the society provided "that, if any member becomes more than four weeks' payments in arrear, the committee immediately inform the sureties of the same, and have power to institute legal proceedings against them." P died, being more than four weeks' payments in arrear, but no application was made to his sureties until two years afterwards. Held, the sureties were liable. The court said: "The rule is a mere statement of the duty of the committee, and is not obligatory on them as between the society and the sureties:"<sup>3</sup> The rules of a railway company required from the cashier monthly reports and payments, and the bond of the cashier and his sureties was conditioned that he should faithfully discharge his duty as required by the rules, "a copy of which he acknowledged to have received." The cashier neglected to account and pay over for six months, when he was dismissed, and the

fails to give immediate notice of default. The unpaid individual surety does not do so and suffers.

<sup>1</sup> Watertown Fire Ins. Co. v. Simmons, 131 Mass. 85. The rules and regulations of a corporation, made for the government of the conduct of its officers, held not to become terms and conditions of the bonds of such officers unless such intention is expressed in the bond. Richmond & Petersburg R. R. Co. v. Kasey, 30 Gratt. (Va.) 218. In Humboldt Savings & Loan Society v. Wennerhold, 81 Cal. 528, it is held that such by-laws enter into and form a part of the contract of suretyship.

<sup>2</sup> State v. Atherton, 40 Mo. 209; Morris Canal & Banking Co. v. Van

Vorst's Adm'x, 1 Zab. (N. J.) 100; Albany Dutch Church v. Vedder, 14 Wend. 165; Amherst Bank v. Root, 2 Met. (Mass.) 522; Louisiana State Bank v. Ledoux, 3 La. Ann. 674; Mayor v. Blache, 3 La. (Curry) 500; Chew v. Ellingwood, 86 Mo. 260. See application of the above principle to the liability of sureties on the bond of a treasurer of a building and loan association in People's Building Ass'n v. Wroth, 43 N. J. Law 70.

<sup>3</sup> Price v. Pool, 3 Hurl. & Colt. 437, per Bramwell, B. Foster v. Franklin Life Ins. Co., Tex. Civ. App., Jan'y, 1903, 72 S. W. Rep. 91, action on the official bond of a life insurance agent.



sureties were not notified of his default for three months afterwards. Held, the sureties were liable for the default. The court said that corporations can act "only by officers and agents." They do not guaranty to the sureties of one officer the fidelity of the others. The rules and regulations which they may establish in regard to periodical payments are for their own security and not for the benefit of the sureties. • • "They (the sureties) undertake that he (their principal) shall be honest though all around him are rogues. Were the rule different, by a conspiracy between the officers of a bank or other moneyed institution all their sureties might be discharged."<sup>4</sup> So it is held no defense to the sureties on a

<sup>4</sup> *Pittsburg, Ft. Wayne & C. R. R. Co. v. Shaeffer*, 59 Pa. St. 350, per Sharswood, J., as to which case see note 49, § 478. To same effect, see *Phillips v. Bossard*, 35 Fed. Rep. (Dist. Ct. D. S. C.) 99; *Richmond & Petersburg R. R. Co. v. Kasey*, 30 Gratt. (Va.) 218; *Watertown Ins. Co. v. Simmons*, 131 Mass. 85. In *Ida County Savings Bank v. Seidensticker*, Iowa, Dec. 1902, 92 N. W. Rep. 862, a bank cashier's sureties were held not released because the president and directors of the bank had knowledge of his defalcations and took no steps to stop them. The *Shaeffer* case supra was cited and approved in *Fidelity and Deposit Co. of Md. v. Courtney*, 186 U. S. 342, at page 361, 46 L. Ed. 1193, an action on the fidelity bond of a bank president where the defense was that the cashier of the bank knowing of irregularities on the part of his president had, acting for the bank, procured a renewal of the bond by fraudulently concealing them from the surety. The court there said that the principle that the act of the agent is to be imputed to the corporation was intended for the protection of parties dealing with the corporation

through such agent and added that "In the very nature of things such a principle does not obtain in favor of a surety who has bonded one officer of a corporation, so as to relieve him from the obligations of his bond, by imputing to the corporation knowledge acquired by another employee subsequent to the execution of the bond (and from negligence or wrongful motives, not disclosed to the corporation), of a wrong committed by the official whose faithful performance of duty was guaranteed by the bond." In *Pauly v. American Surety Co.*, 170 U. S. 133, 42 L. Ed. 977, 18 Sup. Ct. Rep. 552, affirming 38 U. S. App. 254, 72 Fed. Rep. 470, 18 C. C. A. 644, the president of the California National Bank made a written certificate as to the character, habits, history of its cashier to enable him to obtain a fidelity bond and such bond was issued upon the surety's faith in that certificate. The certificate was in fact given to enable the president and cashier to defraud the bank. Held, that the falsity of the certificate did not affect the bank's right to recovery on the bond. It was the cashier's duty to procure a bond, and it was not within the scope of

bank cashier's bond that the president and directors failed to examine the bank accounts and look into the management of the cashier's duties, and that they assumed such liability on the faith that this would be done.<sup>5</sup> The neglect of a municipality to proceed against its tax collector as required by law, or the by-laws of the corporation, held not to release the sureties on the collector's official bond.<sup>6</sup> It has been held that neglect by a public official to watch the accounts of subordinates as required by statute will not release the surety because the official's duty to obey the statute is not owing to the surety unless the surety has exacted a stipulation for such obedience.<sup>7</sup>

any duty of the president to make the certificate to enable him to procure one. Moreover, the giving of such certificate was part of the president's scheme of defrauding the bank, and, that being the case, the bank was not chargeable with constructive notice of things which it was for his interest to conceal from it. See, also, *First National Bank v. Briggs' Assignees*, 70 Vt. 594, 41 Atl. Rep. 580.

<sup>5</sup> *Frelinghuysen v. Baldwin* (Dist. Ct. D. N. J.), 16 Fed. Rep. 452. It is held no defense to the sureties of an insurance agent that their principal failed to comply with statutory requirements regulating the conduct of such officers. *Manhat-*

*tan Ins. Co. v. Ellis*, 32 Ohio St. 388.

<sup>6</sup> *Mayor v. Knight*, 12 B. J. Lea (Tenn.) 700.

<sup>7</sup> In *Williams v. Lyman*, 88 Fed. Rep. 237, 31 C. C. A. 511, 60 U. S. App. 25, the negligence of plaintiff, a revenue collector, in failing to examine the accounts of his deputy, which resulted in the deputy's embezzlement of \$8,000, was held not to release the defendants as sureties on the deputy's official bond. The court said that the duties imposed by statute which the collector had neglected to perform, were owing to the government, not to the surety, and the collector had made no stipulation with the surety that he would perform such duties.

## CHAPTER XVII.

### OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY THE CREDITOR'S RELINQUISHING SECURITY FOR THE DEBT.

- § 480. Surety discharged pro tanto if creditor relinquish lien on property of principal for payment of the debt.
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- § 490. The same, continued—Surety released even though he has taken indemnity bond.
491. The same, continued—Effect of mere delay resulting in loss of lien—Where creditor's negligence releases surety.
492. Instances where surety discharged by release of levy on property of principal.
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494. Surety discharged if creditor release attachment on property of principal—Dismissing suit against principal.
495. When surety discharged by failure of creditor to cause execution to be levied on property of principal—Duty of creditor toward surety before and after he acquires lien.
496. When and how far surety discharged by release of co-surety—Principal by release of joint obligor.
497. Surety may without paying the debt resort to equity to prevent loss or misapplication of securities.

§ 480. Surety discharged pro tanto if creditor relinquish lien on property of principal for payment of the debt.—If the cred-

itor has a surety for the debt, and also has a lien on property of the principal for the security of the same debt, and he relinquishes such lien, or by his act such lien is rendered unavailable for the payment of the debt, the surety is, to the extent of the value of the lien thus lost, discharged from liability. This rule does not depend upon contract between the surety and creditor, but results from equitable principles inherent in the relation of principal and surety. It is equitable that the property of the principal, pledged for the payment of the debt, should be applied to that purpose, and it is grossly inequitable that in such case the property should be diverted from that purpose, and the debt thrown upon a mere surety. Upon obtaining such a lien the creditor becomes a trustee for all parties concerned, and is bound to apply the property to the purposes of the trust. When such lien is acquired after the surety becomes bound, and even without his knowledge, the rule is the same. The surety is entitled, upon paying the debt, to subrogation to all the securities which the creditor may have at any time acquired for the payment thereof, and it results as a corollary from this proposition, that if this right is rendered unavailing by the act of the creditor, the surety is discharged to the extent that he is injured.<sup>8</sup> Where a cred-

<sup>8</sup> Willis v. Davis, 3 Minn. 17; Cummings v. Little, 45 Me. 183; Loop v. Summers, 3 Rand. (Va.) 511; New Hampshire Savings Bank v. Colcord, 15 N. H. 119; Armor v. Amis, 4 La. Ann. 192; Wharton v. Duncan, 83 Pa. St. 40; Ives v. Bank of Lansingburg, 12 Mich. 361; Kirkpatrick v. Howk, 80 Ill. 122; Finney's Adm'rs v. Commonwealth, 1 Pen. & Watts (Pa.) 240; Bonney v. Bonney, 29 Iowa 448; Cherry v. Miller, 7 B. J. Lea (Tenn.) 305; Hurd v. Spencer, 40 Vt. 581; Barrow v. Shields, 13 La. Ann. 57; Strong v. Wooster, 6 Vt. 536; Foss v. City of Chicago, 34 Ill. 488; American Bank v. Baker, 4 Met. (Mass.) 164; Rogers v. School Trustees, 46 Ill. 428; Baker v. Briggs, 8 Pick. 122; Holland v. Johnson, 51 Ind. 346; Pledge v. Buss, Johnson (Eng. Ch.) 663; Guild v. Butler, 127 Mass. 386; Lucas Co. v. Roberts, 49 Iowa 159; Sample v. Cochran, 82 Ind. 260; Weik v. Pugh, 92 Ind. 382; Underhill v. Palmer, 10 Daly (N. Y. Com. Pleas) 478; Austin v. Belknap, 54 Vt. 495; Knighton v. Curry, 62 Ala. 404; Wasson v. Hodshire, 198 Ind. 26; Sample v. Cochran, 84 Ind. 594; White's Adm'r v. Life Ass'n of America, 63 Ala. 419; Allen v. O'Donald, 23 Fed. Rep. 573. Contra as to after-acquired securities, see Newton v. Chorlton, 2 Drewry 333. Where lien was doubtful, see Crane v. Stickles, 15 Vt. 252. Where defense was set up at law, see Shaw v. McFarlane, 1 Ired. Law (N. C.) 216. Where the creditor's hold on property is of doubtful validity, and is relinquished by way of com-

itor has released a security to the benefit of which the surety is entitled, it has been held that the burden of proving the value of the thing lost is on the creditor.<sup>9</sup> And where a judgment against the principal was discharged, and there was no proof as to its value, it was presumed to be of its face value. The court said: "It is right to apply the general rule of damages that when the amount is made incapable of estimation by the act of the wrong-doer, he must be made responsible for the value it may by reasonable possibility turn out to be of."<sup>10</sup> If the surety knows a creditor is about to release securities on which he has a right to rely, and says nothing, the fact of his silence will not prevent his being discharged by such release, as in such case he is not called upon to speak.<sup>11</sup> But where such release is made at the instance and request of the surety, he is not thereby discharged.<sup>12</sup>

promise made in good faith and the proceeds applied in discharge of the debt pro tanto, surety held not discharged in the absence of a showing that an attempt to subject the property would have resulted more favorably. *Bedwell v. Gephart*, 67 Iowa 44. Mere passive negligence of the creditor in collecting the debt out of collateral securities held by him, held not to discharge the surety. *Wasson v. Hodshire*, 108 Ind. 26. Neglect on the creditor's part to obtain possession of property for security which might have been obtained with more effort, held not to discharge surety, as the surrender of a security by a creditor in order to discharge the surety must be a surrender of property actually acquired. *Otis v. Von Storch*, 15 R. I. 41. As to when sureties are released by failure of a trustee to hold property for their benefit, see *Bixby v. Barklie*, 26 Hun (N. Y.) 275. If the holder of a note surrender to the maker collateral placed in his hands by the maker as indemnity, the surety therein is held discharged. *In re Caton, Ex'r*

of *Berry*, 14 B. J. Lea (Tenn.) 408. In *Boston Penny Savings Bank v. Bradford* (Mass.), 63 N. E. Rep. 427, the creditor's release of an assignee for the benefit of creditors was held to release the surety for the debt to the extent of the value of the property released.

<sup>9</sup> And where a creditor relinquished a lien he had on the debtor's property, it was held the burden of proof was on him, in a suit to collect the debt from the surety, to show that the surety was not injured by such relinquishment. *Allen v. O'Donald* (Cir. Ct. D. Oreg.), 23 Fed. Rep. 573.

<sup>10</sup> *Fielding v. Waterhouse*, 8 Jones & Spen. (N. Y. Superior Ct.) 424, per Sedgwick, J. See, also, *Lewis v. Armstrong*, 80 Ga. 402. If a creditor, having the means of satisfaction from the principal's property in his power, fail to avail himself of them the surety will be discharged. *Clom v. Derby Coal Co.*, 98 Pa. St. 432.

<sup>11</sup> *Polak v. Everett*, Law Rep. 1 Q. B. Div. 669.

<sup>12</sup> *Pence v. Gale*, 20 Minn. 257. This on the principle that where a

§ 481. **Instances of discharge of surety by creditor relinquishing lien on property of principal.**—In a leading case upon this subject, Law became the surety of Tierney for his good behavior as paymaster of the East India Company. Tierney died solvent, and the company settled with his legal representatives, and 50,548 rupees were found by such settlement to be due the representatives, and the company paid that amount to them. Afterwards it was ascertained that Tierney in fact died indebted to the company in 96,857 rupees, and the company by duress compelled Law to pay that sum upon the eve of his setting out from India. Upon Law's arrival in England he filed a bill against the company to recover the money. Held, he was entitled to recover at least to the extent of the 50,548 rupees, as paying the principal that sum discharged the surety for so much. The court said: "Nothing is more clear than whether that was done with the consent and by the orders of the company or not, but ignorantly by their officers, it was, as to the two sureties, a complete discharge. It cannot be contended, upon any principle that prevails with regard to principal-and surety, that where the principal has left a sufficient fund in the hands of the obligee, and he thinks fit, instead of retaining it in his hands, to pay it back to the principal, the surety can never be called upon. This payment, therefore, or permitting that part of the assets to be paid back to the administrator of the principal by the officers of the company, whether with their consent or ignorantly, is a complete discharge of the two sureties."<sup>13</sup> A bought of B ten slaves for \$6,750, for which he gave his note, with C as accommodation indorser. Afterwards B repurchased of A nine of the slaves for \$4,675, and it was held that he thereby deprived C of the right of subrogation to the vendor's lien on the slaves, and discharged him. The court said: "It is clear that the defendant was an accommodation indorser, and as such merely a surety for the maker. It is equally clear that, by the law of suretyship, there

person consents to the doing of an act which would not have been done but for his assent thereto, the person so assenting will not be permitted to make the doing of it a matter of personal advantage to himself. *Brown v. Abbott*, 110 Ill.

a note consented to the release of a trust deed also securing the same, and it was held he was not thereby released from liability.

<sup>13</sup> Per master of the rolls in *Law v. The East India Company*, 4 Vesey 824.

162. In this case the guarantor of



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is a privity between the surety of a debtor and the creditor which compels the latter to preserve all his rights against the debtor unimpaired when he intends to look to the surety for payment. This obligation on the part of the creditor is a corollary of the right of subrogation, which the law has established in favor of the surety who pays the debt of his principal. If the creditor fails to comply with this obligation, or does any act which destroys or impairs this right of subrogation to his mortgages or privileges, he thereby releases the surety."<sup>14</sup> A note, without surety, for \$3,000 was secured by chattel mortgage on property of the maker. When it came due, the creditor advanced the principal \$500 more, and a new note for \$3,500, with surety, was given, the creditor telling the surety when he signed that the chattel mortgage should stand security for the new note. Afterwards the creditor released the mortgaged property, and it was held that the surety was thereby discharged.<sup>15</sup> A agreed to furnish material and erect a building for B, and B agreed to pay A various specified sums at particular stages in the progress of the work, the remainder to be paid sixty days after the completion of the building and its acceptance by B. Upon this contract C became the surety of A. The building was completed by A and accepted by B, and, although B received notice before the completion of the building of the filing of various mechanics' lien suits thereon, yet he paid the contract price to A before he was bound by the contract to pay the same. B afterwards had to pay the liens, and sued C on the contract, but it was held he could not recover, as he had released C by paying A.<sup>16</sup> Where a creditor held as collateral security the lease of a farm and live stock to have and hold possession of all the wool and farm products until the debt was paid, it was held that the surety for the debt was discharged upon the relinquishing of such security.<sup>17</sup> Other instances are stated in a note.<sup>18</sup>

<sup>14</sup> Herford v. Chase, 1 Rob. (La.) 212, per Morphy, J. Holding that the surety is not discharged by the surrender of an equitable vendor's lien on real estate, see Woodward v. Clegg, 8 Ala. 317. But this seems to be a very questionable case.

<sup>15</sup> Port v. Robbins, 35 Iowa 208.

<sup>16</sup> Taylor v. Jeter, 23 Mo. 244.

See, also, involving the same principle, Ryan v. Morton, 65 Tex. 258.

<sup>17</sup> Brown & Co. v. Rathburn, 10 Oreg. 158.

<sup>18</sup> Eddy v. People, 187 Ill. 304, was debt on an executor's bond.

**§ 482. Instances of discharge of surety by creditor rendering unavailing lien on property of principal.**—A principal and two sureties signed a note for \$314. After the note fell due the creditor, by the assistance of the sureties, induced the principal to give a chattel mortgage to secure the note on property worth at least \$400. When the mortgage became due the creditor took possession of the mortgaged property and sold it for \$31 to a party he employed to bid for him. This amount he credited on the note and long afterwards sued the sureties. Held, that by wasting the property he had discharged the sureties and could not recover. The court said: "It is a well-established rule of equity jurisprudence that where a creditor procures further security by the pledge of property he becomes a trustee as to that property for the sureties for the payment of the debt. By his taking a mortgage or other pledge it inures to the benefit of the sureties as well as to the creditor. In such case they have the right to discharge the debt and compel the creditor to transfer the mortgage or pledge to them for their indemnity. Where additional security is taken, it is regarded as an indemnity to both creditor and the sureties, and any waste or misapplication of the pledge operates as a release to the sureties to the extent of the waste or misapplication. Where the creditor receives such a pledge

The plaintiff's claim had been allowed as a claim for money received in trust and therefore, by statute, took precedence of general claims against the estate of the deceased. There was enough money to pay it in full but to avoid litigation with other creditors plaintiff agreed to take the principal and allow the balance of the assets to be distributed among the general creditors. Held, that by carrying out that arrangement plaintiff released the sureties. In *Pierce v. Atwood*, Neb., Mch. 1902, 89 N. W. Rep. 669, the surety was held released by the creditor's consenting to the payment to the principal of money which he might have had applied in payment of the debt. Citing

*City of Maquoketa v. Willey*, 35 Iowa 323; *Rees v. Berrington*, Smith Lead. Cases (Hare & W. Notes) 552; *Pain v. Packard*, 13 Johnson (N. Y.) 174; 2 Am. Lead Cas. (Hare & W. Notes) 362. See, also, *Monroe v. De Forest*, 53 N. J. Eq. 264, 31 Atl. Rep. 773, in which case where the holder of a mortgage for \$30,000 on a tract of land, which provided for the release of lots upon payment of \$2,500 each, released certain lots without receiving any payment. Held, that the estate of a deceased surety was released although the executor of his will who was clothed with "full discretion in the management of \* \* the investments" had expressly consented thereto.

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he becomes a trustee for the sureties and is bound to observe the duties that relation imposes as to the trust property.<sup>19</sup> Where the creditor wilfully caused property mortgaged by the principal for the payment of the debt to be sold for much less than it was worth, it was held that the surety was discharged to the extent of the true value of the property.<sup>20</sup> But where property so mortgaged was sold under order of the court and bid in by the creditor for less than its value, and afterwards sold by him for much more than he bid it in for, it was held that in the absence of fraud or improper practice he was not obliged to account to the surety for more than the sum for which he bid the property in.<sup>21</sup> Judgment was recovered against principal and surety, which was a lien on a slave of the principal then in the hands of the surety. Execution was issued, but was "held up" by order of the creditor. The principal then gave the creditor a mortgage on his personal property, including the slave above mentioned, to secure another debt. The creditor afterwards took possession of the slave and sold it, and it was removed from the state. Held, the surety was discharged to the extent of the value of the slave.<sup>22</sup> Where the creditor makes an agreement by which a security is rendered valueless to a surety, who is entitled to be subrogated in respect thereto, the surety who has paid the creditor after a judgment has been obtained against him,

<sup>19</sup> *Phares v. Barbour*, 49 Ill. 370, per Walker, J. Where a creditor receives notes, mortgages or property in pledge for a debt, they are regarded as an indemnity to the creditor and to the surety of the debtor, and the surety will have the right to exact of the creditor proper care and diligence in the management and collection of such collateral security, and any waste or misapplication of the collaterals will operate as a release of the surety to the amount of the loss actually sustained. *Hall v. Hoxsey*, 84 Ill. 616.

<sup>20</sup> *Everly v. Rice*, 20 Pa. St. 297. Release by a creditor of part of

the land mortgaged to him as security for payment of a bond does not discharge a surety on the bond, though made without his consent, if the remainder of the land is sufficient to indemnify him against loss. *Saline Co. v. Bine*, 65 Mo. 63; *Lafayette Co. v. Hixon*, 69 Mo. 581.

<sup>21</sup> *Brown v. Gibbons*, 37 Iowa 654.

<sup>22</sup> *McMullen v. Hinkle*, 39 Miss. 142. For a case holding surety discharged by the creditor's relinquishing security for the debt, see *Henderson, Adm'r, v. Huey*, 45 Ala. 275; *Pfirshing v. Peterson*, 98 Ill. App. 71 at 75.

in ignorance of such agreement, is entitled to recover from the creditor the amount of the defeated security.<sup>23</sup>

**§ 483. When surety wholly discharged by creditor relinquishing security for debt.**—When by the act of the creditor the surety has been deprived of the benefit of a fund for the payment of the debt, and the contract by which the surety is bound is not changed, he is only discharged to the extent that he is injured, as in such case it is the fact that he is injured which entitles him to the discharge. But where the creditor relinquishes a security for the debt, and thereby materially alters the contract, the surety is wholly discharged, whether he is injured or benefited, because in such case it is no longer his contract. Thus A agreed to redeem certain shares for £6,000 within twelve months, and B became his surety. A at the same time transferred to the creditor certain book accounts, amounting to £8,000, with the understanding that they should be collected, and one-half the amount collected should go as payment on the £6,000. Afterwards the creditors for an equivalent in shares and cash, released to A their interest in the book accounts. Held, this discharged B altogether from his obligation, even though the book accounts would only have paid £4,000 of the £6,000 if they had all been collected. This was put upon the ground that the contract for which the surety became responsible had been changed, and he was thereby wholly discharged, the same as if time had been given, or any other material alteration in the original contract had been made.<sup>24</sup> The release of the surety through the creditor's re-

<sup>23</sup> *Chester v. Bank of Kingston*, 16 N. Y. 336.

<sup>24</sup> *Polak v. Everett*, Law Rep. 1 Q. B. Div. 699, which case was reviewed and followed in *Prairie State National Bank v. United States*, 164 U. S. 227, 41 L. Ed. 412, 17 Sup. Ct. Rep. 142, affirming 27 Ct. Claims 185. See also, *Lord Haberton v. Bennett*, Beatty, 386; *Watts v. Shuttleworth*, 7 Hurl. & Nor. 353. For miscellaneous cases further illustrating liability of surety where creditor misapplies or relinquishes security, see *Rosborough v. McAleley*, 10 Rich. (S.

C.) 235; *Hutchinson v. Woodwell*, 107 Pa. St. 509; *Finney v. Condon*, 86 Ill. 78; *Gotzian & Co. v. Heine*, 87 Minn. 429, 92 N. W. Rep. 398, holding that the accommodation maker of a note was released by the creditor's release of a mortgage by which it was secured. In *Sullivan v. State*, 59 Ark. 47, 26 S. W. Rep. 194, the lender of money failed to record a mortgage by which it was secured until after a second mortgage had been filed which made it worthless. Held, that the surety was discharged. In *Griffin v. Frick & Co.*,

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lease or failure to record a mortgage by which the debt is secured is often put upon this ground.<sup>25</sup>

**§ 484. Creditor must have some interest in the property released in order to discharge surety.**—In order that a surety may be discharged by the act of the creditor in relinquishing property in his possession belonging to the principal he must

97 Ga. 219, 23 S. E. Rep. 833, Powell & Co. bought saw mill machinery for \$2,450, of which \$1,450 was paid and suit was brought against a guarantor of notes securing the rest of the purchase money. The guarantor pleaded that plaintiffs, having a lien on the property for the amount due them, and it being of sufficient value to pay said amount, permitted the property to be sold, without notice to the guarantor, to one Gibbs, who removed it from the county, so that plaintiff failed to make the amount due them. Held, that the court erred in sustaining a demurrer to that defense, and directing a verdict for plaintiffs. In Foerderer v. Moors, 91 Fed. Rep. 476, 33 C. C. A. 641, 62 U. S. App. 538, the Keen-Sutterle Co., importers, obtained £15,000 credit from Moors, bankers, on the strength of their written agreement to the effect that Moors should have a lien on all goods imported by it, or the proceeds thereof, for repayment. The defendant, Foerderer, guaranteed performance of that agreement by the Keen-Sutterle Co., and agreed in effect that he should not be released as guarantor by the Moors releasing their lien on such imported goods, provided that the goods released were stored in the name of Moors or the proceeds of the sale turned over to them or the goods sold on their account. Moors released the goods absolutely, taking in their place only the Keen-Sutterle Co.'s promise to deliver to them the pro-

ceeds of the sale as soon as received. The Keen-Sutterle Co. sold the goods, kept the proceeds and became insolvent. Held, reversing the circuit court, that the guarantor was discharged. The value of the goods released exceeded the amount of the verdict against the guarantor. The rule stated in the text applies also to property that occupies the position of surety. Thus, in Phillips v. Trowbridge Furn. Co., 86 Ga. 699, 13 S. E. Rep. 19, Neal, having sold a lot of furniture to various parties on the instalment plan, and being in arrears in paying the manufacturers, from whom he had bought it, executed a written transfer in which he sold, assigned and delivered to them all furniture in his store and outstanding, the proceeds of the sale thereof by them to be applied to payment of the purchase price. This instrument was afterwards cancelled without notice to defendant, who had executed a mortgage to secure payment for the furniture. Held, that defendant's property was released to the extent that she was damaged by such cancellation.

<sup>25</sup> In Antidel v. Williamson, 165 N. Y. 372, 59 N. E. Rep. 207, a mortgagee made a valid agreement with a purchaser of the mortgaged property who had not assumed the mortgage debt, to extend the mortgage for three years. Within that time the property was lost by the foreclosure of a prior mortgage. Held, that a guarantor of the mortgage who had not consented to such

have some lien on or interest in the property, so that it is charged with a trust in favor of the surety. If he have no such lien or interest, and is not chargeable as trustee, he is under no more legal obligation to retain the property than he would be to take any other step for the collection of the debt; and it is settled that the mere passive delay or inactivity of the creditor, where he is not chargeable as trustee, will not discharge the surety. Thus, the plaintiff held a promissory note, indorsed by the defendant for the accommodation of the makers, who were insolvent. A firm of which the plaintiff was a member owed the makers a larger sum than the amount of the note, against which, if sued, they could by statute have set off the claim held by the plaintiff. The firm, with a full knowledge of the facts, paid the makers the amount due them. Held, the indorser was not discharged thereby. The court said that the creditor must part with no security for the payment of the debt; but the security must be "a mortgage, pledge or lien—some right or interest in the property which the creditor can hold in trust for the surety, and to which the surety, if he pay the debt, can be subrogated; and the right to apply or hold must exist and be absolute." The plaintiff in this case had no lien, and the indorser had no more right to insist that the set-off should be made than to insist that the plaintiff "should do any other act to secure or enforce payment."<sup>26</sup> A creditor held a judgment against principal and surety, and, while it was in force, hired the principal to remove some slaves for him, and paid the principal for his services. Held, no lien was released, and the surety was not discharged.<sup>27</sup> A agreed to build a house for B for \$13,000, and was to be paid when the building was completed. Afterward A borrowed \$700 from B, and gave his note for it with surety. Afterwards B paid A more than \$4,000 on the contract, which A never completed. Held, the surety on the note

extension was released. In *Holmes v. Williams*, 177 Ill. 386, 53 N. E. Rep. 93, the holder of notes which were secured by chattel mortgage and guaranteed by appellant, by agreement with the maker of the notes, sold the chattels at private sale on credit. Held, that by so doing he released the guarantor, who did not consent to such sale. Reversing *Holmes v. Williams*, 69 Ill. App. 114.

<sup>26</sup> *Glazier v. Douglass*, 32 Conn. 393, per Butler, J.

<sup>27</sup> *Hollingsworth v. Tanner*, 44 Ga. 11.



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was not discharged because B paid A the \$4,000 when he was not obliged to do so. The court said that the contract to build the house had nothing to do with the note and no lien for the payment of the note had been relinquished, and proceeded: "I think the surety, in order to claim a discharge, must have some connection or privity with the money paid over or security parted from, and I perceive none here. It would embarrass the affairs of men too much for the practical purposes of life and of business, to say that one holding a note on two should not voluntarily pay a note due by him to one of them, and that is substantially this case."<sup>28</sup>

**§ 485. The same continued—Whether creditor must have a lien on property released to discharge surety.**—A party gave his note with an indorser for certain stock of a fire insurance company, the charter of which provided that it might at its option prohibit the transfer of the stock, and retain the dividends of any stockholder who was indebted to it. The principal sold his stock, and it was transferred on the books of the company without the note being paid, and it was held the surety was not thereby discharged. The court said that, whenever the creditor has the means of satisfaction in his hands, and chooses not to, and does not, retain it, he discharges the surety; but the "means of satisfaction in his hands" means that "there must be a lien in his favor on the property in his hands conferred by law or the owner."<sup>29</sup> The surety on a negotiable note which was not due became insolvent, and the creditor applied to the principal to get other security, which the principal furnished by giving a mortgage on real estate sufficient to secure the note. At the time the mortgage was given it was agreed between the principal and creditor that it should be released upon the principal getting another satisfactory indorser on the note. Afterwards, and before the note became due, the principal procured another and responsible indorser, who indorsed his name after that of the surety, and the creditor thereupon released the mortgage. Held, the creditor was not thereby discharged, as the creditor had no right to retain the mortgage after the indorser had been pro-

<sup>28</sup> *Beaubien v. Stoney*, *Speer's Knighton v. Curry*, 62 Ala. 404, Eq. (S. C.) 508. 409, it is held that this definition of

<sup>29</sup> *Perrine v. Firemen's Ins. Co.*, the term "means of satisfaction" 22 Ala. 575, per *Phelan, J.* In is too narrow.

cured.<sup>30</sup> It has been held that a surety for a bankrupt is not discharged by the creditor signing the bankrupt's certificate, even after notice from the surety not to do so.<sup>21</sup>

§ 486. **Instances where surety not discharged by creditor's releasing property of principal.**—If the release of the property of the principal does not have the effect of changing the contract and does not injure the surety, his liability is not affected thereby. Thus, a creditor having a judgment against principal and surety, which was a lien on real estate of the principal, agreed to release part of such real estate in order to make a title to one who purchased it for its full value, upon condition that the purchase money should be applied to the extinguishment of a mortgage which was a prior lien upon the whole estate. Such application of the money was made and the remainder of the real estate released from the lien of the mortgage. Held, the surety was not discharged, as the release of the land bettered his condition rather than otherwise.<sup>32</sup> After a surety became liable the creditor obtained from the principal a policy of insurance on his life as a security for the debt. The principal became bankrupt, and the creditor surrendered the life policy upon receiving from the office from which it was issued its then value. Held, the surety was not discharged, as it was doubtful whether the policy would have been kept up, and to have kept it up would have been a speculation which might have turned out unfavorably for the surety.<sup>33</sup> If the security is worthless when given by the principal, or afterwards, without fault on the part of the creditor,

<sup>30</sup> *Pearl Street Congregational Society v. Imlay*, 23 Conn. 10.

<sup>31</sup> *Browne v. Carr*, 7 Bing. 508; *Id.*, 5 Moore & Payne 497; *Guild v. Butler*, 5 The Reporter 15. So where a creditor took part in an agreement with the principal in the bankruptcy court whereby the principal was to pay in certain instalments, it was held not such an extension of time as discharged the surety. *Provincial Bank v. Cussen*, Law Rep., Irish (18 Q. B., C. P. and Ex. Div.) 382. So a surety for a bankrupt is not discharged from liability on a note

executed by the bankrupt to his wife; and the fact that the wife assented to her husband's discharge in bankruptcy held no defense. *Clark v. Clark*, 86 Mo. 114. To the effect that the creditor may, without discharging the surety, purchase property of the principal and pay him for it before the note upon which the surety is liable becomes due, see *Higdon v. Bailey*, 26 Ga. 426.

<sup>32</sup> *Neff's Appeal*, 9 Watts & Serg. (Pa.) 36.

<sup>33</sup> *Coates v. Coates*, 33 Beavan 249.

becomes worthless, this does not discharge the surety.<sup>34</sup> If a creditor release from the operation of a judgment lands in which it is thought the principal may have some contingent interest, in order to relieve the premises from a possible cloud arising therefrom, this does not exonerate the surety where it is shown that the principal has in fact no interest in the lands so released, and that the judgment was in consequence no lien upon such lands.<sup>35</sup> Where a mortgage was given by a principal to secure seven bonds, one of which was assigned to a third party, and the holder of the other six released the mortgage, it was held that the surety on the assigned bond was not thereby released from liability on such bond. The assignee had done nothing to prejudice the surety's right, and it was questionable whether the holder of the six bonds could release the mortgage as to the assigned bond.<sup>36</sup> Principal and surety signed a bond and the principal gave a mortgage to secure it. Afterwards the principal agreed to give the creditor a different security, and the creditor delivered up the mortgage and agreed to, but did not, deliver up the bond. The principal died and the creditor sued the surety, who filed a bill to have the bond delivered up. Held, he was not entitled to relief in equity. The court said: "Here the defendant was shipwrecked and had this plank to save him, and \* \* \* (the court) would not take this from under him to let him sink and make him lose his debt."<sup>37</sup> The lessor of premises refused the offer of the lessees to allow him to collect rent from the under-tenants of the premises and apply it on the accruing rent without notifying the sureties of the lessees of such offer. Held, the sureties were not thereby discharged, as the lessor was under no obligation to undertake the collection of the rent

<sup>34</sup> *Hardwick v. Wright*, 35 Beavan 133.

<sup>35</sup> *Blydenburgh v. Bingham*, 38 N. Y. 371. To similar effect, see *Lilly v. Roberts*, 58 Ga. 363; *Adams v. Logan*, 27 Gratt. (Va.) 201.

<sup>36</sup> *Muller v. Wadlington*, 5 Rich. N. S. (S. C.) 342. So when the principal debtor made an assignment of his estate for the benefit of his creditors, a surety for one of the debts secured by the assign-

ment was held not discharged, there being no proof that the creditor had done any positive act affecting injuriously his interest, though he attended a meeting of the creditors called to determine whether an agent should be appointed. *Jackson v. Patrick*, 10 Rich. (S. C.) 197.

<sup>37</sup> *Purefoy v. Jones*, *Freeman's* Ch. 44, per Finch, C.

from the under-tenants.<sup>38</sup> A judgment was recovered against principal and surety, which became a lien on real estate of the principal. Afterwards the creditor brought suit on the judgment against both principal and surety, and judgment was had against the principal and the case was continued as to the surety. The surety then filed an amended answer, setting up that by the last judgment the lien of the first had been lost and other liens had intervened, but it was held to be no defense. The court said that when the surety assumed his obligation he knew that the remedies provided by law might be enforced. If, in the second suit, judgment had been rendered against the principal and surety at the same time, the surety could not have set up the defense, because it would not then have existed, and the effect of the second judgment would have been the same. The surety was not, therefore, prejudiced.<sup>39</sup> Appellants having become sureties on the faith of a mortgage granted by the principal debtor to his creditor, were held not discharged from liability because the creditor had, without notice to them, sold parts of the mortgaged property and thereby deprived them of a security upon which they relied for protection.<sup>40</sup>

**§ 487. When surety discharged if bank does not retain debt due it out of deposit of principal.**—Principal and surety were indebted to a bank on a note which was due. The principal deposited with the bank more than the amount of the note, upon the express agreement that he should buy cattle and check against this money to pay for them, and that the checks should be paid. This was done, and the surety claimed to be discharged because the bank, having money enough in its possession to pay the note, had not kept it. Held, the surety was not discharged, because the money having been deposited under a special agreement, the bank had no lien on it, and could not divert it from the purpose agreed upon.<sup>41</sup> In this

<sup>38</sup> *Ducker v. Rapp*, 9 Jones & Spencer (N. Y.) 235.

<sup>39</sup> *Perry v. Saunders*, 36 Iowa 427.

<sup>40</sup> *Taylor v. Bank of New South Wales*, Law Rep. (11 App. Cases) 596.

<sup>41</sup> *Wilson v. Dawson*, 52 Ind. 513. To similar effect, with reference to

lien on a note when it is deposited in a bank for a special purpose, see *Neponset Bank v. Leland*, 5 Met. (Mass.) 259. In *Commercial National Bank v. Proctor*, 98 Ill. 558, it is held that a bank has no power to retain the money of a depositor to meet a note, the payment of which

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case the deposit was special; but where the principal has a general balance at a bank after a debt to the bank is due, the authorities differ as to the duty of the bank to retain the amount of the debt. Thus principal and surety were liable on a bill of exchange held by a bank. When the bill became due, and for a long time thereafter, the principal had money in the bank where he deposited and drew out money from time to time, and at one time, after the bill was due, a balance was struck between the bank and the principal, and he had more than enough money in the bank to pay the bill. Held, the surety was not discharged by the failure of the bank to retain the money to pay the bill. The court said that mere delay would not discharge the surety, and if the bank was under no obligation to sue, it was under no "obligation to violate the terms on which the money was obviously placed in the bank, and apply it to the payment of the bill for the benefit of the indorsers." The money was placed in the bank for the payment of the checks of depositors, and the failure of the bank to retain it "was no more to the prejudice of the indorsers than their forbearing to sue the principal."<sup>42</sup> In a case where precisely the opposite doctrine was held, the court said: "Upon what principle of justice can such a creditor in a court of equity claim to hold the surety bound, after the debt had been in point of fact paid, if the creditor had elected to say so, or to so consider it. The creditor could have set off the debt and charged it in the account, and, having the power, was it not his duty to do so in justice to the surety?"<sup>43</sup>

§ 488. When surety not discharged by creditor's releasing principal from imprisonment.—As a general rule, the surety is not discharged by the mere fact that the creditor releases the principal for imprisonment on account of the debt, unless he is injured thereby. The body of a principal was taken on final process, and he was about to be committed to jail, but was, by the advice and consent of a guarantor of the debt, released from custody. Held, that while the discharge was a technical

he has guarantied, and which is not due.

<sup>42</sup> *Martin v. Mechanics' Bank*, 6 Harr. & Johns. (Md.) 235, per Buchanan, J. To the same point, see

*The Second National Bank of Lafayette v. Hill*, 76 Ind. 223.

<sup>43</sup> *McDowell v. Bank*, 1 Harr. (Del.) 369, per Black, J. See, also, *Voss v. German-American Bank*, 83 Ill. 599.

satisfaction of the debt, as between the principal and creditor, yet it was not a payment in fact, and did not discharge the guarantor. "The terms of the guaranty are that the note shall be paid, and nothing short of actual payment, or some act or neglect of the creditor, by which the guarantor is prejudiced, will discharge the liability."<sup>44</sup> A surety is not discharged by the mere acceptance of the obligee of a common appearance, where the principal has been arrested at the suit of the obligee, and where, in consequence of the release of the principal from imprisonment, he assigns all his property to the obligee for the payment of the obligation, and it is applied to that purpose. If the principal had gone to jail, and been discharged under the insolvent act, the property would have been divided among his creditors, and less would have gone to the payment of the obligation than was realized for that purpose. The surety was therefore benefited, and not injured.<sup>45</sup> The body of the principal in a bond having been taken on final process, the creditor, with the principal's consent, discharged him from custody under the provisions of a statute which authorized a plaintiff to discharge, with his consent, a debtor in custody under a ca. sa., without weakening the force of the judgment, or impairing the right to a fi. fa. or a subsequent ca. sa. Held, the surety had not been in any manner injured, and was not discharged.<sup>46</sup> A special act of congress released a principal from imprisonment upon his assigning all his estate to the United States, for the security of the debt upon which he was imprisoned, and also provided that any estate which he might afterwards acquire might be taken the same as if he had not been released. Held, the surety was not discharged. The court said: "That the same rules of contract are applicable where the sovereign is a party, as between individuals, is admitted; but the right of the sovereign to discharge the debtor from imprisonment without releasing the debt is clear. And how can such a release discharge the surety?

\* \* The recourse of the government against the property of  
 \* \* (the principal) still remains unimpaired; consequently

<sup>44</sup> Terrell v. Smith, 8 Conn. 426,  
 per Bissell, J.

<sup>46</sup> Treasurers v. Johnson, 4 McCord, Law (S. C.) 458.

<sup>45</sup> Comm'rs Berks Co. v. Ross. 3 Binney (Pa.) 520.



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the judgment remains unsatisfied, and no act has been done to the prejudice of the surety." <sup>47</sup>

§ 489. **Surety is discharged if creditor release levy on property of principal.**—If the creditor recovers a judgment against principal and surety, or against the principal alone, and execution is issued thereon and levied upon real or personal property of the principal subject thereto, and such property is, by act of the creditor, released from the levy and lost as a security, the surety is discharged to the extent that he is injured thereby.<sup>48</sup> This is the most frequently occurring illustration of

<sup>47</sup> Hunter v. United States, 5 Pet. 173, per McLean, J. To similar effect, see United States v. Stansbury, 1 Pet., 573; Hunt v. United States, 1 Gall. 32; United States v. Sturges, 1 Paine, 525.

<sup>48</sup> Dixon v. Ewing's Adm'r, 3 Ohio 280; Houston v. Hurley, 2 Del. Ch. 247; Cooper v. Wilcox, 2 Dev. & Bat. Eq. (N. C.) 90; Morley v. Dickinson, 12 Cal. 561; State Bank v. Edwards, 20 Ala. 512; People v. Chisholm, 8 Cal. 29; Spencer v. Thompson, 6 Irish Com. Law Rep. 537; Winston v. Yeargin, 50 Ala. 340; Comstock v. Creon, 1 Rob. (La.) 528; Alexander v. Bank of Commonwealth, 7 J. J. Marsh. (Ky.) 580; Bank v. Fordyce, 9 Pa. St. 275; Moss v. Pettengill, 3 Minn. 217; Shannon v. McMullen, 25 Gratt. (Va.) 211; Commonwealth v. Miller's Adm'rs, 8 Serg. & Rawle (Pa.) 452; Baird v. Rice, 1 Call (Va.) 18; Finley v. King, 1 Head (Tenn.) 123; Mulford v. Estudillo, 23 Cal. 94; McHaney v. Crabtree, 6 T. B. Mon. (Ky.) 104; Brown v. Ex'rs of Riggins, 3 Kelly (Ga.) 405; Mellish v. Green, 5 Grant's Ch. 655; Curan v. Colbert, 3 Kelly (Ga.) 239; Parker v. Nations, 33 Tex. 210; Davis v. Mikell, 1 Freem. Ch. (Miss.) 548; Jenkins v. McNeese, 34 Tex. 189; Jones v. Bullock, 3 Bibb (Ky.) 467; Springer v.

Toothaker, 43 Me. 381; Watson v. Read, 1 Cooper's Ch. (Tenn.) 196. Contra, Union Bank v. Govan, 10 Smedes & Mar. (Miss.) 333; Green v. Blunt, 59 Iowa 79. To same effect as the text, see, also, Day v. Rumey & Co., 40 Ohio St. 446; Brinton v. Gerry, 7 Bradw. (Ill. App.) 238; Rawson v. Gregory, 59 Ga. 733. The surety being discharged by a release of the principal's property seized upon execution, resort cannot, of course, be had to his property. Hyde v. Rogers, 59 Wis. 154. After a levy the judgment creditor is regarded as a trustee of the execution for all interested persons and he will not be permitted to injure them by a release of the levy. Lower v. Buchanan Bank, 78 Mo. 67. In Mt. Sterling Improvement Co. v. Cockrell, Ky., Dec., 1902, no official report, 70 S. W. Rep. 842, the surety on a supersedeas bond was held released by the principal's direction to the sheriff to hold until further orders an execution which he had placed in the sheriff's hands. Citing this section, Burnam, J., said: "The law is well settled that when a plaintiff issues an execution against the defendant, which is levied upon property sufficient to satisfy it, a lien on the defendant's property inures to the security, and if that lien is dis-

the rule that the surety is entitled to the benefit of all the securities which the creditor, after the surety becomes bound, or at any time, may obtain for the payment of the debt. The creditor is not bound to be diligent in obtaining securities for the debt, but having obtained them, he at once becomes a trustee thereof for all parties concerned. In a leading case on this subject, the creditor held a warrant of attorney from the principal to confess judgment, of which the surety did not know, and the creditor entered up judgment thereon, and levied on chattels of the principal sufficient to satisfy the debt, and afterwards withdrew the execution, and the property was lost as security. Held, the surety was thereby discharged. The lord chancellor said: "The mere circumstance that the \* \* (surety) did not know that the \* \* (creditor) held a warrant of attorney would be of no consequence, because sureties are entitled to the benefit of every security which the creditor had against the principal debtor, and whether the surety knows the existence of those securities is immaterial, and I think it clear that though the creditor might have remained passive if he chose, yet if he takes the goods of the debtor in execution, and afterwards withdraws the execution, he discharges the surety both at law and in equity. \* \* The principle is that he is a trustee of his execution for all parties interested."<sup>49</sup>

**§ 490. The same continued—Surety released even though he has taken indemnity bond.**—The rule stated in the preceding

charged or lost through the negligence or misconduct of either the plaintiff or the sheriff, the execution debt is considered paid, in so far as the surety is concerned." *Dills v. Cecil*, 4 Bush (67 Ky.) 579. In *Montgomery v. Sayre*, 100 Calif. 182, 34 Pac. Rep. 646, the surety for both maker and indorser of a note was held to have been released by the payee's release of the indorser from a deficiency decree entered against him in a suit to foreclose a mortgage made by the maker of the note to secure the same indebtedness. In *Traveler's Insurance Co. v. Mayo*, 170 Ill. 498, 48 N. E. Rep. 917, it was held

that the surety on a note was released by the fact that the holder of the note, in foreclosing a mortgage by which it was secured, took a deficiency decree against the principal only when he might have taken such deficiency decree against the surety at the same time. The holder of the note and mortgage should not be allowed "to disturb the courts and vex the parties with many actions." Citing and following *Lawrence v. Beecher*, 116 Ind. 312; S. C. 19 N. E. Rep. 143.

<sup>49</sup> *Mayhew v. Crickett*, 2 Swanst. 185, per Lord Eldon, C.

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section does not prevent the creditor from availing himself of any indemnity that has been placed in the hands of the surety by the principal debtor. It follows that the surety remains bound to the extent that he has been indemnified by the principal and to the extent that he holds money or property by way of indemnity that would otherwise be available to the creditor for the payment of his claim. It is held, however, that if his indemnity is in the form of a bond with sureties, he is released the same as if he had taken no indemnity at all. Judgment was obtained against the principal in an injunction bond for \$1,130.50. Execution issued and by means of it \$4,300 of the principal's money was tied up. Afterwards by an arrangement in which the sureties did not participate, that judgment was vacated and a new judgment obtained against principal and sureties. Held, that by releasing his levy on the funds of the principal the creditor also released the sureties. And it made no difference that the sureties had taken an indemnity bond. The court said (p. 456): "Where a surety for the purpose of his indemnification has obtained possession or control of property or money of the principal debtor, sufficient for the payment of the debt, and which would otherwise be available to the creditor for that purpose, to permit him to retain the security and repudiate the obligation would be unjust, whether the principal was released or not; and it is in such cases that the courts have held that the release of the principal debtor does not discharge the surety. We think that the exception to the rule must be confined to this class of cases, and that it cannot be extended to the case of an indemnifying bond executed by other sureties, without abrogating the rule itself." <sup>50</sup>

**§ 491. The same continued—Effect of mere delay resulting in loss of lien—Where creditor's negligence releases surety.—**If the creditor releases the lien of a judgment or execution on the property of the principal, the surety will be released, even though the creditor did not at that time know the fact of suretyship. With reference to this, it has been said that it is the fact of the relation of principal and surety, "with or without the creditor's knowledge of it, that gives the right of substitution. The right is inherent in the transaction, if the relation

<sup>50</sup> Thomas v. Mason, 8 Colo. App. 452, 46 Pac. Rep. 1079.

exists. \* \* While the law enforces the payment of \* \* (the creditor's) claim, it does not make his will the law of the contract, and allow him to shift the burden from the property of one defendant to that of the other, at his pleasure. Nor may he blindly act so as to affect the rights of others, and then excuse himself by saying he did not know. He should not in any way discharge one of his joint debtors without the assent of the other, for that other has an interest in that act. The knowledge of the \* \* (creditor) of the fact of suretyship was therefore immaterial."<sup>1</sup> It has been held that if the creditor releases from the lien of a judgment sufficient real estate of the principal to pay the debt, he thereby discharges the surety, even though there remains enough real estate of the principal subject to the lien of the judgment to pay it. To hold the surety liable in such case would be throwing the risk entirely upon him. He is discharged to the extent of the value of the property released.<sup>2</sup> It has been held that if the sheriff, without direction from the creditor, releases personal property of the principal which he has levied on, the surety is discharged pro tanto, and that the act of the sheriff in this regard is the act of the creditor.<sup>3</sup> It has also been held that the return of a sheriff indorsed on an execution, which states that the execution had been "held up" by order of the creditor, is no evidence of that fact.<sup>4</sup> Mere delay in levying under an execution is held not to release the surety, even though, during such delay, the principal disposes of all his property subject to execution.<sup>5</sup> Negligence on the part of the creditor

<sup>1</sup> *Holt v. Bodey*, 18 Pa. St. 207, per Lowrie, J.; *Martin v. Taylor*, 8 Bush (Ky.) 384; *Irick v. Black*, 2 C. E. Green (N. J.) 189.

<sup>2</sup> *Holt v. Bodey*, 18 Pa. St. 207. But an accommodation indorser is held not absolutely discharged by the holder's releasing real estate of the maker from the lien of a judgment on the note. *Dunn v. Parsons*, 40 Hun (N. Y.) 77.

<sup>3</sup> *Lumsden v. Leonard*, 55 Ga. 374. *Contra*, *Summerhill v. Trapp*, 48 Ala. 363. See, also, *Wright v. Watt*, 52 Miss. 634. And it is held that where the sheriff delivered prop-

erty, seized under a levy, to the assignee in bankruptcy of the principal, the surety was discharged. *Fleming v. Odum*, 59 Ga. 362.

<sup>4</sup> *Shannon v. McMullin*, 25 Gratt. (Va.) 211.

<sup>5</sup> *Jerauld v. Trippett*, 62 Ind. 122; *Hogshead v. Williams*, 55 Ind. 145. Holding that a bank's delay for two and one-half years to foreclose a mortgage that it held as security, did not release the surety or lessen his liability, though by reason of the accumulation of interest, the proceeds did not satisfy the debt, see *Gray v. Farmers' Bank*,

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releases the surety to the extent it has injured him when the surety has stipulated for diligence.<sup>6</sup>

§ 492. **Instances where surety discharged by release of levy on property of principal.**—A sheriff levied on property of a principal debtor sufficient to satisfy the execution, and by negligence and unreasonable delay released the levy and became responsible to the creditor. He then paid the creditor, and took from him an assignment of the judgment to himself, and levied it on property of the surety. Upon a bill filed by the surety to enjoin proceedings against himself, it was held that he was discharged.<sup>7</sup> A joint judgment having been obtained against principal and surety, execution was issued and became a lien on sufficient personal property of the principal to pay the debt, but no levy was made. The creditor, under color of a fraudulent assignment from the principal, took this property out of the county, and beyond the reach of execution, and appropriated the proceeds to himself, his object being to collect the judgment from the surety. Held, the surety was discharged from the judgment.<sup>8</sup> In another case judgment

81 Md. 631, 32 Atl. Rep. 518, citing *McShane v. Howard Bank*, 73 Md. 155, 20 Atl. Rep. 776.

<sup>6</sup> Forbearance or neglect by a creditor to sell property pledged as security for the payment of a debt will discharge the surety from liability where the contract requires diligence in the sale of the property so pledged. Thus, the principal borrowed money for which he gave his note with surety, the latter conveying his interest in certain lands owned by himself and the principal, to a trustee, to be held in trust in case of default. At the maturity of the note an agreement was made for an extension, wherein it was stipulated that in the event of default in the monthly payment of interest, the entire debt should become due, and the land held in trust sold for the payment thereof. Upon default of the principal, and of which the

surety had no notice until several months thereafter, held, that the neglect to sell the property held in trust upon default in accordance with the agreement discharged the surety's property from liability: *Walker v. Goldsmith*, 7 Oreg. 161.

<sup>7</sup> *Miller v. Dyer*, 1 Duvall (Ky.) 263.

<sup>8</sup> *Robeson v. Roberts*, 20 Ind. 155. In *Griffith v. Moss & Co.*, 94 Ga. 199, 21 S. E. Rep. 463, the creditor after foreclosing a mortgage on property securing the note on which defendant was surety, directed the sheriff not to levy, whereupon the mortgagor removed the property beyond the sheriff's reach. Held, that the surety was discharged to the extent of the value of the security that was so lost to the creditor. The court said that "the creditor was not merely inert or passive but interfered actively in preventing seizure of the mort-

was recovered against principal and surety, and property of the principal, sufficient to satisfy the judgment, was levied on. Afterwards D, a creditor of the principal, took a mortgage on the same property from the principal, and paid the judgment creditor the amount due on the judgment, and took an assignment of it from him. D then released the levy and sold the property under his mortgage, and proceeded against the surety on the judgment. Upon bill filed by the surety to restrain proceedings on the judgment, it was held he was discharged. The court said: "The surety is entitled to the benefit of every additional or collateral security which the creditor gets into his hands for the debt for which the surety is bound, as soon as such a security is created, and by whatever means the surety's interest in it arises, and the creditor cannot himself, nor by any collusion with the debtor, do any act to impair the security or destroy the surety's interest."<sup>9</sup> Surety and principal confessed a judgment which became a lien on land of the principal sufficient to pay the debt. Afterwards the principal sold the land to D, and afterwards the creditor sold the judgment to D, who endeavored to revive it against the surety. Held, the surety was discharged, and the judgment could not be revived against him.<sup>10</sup> Judgment having been recovered against a principal, and B and C, who were sureties, an execution was levied on the property of B. Pending the levy, A bought this property from B, and afterwards obtained an assignment of the judgment, the whole amount of which he endeavored to have satisfied out of C's property. Held, equity would restrain him from collecting from C more than the fair proportion of the debt, whether he had notice of the lien of the execution when he bought the judgment or not.<sup>11</sup> Equity will, at the instance of the surety, enjoin the creditor from releasing a levy on property of the principal, and this whether the principal is insolvent or not. The ground of relief in such case is that the property of the principal should pay the debt. The insolvency of the principal might quicken the action of the court, but it is not necessary to relief.<sup>12</sup>

gaged property and bringing it to sale."

<sup>9</sup> Nelson v. Williams, 2 Dev. & Bat. Eq. (N. C.) 118.

<sup>10</sup> Wright v. Kuepper, 1 Pa. St.

361. To similar effect, see Johnson v. Young, 20 W. Va. 614.

<sup>11</sup> Dobson v. Prather, 6 Ired. Eq. (N. C.) 31.

<sup>12</sup> Irick v. Black, C. E. Green (N.



§ 493. **Surety not discharged unless injured by release of levy on property of principal.**—As a general rule, the liability of the surety is not affected by the release of a levy on property of the principal unless he is injured thereby. Thus, where a surety had a mortgage for his indemnity on the property which was released from the levy, it was held that he was not discharged by such release, as his mortgage remained in force, and he was not injured.<sup>13</sup> So where real estate of a principal was levied on, and, after two or three postponements, the execution was returned by order of the plaintiff without a sale being made, but the lien of the judgment on the real estate still subsisted, and it did not appear that any loss had happened by the return of the execution, it was held the surety was not discharged. There was no loss of a security, but simply a giving of time without any agreement to do so.<sup>14</sup> Execution was issued against a principal, and property of his worth \$90 was levied in. He then gave the creditor an order for \$100 on his wife's interest in her father's estate, which was good for that amount, and could not have been reached by the execution, and in consideration thereof the creditor released the levy. Held, the surety was not discharged because he was benefited by the transaction.<sup>15</sup> Where real estate of the principal was levied on, the boundaries of part of which were so undefined that a suit in chancery was necessary to establish them, and the remainder of which was incumbered, but not for its full value, it was held that the surety was not discharged by a release of the levy. The court said: "The law imposes no duty on the judgment creditor to encounter the expense or delay of a suit in chancery to ascertain incum-

J.) 189. See further to this point, Philadelphia & Reading R. R. Co. v. Little, 41 N. J. Eq. 519.

<sup>13</sup> Glass v. Thompson, 9 B. Mon. (Ky.) 235; Stringfellow v. Williams, 6 Dana (Ky.) 236. See, also, for a peculiar case on this subject, Bartlow v. Bonde, 3 Dana (Ky.) 591. See, also, Lilly v. Roberts, 58 Ga. 363; Adams v. Logan, 27 Gratt. (Va.) 201.

<sup>14</sup> Sasscer v. Young, 6 Gill & Johns. (Md.) 243. For a like ruling on similar facts see Wood v.

Brown, (Colo.) 104 Fed. Rep. 203, 43 C. C. A. 474 at 477, citing the text. In that case the principal having obtained a lien on real estate of the debtor made a levy and afterwards released it. Held, that such levy and release thereof neither strengthened nor impaired the lien, therefore the security of the surety was not impaired, and he was not released.

<sup>15</sup> Thomas' Ex'r v. Cleveland, 33 Mo. 126.

brances or define boundaries of his debtor's lands."<sup>16</sup> An execution was levied upon partnership property to satisfy a debt due from one of the partners, but the creditor, finding that the extent of the firm liabilities was so great that nothing could be realized from the levy, abandoned it. Held, he might adopt this course, but by so doing he took upon himself the responsibility of establishing the facts of the sufficiency of the property if any surety or party standing in that relation should question the propriety of the release.<sup>17</sup> It has been held that the mere fact that personal property of the principal sufficient to satisfy the debt has been levied on, but not sold for want of bidders, does not discharge the surety.<sup>18</sup> If a surety, after he has been discharged by the release of a levy on property of the principal, promises to pay the debt with knowledge of the facts, but without any new consideration, he is bound.<sup>19</sup>

**§ 494. Surety discharged if creditor release attachment on property of principal—Dismissing suit against principal.**—If the creditor levies an attachment upon property of the principal, and afterwards releases it, this will have the same effect to discharge the surety as the release of any other lien on the property of the principal for the payment of the debt. Thus, a city treasurer became a defaulter, and the city levied an attachment on property of his almost sufficient to satisfy the debt. Another party intervened, claiming the property as partner of the defaulter. The matter was left to a referee under an agreement that his decision should be the judgment of the court. He decided that the intervenor was entitled to the greater portion of the property, and it was turned over to him. In a suit on the treasurer's bond against his surety, it was held that the intervenor was not entitled to the property, and the attachment was the first lien on it, and that giving up the property was an act of the creditor which discharged the surety to the extent of the value of the property surrendered. The court said the creditor was not bound to commence proceedings, but having done so he "cannot relinquish any hold he has acquired upon the property of the debtor, without resorting to the proper proceedings to make therefrom the debt. And

<sup>16</sup> Commercial Bank v. Western Reserve Bank, 11 Ohio 444, per Lane, C. J.

<sup>17</sup> Moss v. Pettingill, 3 Minn. 217.

<sup>18</sup> Moss v. Craft, 10 Mo. 720.

<sup>19</sup> Mayhew v. Cricket, 2 Swanton 185.

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this rule is alike applicable if the property has been voluntarily placed in the hands of the creditor, or he has acquired a lien thereon by proceedings at law."<sup>20</sup> It has been held that the liability of a surety is not affected by the fact that the creditor releases an attachment on property of the principal, upon the ground that the creditor is not bound to use active diligence to obtain payment of the debt.<sup>21</sup> This, however, ignores the fact that as soon as a creditor obtains a lien on the property of the principal for the payment of the debt, he becomes a trustee; and it is difficult to perceive why the release of an attachment lien on the property of the principal should not have the same effect as the release of any other specific lien upon property of the principal, acquired by the creditor after the surety becomes bound. The mere dismissal by the creditor of a suit which he has commenced against the principal, and by which, if prosecuted, the money could have been collected, will not discharge the surety. In such case no lien is lost, and the transaction amounts to simple forbearance without consideration.<sup>22</sup>

**§ 495. When surety discharged by failure of creditor to cause execution to be levied on property of principal—Duty of creditor toward surety before and after he acquires lien.**—If the creditor, having an execution against the principal, or against the principal and surety, causes it to be returned without any levy being made, he does not thereby discharge the surety, even though the principal had property subject to the execution from which the debt might have been made if the execution had been levied and such property becomes unavailable for the payment of the debt, provided no lien has attached by virtue of

<sup>20</sup> *City of Maquoketa v. Willey*, 35 Iowa 323, per Beck, C. J.; *Bank of Missouri v. Matson*, 24 Mo. 333; *Ashby's Adm'x v. Smith's Ex'r*, 9 Leigh (Va.) 164; *Twigg v. Augusta Savings Bank*, 26 S. C. 612. So the holder of a promissory note, by voluntarily relinquishing the levy of an attachment upon sufficient goods of the maker to satisfy the debt, discharges an indorser thereon. *Spring v. George*, 50 Hun (N. Y.) 227.

<sup>21</sup> *Executors of Baker v. Marshall*, 16 Vt. 522; *Montpelier Bank v. Dixon*, 4 Vt. 587; *Barney v. Clark*, 46 N. H. 514. See, also, on this subject, *Bellows v. Lovell*, 5 Pick. 307; *Somersworth Savings Bank v. Worcester*, 76 Me. 327.

<sup>22</sup> *Somerville v. Marbury*, 7 Gill & Johns. (Md.) 275. For a peculiar case on this subject, see *McVeigh v. The Bank of the Old Dominion*, 26 Gratt. (Va.) 785.

the issuing of such execution, and none is lost by its return.<sup>23</sup> The creditor, not being bound to active diligence to obtain a lien, is no more bound to levy an execution which is not otherwise a lien than he would be to commence suit or to take any other steps to obtain a lien. It has, however, been held, where execution was issued against a principal which became a lien on his property sufficient in amount to satisfy the debt, and it was returned not levied by order of the creditor, and the property was lost as a security, that the surety was not thereby discharged on the ground that "the relinquishment of so imperfect a lien is not like the giving up of funds actually placed by the principal in the creditor's hands to be appropriated to the payment of the debt, nor like goods placed in the custody of the law for that purpose by the actual levy of a *fieri facias*."<sup>24</sup> The better opinion, and the one sustained by the weight of authority, however, is that if, when the execution is issued, it becomes a valid lien on property of the principal without any levy being made, and such lien is lost in consequence of the return of the execution without a levy by procurement of the creditor, and the surety is thereby injured, he is discharged *pro tanto*.<sup>25</sup> There is no good reason for a distinction in this regard between valid liens of various kinds. And in all cases of this character the distinction should be clearly borne in mind between the case of a creditor holding

<sup>23</sup> *Hetherington v. Bank at Mobile*, 14 Ala. 68; *Thornton v. Thornton*, 63 N. C. 211; *Caruthers v. Dean*, 11 Smedes & Mar. (Miss.) 178; *Sawyer v. Bradford*, 6 Ala. 572; *Hunter v. Clark*, 28 Tex. 159; *Summerhill v. Tapp*, 52 Ala. 227; *Woodburn v. Friend*, 10 La. (Curry) 496; *Humphrey v. Hitt*, 6 Gratt. (Va.) 509; *McKenny's Ex'rs v. Waller*, 1 Leigh (Va.) 434; *Royston v. Howie*, 15 Ala. 309; *Sawyer's Adm'r v. Patterson*, 11 Ala. 523. And to similar effect, see *Ambler v. Leach*, 15 W. Va. 677; *Knight v. Charter*, 22 W. Va. 422; *Brown v. Chambers*, 63 Tex. 131; *McNeilly v. Cooksey*, 2 B. J. Lea (Tenn.) 39.

<sup>24</sup> *Naylor v. Moody*, 3 Blackford (Ind.) 92, per Blackford, J. See, also, on this subject, *Lenox v. Prout*, 3 Wheaton 520; *Morrison v. Hartman*, 14 Pa. St. 55.

<sup>25</sup> *Dills v. Cecil*, 4 Bush. (Ky.) 579; *Ferguson v. Turner*, 7 Mo. 497; *Robeson v. Roberts*, 20 Ind. 155; *Blandford's Adm'r v. Barger*, 9 Dana (Ky.) 22; *Brown v. Ex'rs of Riggins*, 3 Kelly (Ga.) 405. See, also, on this subject, *Miller v. Dyer*, 1 Duvall (Ky.) 263, overruling *Finn v. Stratton*, 5 J. J. Marsh. (Ky.) 364; *Sterne v. Bank of Vincennes*, 79 Ind. 549; *Sterne v. McKinney*, 79 Ind. 578.

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no lien, who is not bound to active diligence, and the case of a creditor who does not hold a lien on property of the principal for payment of the debt, and who in such case is a trustee for all concerned, and bound to use the same diligence as any other trustee similarly situated.

§ 496. When and how far surety discharged by release of co-surety—Principal by release of joint obligor.—If there are several sureties liable for the same debt, and the creditor releases one of them from liability, but does not thereby materially alter the contract, he generally releases the remaining sureties to the extent that such released surety would otherwise have been liable to contribute to his co-sureties.<sup>1</sup> With reference to this it has been said that: "The same principles of equity exist between co-sureties to be relieved to the extent of the share of each in the debt by acts of the creditor as exist between them and the principal to be relieved of the whole debt by similar acts of the creditor with the principal; and where a creditor by his acts discharges one surety or actively relinquishes a lien, he can only hold the other surety liable for his pro rata share of the debt."<sup>2</sup> A principal, being indebted to a creditor in £8,000, gave him certain securities, and also, as additional security, four notes, each for £2,000, and each indorsed by a separate surety. Time was given to three of the sureties, and it was held that the remaining surety was released from three-fourths of the note for which he had become bound.<sup>3</sup> Judg-

<sup>1</sup> *Jemison v. Governor*, 47 Ala. 390; *State v. Matson*, Adm'r, 44 Mo. 305; *Shock v. Miller*, 10 Pa. St. 401; *Klingensmith v. Klingensmith's Ex'r*, 31 Pa. St. 460. Contra, see *Starry v. Johnson*, 32 Ind. 438. See, also, on this subject, *Thompson v. Adams*, 1 Freeman's Ch. (Miss.) 225; *Ex parte Gifford*, 6 Vesey 805, and *Clarke v. Birlye*, Law Rep. (41 Ch. Div.) 422; *Cain v. Williams*, 16 Nev. 426. To the effect that the discharge of one surety entirely releases all the sureties, see *Stockton v. Stockton*, 40 Ind. 225; *Tourns v. Riddle*, 2 Ala. 694. To the effect that the discharge of one surety entirely dis-

charges all the sureties when the contract is thereby varied, see *Mitchell v. Burton*, 2 Head (Tenn.) 613. The release of a surety is a release of the other surety for one-half the debt. *Gordon v. Moore*, 44 Ark. 349. In Maryland it is held that while at law the release of one or more sureties will discharge the others, yet in equity such release will not operate as a discharge unless their risk or liability is increased. *Smith v. State*, 46 Md. 617.

<sup>2</sup> *Rice v. Morton*, 19 Mo. 263.

<sup>3</sup> *Stirling v. Forrester*, 3 Bligh 575.

ment was recovered again B, one of the five sureties on a note, and an execution was levied on property of B sufficient to pay the debt, but the creditor ordered the execution to be returned unsatisfied. Subsequently the creditor commenced suit against C, another of the sureties. Held that, if all the sureties were solvent, the creditor could recover from C only four-fifths of the debt, but if all the other sureties were insolvent, he could only recover one-half thereof.<sup>4</sup> B and C were jointly bound as sureties for A, and D, the wife of A, charged her separate estate to indemnify B from all loss, etc. The whole loss was paid by B alone, who afterwards, without the concurrence of D, released his co-surety, C. Held, that D's separate estate was thereby released from one-half the loss suffered by B.<sup>5</sup> Where the sureties in a bond were only bound severally and for different amounts, it was held that the release of one of them, by striking his name from the bond, did not affect the liability of the others at law.<sup>6</sup> It has been held that if a county court, under the provisions of a statute, releases one of several sureties in a guardian's bond it does not affect the liability of the other sureties who became bound, knowing the law, and must be presumed to have contemplated such an event.<sup>7</sup> It has also been held that the act of the creditor in releasing an attachment levied on the property of one surety does not discharge another surety.<sup>8</sup> If the creditor releases one surety, but expressly provides that such release shall not affect the liability of the other sureties, it has been held that such other sureties remain bound the same as if no release had been given.<sup>9</sup> Where a creditor agreed with one of two sure-

<sup>4</sup> *Dodd v. Winn*, 27 Mo. 501.

<sup>5</sup> *Hodgson v. Hodgson*, 2 Keen 704.

<sup>6</sup> *Collins v. Prosser*, 1 Barn. & Cress, 682; *Id.*, 3 Dow. & Ryl. 112. To similar effect, see *Hoyt v. Tut-hill*, 33 Hun (N. Y.) 196. And when the obligation of sureties is joint and several, the discharge of one surety is held not to release the others from their proportionate liability. *Glasscock v. Hamilton*, 62 Tex. 143. In a suit against two joint indorsers of a note, the court directed a verdict against one and

in favor of the other and judgment was so rendered. Held, error; the discharge of one surety operated to discharge both. *Seligman v. Gray*, 66 Mich. 341.

<sup>7</sup> *Frederick v. Moore*, 13 B. Mon. (Ky.) 470.

<sup>8</sup> *Chapman v. Todd*, 60 Me. 282.

<sup>9</sup> *Thompson v. Luck*, 3 Man., Gr. & Scott, 540. See, also, *Hewitt's Adm'r v. Adams*, 1 Patton, Jr. & Heath (Va.) 34. And it is held that the release of one of two sureties upon an executor's bond will not release the other surety if it is



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ties upon a joint and several undertaking not to sue him, it was held that the other surety when sued might avail himself of such agreement; and that the creditor was limited in his recovery against the surety sued to one-half the damages recoverable upon the undertaking.<sup>10</sup> It is held that the release of an indorser releases a surety for the same indebtedness.<sup>11</sup> Any act of the creditor that releases one of two or more joint obligors also releases the rest.<sup>12</sup>

§ 497. **Surety may without paying the debt resort to equity to prevent loss or misapplication of securities.**—The surety who fears the loss or destruction of the property by which the principal's debt is secured may without paying the debt or exhausting other remedies resort to a court of equity for the purpose of preventing it. The city of Little Rock gave the Home Water Company, an Arkansas corporation, the right to establish and maintain a sytem of water works and collect certain charges.

apparent from the instrument of release that there was no intention to release him. *Hood v. Hayward*, 48 Hun (N. Y.) 330.

<sup>10</sup> *Benedict v. Rea*, 35 Hun (N. Y.) 34.

<sup>11</sup> In *Montgomery v. Sayre*, 91 Calif. 206, 27 Pac. Rep. 648, the indorser on the mortgage note of a corporation was released, by the creditor, from a deficiency decree after foreclosure and it was held that thereby the maker of a collateral note to secure payment of the corporation's note, holding the position of a surety, was released from liability.

<sup>12</sup> In *Munyan v. French*, 60 N. J. Law 12, 36 Atl. Rep. 771, one of two joint obligors on a bond made an assignment for the benefit of his creditors. The obligee presented his claim against the assignees based upon the bond. A statute provided that such presentation of claim should bar the creditor from afterwards maintaining any action or suit on his claim. Held, that the obligee could not thereafter

maintain any action on the bond against the obligor who had made the assignment and so had released him and therefore could not maintain any action against the co-obligor on the bond. Mr. Ackley thinks that this result should not follow in states which, like Illinois, by statute, provide that "all joint obligations and covenants shall be taken and held to be joint and several obligations and covenants." *Hurd's Ill. Stat. Ch. 76, Sec. 3*. Yet, in New Jersey a statute, not alluded to by the court, provides that "all persons jointly indebted \* \* upon any joint contract \* \* shall be answerable to their creditors separately for such debts \* \*" and provides that judgment may be taken against part when part only are served. 2 N. J. Gen. Stat., p. 2336. In Ohio a statute quoted in *Walsh v. Miller*, 51 Ohio St. 462, 38 N. E. Rep. 381, provides that when one of several joint obligors is released the others remain liable, each for an equal share of the entire liability.

The Home Water Company hired the Arkansaw Water Company, another Arkansas corporation, to construct reservoirs and provide the necessary water supply and mortgaged its property, plant and franchises to the Arkansaw Water Company and assigned to the Arkansaw Water Company all revenues that might accrue from the operation of its plant. To obtain money to construct the reservoirs the Arkansaw Water Company issued bonds secured by its trust deed conveying all its property to the Farmers' Loan and Trust Company, as trustee, and procured the American Water Works and Guarantee Company, a New Jersey corporation, to guarantee prompt payment of principal and interest. The city, by its board of public affairs and its fire committee of city councils, having notified the Home Water Company that its franchises were annulled, and being in arrears \$31,500 for two years' water supply and the guarantee company having paid \$88,096.58 interest on the bonds which the Arkansaw Water Company could not pay, it was held, on demurrer, that the guarantee company was entitled to an injunction to prevent the cancellation and repeal of the franchise of the Home Water Company.<sup>13</sup> In another case, appellant sold land that had been devised to her by her deceased husband subject to whatever debts might be allowed against his estate during the two years next after the issuing of letters, and she, as principal, and the American Bonding and Trust Company, as surety, executed a bond in the penal sum of \$70,000 to the purchaser of the land conditioned that she would pay or cause to be paid all debts

<sup>13</sup> American Water Works and Guaranty Co. v. Home Water Co., 115 Fed. Rep. 171, at 182. In this case the Court, Trieber, J., said: "The trustee may refuse to take any steps to prevent the destruction of the security by reason of the fact that its debt is perfectly secure, owing to complainant's guaranty. In such a case the guarantor cannot compel the creditor to exhaust the security of the principal debtor before calling on it for the debt. \* \* The Arkansaw Water Company, the principal debtor, being alleged in the bill to be insolvent, may decline to incur any expense of litigation, for the reason that its entire property is mortgaged for its full value, and it has, therefore, nothing to lose. Upon what principle of equity, then, should the guarantor, the only party who, by the action of the city, is liable to be the loser, be denied relief by a court of equity? How are its rights to be protected if the doors of the courts of equity are closed to it?" Citing Mitford's Eq. Pl. 148; Story Eq. Jur. § 826; City of New Orleans v. Christmas, 131 U. S. 191 at 212, 33

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proved against his estate. She received for the land bonds of the Merrimac Building Company of the par value of \$70,000 secured on other real estate, of which she deposited \$15,000 in par value with the surety as indemnity. Her husband's estate was, in fact, insolvent, discovering which the surety filed its bill alleging appellant's insolvency and stating that the bonds constituted her only means of repaying it for indemnifying the purchaser of the land for the loss he would sustain if the debts of the estate were not paid. The court said that it was entitled to have the bonds applied in payment of the debts and affirmed the order appealed from appointing a receiver.<sup>14</sup>

L. Ed. 99, 9 Sup. Ct. Rep. 745. Compare note 12, § 1. See as to other equitable relief, § 245 and § 246.

<sup>14</sup> *Roberts v. American Bonding & Trust Co.*, 83 Ill. App. 463. The court, by Shepard, J., said: "We think this is clearly a case where the surety shall not be required to wait until he has made payment before he may go into equity and compel the principal to pay the debt. It is a familiar doctrine of equity that a surety has the right, as against his principal, to be protected from loss by reason of his suretyship, so far as it can be done without prejudice to the rights of the creditor. And so equity will sometimes interfere and compel the principal to exonerate the surety in advance of payment by, or judgment against, the surety, if the debt is due and it

can be done without prejudice to the rights of the creditor. \* \*

The obvious duty by the principal to perform must, of course, exist before its performance will be enforced, and if, added to that, there be the prevention from circuitry of action, a plain case ordinarily exists." *Dobie v. Fidelity & Casualty Co.*, 95 Wis. 540, 70 N. W. Rep. 482; *Neal v. Buffington*, 42 W. Va. 327, 26 S. E. Rep. 172; *Delaware L. & W. R. R. Co. v. Oxford Iron Co.*, 38 N. J. Eq. 151, in which case *Van Fleet, C.*, instructed the receiver of the principal (a corporation) to pay no dividend to the surety (who had paid nothing upon the principal's indebtedness) and to apply the principal's assets to the discharge of its debt.

## CHAPTER XVIII.

### OF THE DISCHARGE OF THE SURETY OR GUARANTOR BY THE CREDITOR'S NEGLIGENTLY LOSING SECURITY FOR THE DEBT.

- § 498. Surety discharged if creditor negligently lose security for the debt—Loss of collaterals.
499. Instances of discharge of surety by creditor's negligently losing benefit of security—Attachment improperly served—Failure to sue after notice—Neglect to foreclose, etc.
500. The same, continued—Allowing mortgaged property to be wasted or lost—Surety discharged if creditor negligently lose security for the debt—Instances.
501. Same, continued—Creditor neglecting to perfect lien of mortgagee, to take care of levy, to record, to retain debtor's property.
502. Instances of discharge of surety by neglect of creditor to preserve or perfect securities—Loss of property by creditor's improperly taking appeal—Failure to seize debtor's money when within grasp.
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- § 504. When surety discharged by negligence of creditor in prosecuting suit or judgment against principal.
505. When surety discharged by neglect of creditor to record mortgage for security of the debt.
506. Cases holding surety not released by negligence of creditor—Exchange of collateral—Delay in foreclosing.
507. Cases holding surety not discharged by negligence of creditor respecting statutory or other duty not owing to the surety, even when the creditor is a receiver and disobeys order of court.
508. Surety not discharged by failure of creditor to present claim against estate of deceased or bankrupt principal—Other cases.
509. Surety who expressly or impliedly consents to risk of security not released by resulting loss.
510. When new promise by released surety need not have new consideration—Waiver—Effect of pooling securities—Defense of loss of collateral available at law.

**§ 498. Surety discharged if creditor negligently lose security for the debt—Loss of collaterals.**—The creditor who has effects of the principal in his hands or under his control for the security of the debt is a trustee for all parties concerned, and if such effects are lost through the negligence or want of ordinary diligence of the creditor, the surety is discharged to the extent that he is injured, the same as if the effects had been lost by the positive act of the creditor. In such case he is bound to be diligent in preserving such effects to the same extent that any other trustee similarly situated is bound to use diligence. The kind of diligence required will be governed by the circumstances of each particular case. If the principal places in the hands of the creditor, as collateral security for the debt, an obligation of a third person, the creditor is, without any special agreement to that effect, bound to use due diligence to collect the same and to charge all the parties thereto, and if anything is lost on account of his failure to use such diligence, not only the surety but the principal also is discharged to the extent that he is injured.<sup>16</sup> With reference to this it has been said that: "The assignor of collaterals parts with his control over them, and the assignee should be bound to use proper exertions to render them effectual for the purpose for which they were assigned. The principle is that when a right of

<sup>16</sup> *First National Bank v. Wilbern*, Neb., Mch., 1903, 93 N. W. Rep. 1002, sustaining demurrer to an answer by a surety on a note: Same case, 90 N. W. Rep. 1126; *Compton v. Wabash R. R.*, 31 U. S. App. 486, S. C. sub nomine *Compton v. Jesup*, 68 Fed. Rep. 263, 15 C. C. A. 397 at 452; *Monroe v. De Forest*, 53 N. J. Eq. 264, 31 Atl. Rep. 773; *Brown v. First National Bank*, 112 Fed. Rep. 901 (C. C. A.); *Kemmerer v. Wilson*, 31 Pa. St. 110; *Pickens v. Yearborough's Adm'r*, 26 Ala. 417; *Noland v. Clark*, 10 B. Mon. (Ky.) 239; *Jennison v. Parker*, 7 Mich. 355; *Sellers v. Jones*, 22 Pa. St. 423; *Hill v. Bourcier*, 29 La. Ann. 841; *Lamberton v. Windom*, 18 Minn. 506; *Douglass v. Reynolds*, 7 Pet. 113;

*Slevin v. Morrow*, 4 Ind. (2 Port.) 425; *Lee v. Baldwin*, 10 Ga. 208; *Shippen's Adm'r v. Clapp*, 36 Pa. St. 89; *Wakeman v. Gowdy*, 10 Bosw. (N. Y.) 208; *Crim v. Fleming*, 101 Ind. 154; *Wooley v. Louisville Banking Co.*, 81 Ky. 527; *Hubbard v. Pace*, 34 Ark. 80; *Featherstone v. Hendrick*, 59 Ill. App. 497. For other cases holding the surety discharged by negligence of the creditor in not perfecting or in losing securities, see *Ex parte Mure*, 2 Cox 63; *Goodloe v. Clay*, 6 B. Mon. (Ky.) 236; *Succession of Pratt*, 16 La. Ann. 357; *Steele v. Mealing*, 24 Ala. 285; *Hill v. Sewell*, 27 Ark. 15; *Miller v. Berkey*, 27 Pa. St. 317; *Chichester v. Mason*, 7 Leigh (Va.) 244.

action or a judgment is transferred by a debtor to his creditor to secure the debt or as collateral security, ordinary diligence must be used to make it available, and if a loss occurs by negligence, even passive negligence, which is unreasonable and results in loss, it will be a good defense to a suit on the original debt."<sup>17</sup> It has also been said that "The necessary care and attention should be bestowed to preserve the value of whatever is thus voluntarily, and with a view to one's own interest, taken under his control."<sup>18</sup> It has been held that the question "What is due diligence?" is, when the facts are ascertained, one of law; and where a note was due when the creditor took it as collateral, and the maker was then solvent, but the creditor did not bring suit on it for three months, when the maker had become insolvent, it was held that this was such negligence as charged the creditor with the loss of the note.<sup>19</sup> The same rule applies when the creditor has disabled himself, by any means, from returning the security. "The principle is the plain and just one, that he who gives a pledge in security for a debt is upon payment entitled to a return of that which he has given in security, from whence it follows that if the creditor is unable to return the pledge he will not be allowed to extract the debt."<sup>20</sup>

**§ 499. Instances of discharge of surety by creditor's negligently losing benefit of security—Attachment improperly served—Failure to sue after notice—Neglect to foreclose, etc.—**

A creditor who was bound to use diligence to charge a guarantor commenced a suit and levied an attachment on property of the principal, but failed to collect the debt because the attachment was improperly served, and it was held that the guarantor was thereby discharged.<sup>21</sup> The assignee of a note as collateral security was notified of the impending insolvency of the maker, and warned that if he did not sue or surrender the note forthwith he must take the risk and would be held re-

<sup>17</sup> Wood v. Morgan, 5 Sneed (Tenn.) 79, per Caruthers, J.

<sup>18</sup> Trotter v. Crockett, 2 Port. (Ala.) 401.

<sup>19</sup> Wakeman v. Gowdy, 10 Bosw. (N. Y.) 208.

<sup>20</sup> Strong, C. J., in Allison v. McDonald, 23 Can. Sup. Ct. 635 at 639,

citing Palmer v. Hendrie, 27 Beav. 349, 28 Beav. 341; Lockhart v. Hardy, 9 Beav. 349; Walker v. Jones, L. R., 1 P. C. 50; Schoole v. Sall, 1 Sh. & Lef. 176, per Lord Redesdale.

<sup>21</sup> Beach v. Bates, 12 Vt. 68.



sponsible. The debt being lost in consequence of a failure to sue when notified as above, the assignee was held responsible for the amount of the note.<sup>22</sup> L, who owed S \$1,000, for which S held L's note and a mortgage on a printing press, sold the press to C for \$5,000, and C agreed to satisfy the note and mortgage. S refused to release L and take C for the debt, but there was evidence that he agreed to take C's liability as collateral security for the debt. Afterwards S gave C time, and the mortgaged property was destroyed by fire. Held, that L was discharged to the extent that he was injured thereby.<sup>23</sup> A bank is bound to take ordinary care only of bonds pledged to it as collateral security for the payment of a note deposited with it, and if, using such care, the bonds are stolen by burglars, the bank is not liable for their loss.<sup>24</sup> Where the creditor at the time he received a collateral security agreed to keep it and return it to the wife of the principal when he paid the debt, it was held that this was a complete answer to a defense set up by the surety to the effect that the creditor had not realized on the collaterals as soon as he might and that they had depreciated in value.<sup>25</sup>

**§ 500. The same continued—Allowing mortgaged property to be wasted or lost—Surety discharged if creditor negligently lose security for the debt—Instances.**—If the creditor has a lien on the property of the principal for the payment of the debt, and negligently suffers the property to be diverted from that purpose or lost as a security, the surety is discharged to the extent of the security lost, and this though the lien was obtained after the surety became bound, and without his knowledge. Thus, after principal and surety had signed a note, and without a previous agreement to that effect, the principal gave the creditor a mortgage on personal property to secure the same. The creditor allowed the principal to sell and waste the property, and it was held that the surety was thereby discharged. The court said the creditor was under no obligation to seek for or take the mortgage, "but, if he chose to do so, it must be regarded as a bailment for the interest of all parties, and imposing upon the creditor the obligation of ordinary care

<sup>22</sup> Bonta v. Curry, 3 Bush (Ky.) 678.

<sup>23</sup> Lochrane v. Solomon, 38 Ga. 286.

<sup>24</sup> Jenkins v. National V. B. of Bowdoinham, 58 Me. 275.

<sup>25</sup> Brick v. Freehold National Banking Co., 8 Vroom (N. J.) 307.

and diligence in respect to them." The creditor, taking a pledge, is bound to the principal to use ordinary diligence in taking care of the pledge, and must account to the pledgor for any loss happening for want of such diligence. Much more must he account to a surety. "Indeed it would be absurd to hold that the surety would not be discharged by the negligence which would discharge the principal, and it would be equally absurd to contend that the duty of the creditor to use ordinary care was lessened by the fact that there was a surety. \* \* If the creditor chooses to accept such securities, the law will imply that he undertakes to hold them in trust for the parties interested, and to use ordinary diligence in the care of them, and, upon payment of the debt by the surety, he is bound to transmit them unimpaired to him. If he relinquish such securities to the principal, it is well settled that he thereby exonerates the surety at least to the extent of their value. \* \* Between this class of cases, namely, the release of securities by the direct act of the creditor, and allowing them by want of ordinary care to be lost or destroyed, we are unable to perceive any solid distinction. In both cases the surety may have been lulled into security and prevented from taking the counter security that he might otherwise have required, relying, as he had a right to do, upon the creditor's holding such securities fairly and impartially." <sup>26</sup> A made a note for \$5,000 payable to B, who indorsed it to C. A lodged with C the note of a third person for \$10,000, secured by mortgage on real estate, as collateral security for the note of \$5,000. The same mortgage secured another note for \$10,000. The mortgaged property was sold at the instance of the holder of the last-mentioned note and brought \$20,000, which was paid to the sheriff, who released the whole mortgage. C, by proceeding against the sheriff for the amount of the \$5,000 note, ratified the release of the mortgage, and, having failed to obtain payment from the sheriff, sued B on his indorsement. Held, that C, by allowing the mortgage security to be lost, had destroyed B's right of subrogation thereto and discharged him.<sup>27</sup>

<sup>26</sup> City Bank v. Young, 43 N. H. 457, per Bellows, J. To contrary effect, see Freauer v. Yingling, 37 Md. 491; Vance v. English, 78 Ind. 80.

<sup>27</sup> Merchants' Bank v. Cordevoille, 4 Rob. (La.) 506. See, also, Bank of Gettysburg v. Thompson, 3 Grant's Cases (Pa.) 114. In Pfrshing v. Peterson, 98 Ill. App. 79,

§ 501. Same continued—Creditor neglecting to perfect lien of mortgagee, to take care of levy, to record, to retain debtor's property.—Principal and surety signed a bond, and the principal and his wife, in order to secure the bond, mortgaged to the creditor their equitable life interest in certain real estate, the legal title to which was in trustees. The creditor assigned the bond, and neither he nor his assignee gave notice of the mortgage to the trustees holding the legal title to the life interest, who sold the same and divided the proceeds among the parties interested, and the life interest was lost as a security. Held, the surety was discharged by the neglect of the creditor to give notice of the mortgage. The court said: "It is perfectly established in this court that if, through any neglect on the part of the creditor, a security, to the benefit of which a surety is entitled, is lost or is not properly perfected, the surety is discharged."<sup>28</sup> Execution against principal and surety was levied on property of the principal, which was in the hands of the surety for his indemnity, and sufficient to pay the debt. The officer exposed the property for sale, but found no bidders, and without direction from the creditor left the property in the hands of the principal, and it was lost. Held that, after the property had been levied on, it was the duty of the creditor, or of the officer, to see that it was taken care of, and the surety was discharged.<sup>29</sup> Plaintiffs lent to P £300, for which A became surety. At the same time P, by

Peterson, who owned a chattel mortgage securing a debt to her of \$2,000, was restrained from foreclosing it by a temporary injunction which was afterwards dissolved by final decree. From that decree an appeal was presented and Pfirsching as surety executed an appeal bond conditioned "to pay all damages accruing to said Peterson through loss or deterioration of said goods and chattels and through the postponement of the sale of said goods and chattels by reason of said appeal." The appeal was dismissed and suit was brought against Pfirsching on the appeal bond. The Court, Windes, J., said

that from the date of the decree there was nothing to prevent the creditor from foreclosing her mortgage, and the fact that she failed to foreclose and suffered her mortgage lien to expire by lapse of time was sufficient to release the surety. See, also, *Bouche v. Louttit*, 104 Calif. 230, 37 Pac. Rep. 902, holding collateral note to mortgage note released by mortgagee's neglect to foreclose for four years after mortgage became due.

<sup>28</sup> *Strange v. Fooks*, 4 Giff. 408, per Sir John Stuart, V. C.

<sup>29</sup> *Sherraden v. Parker*, 24 Iowa 28.

deed dated August 25, 1870, assigned certain fixtures, etc., as security for the debt. The assignment provided for the repayment of the loan August 25, 1871, and for the payment of interest February 25, 1871, and P was to remain in possession till default. The assignment was not recorded, P did not pay the interest due February 25th, and the plaintiffs did not take possession. P became bankrupt, and the trustee in bankruptcy seized and sold the assigned goods, and they were lost as security. Held, A was discharged pro tanto, both by the negligence of the plaintiffs to record the deed and their failure to take possession upon the default in the payment of interest, they knowing that P was in embarrassed circumstances. The principle is fully held that the negligence of the creditor, in permitting securities to be lost which he should hand over to the surety upon payment of the debt, discharges the surety.<sup>30</sup>

**§ 502. Instances of discharge of surety by neglect of creditor to preserve or perfect securities—Loss of property by creditor's improperly taking appeal—Failure to seize debtor's money when within grasp.**—If, through any neglect of the creditor, a security to the benefit of which the surety is entitled is lost or not properly perfected, the surety is discharged to the extent that he is injured thereby. Thus, judgment having been obtained against A, he appealed to the supreme court, giving B as the surety on the appeal bond. Pending the appeal A died, and the creditor failed to make his widow a party to the appeal, and consequently recourse against one-half of A's estate, which was solvent, was lost. The judgment of the court below was a lien on A's estate when the appeal was taken, but such lien on one-half of the estate was lost by the failure of the creditor to make the widow a party to the appeal. Held, B was discharged to the extent that he was injured. The court said: "It would seem to be a necessary consequence of the principles of the law of suretyship that the surety is entitled to the benefit of all the securities in the hands of the creditor; and if any of them are lost by his wilful neglect or want of due diligence, the surety is to that extent discharged. \* \* By article 3030 of the Code, the surety is discharged when by the

<sup>30</sup> Wulff v. Jay, Law Rep. 7 Q. B. low v. Verner, 30 New Brunsw. 150 756. See Molson's Bank v. Girdlestone, 44 Up. Can. (Q. B.) 54; Wins-

§ 503      EFFECT OF CREDITOR'S LOSING SECURITY.

act of the creditor the subrogation to his rights, mortgages and privileges can no longer be operated in favor of the surety. Article 2037 of the Napoleon Code is to the same effect; and the court of cassation has more than once decided that the term 'act of the creditor' applied to omissions or neglects of the creditor, and consisted in *omittendo* as well as in *committendo*." <sup>31</sup> A principal died, and auditors were appointed to marshal the money arising from a sale of his real estate. Judgment had been obtained against him and a surety by a bank, and the money aforesaid was "subject and liable to the judgment of the bank, and would have been obtained if due diligence had been used. \* \* The bank had not the balance actually in their hands, nor did they actually assent to its passing into the hands of \* \* (the principal), but they might, by using due diligence and doing their duty to the surety, have obtained it, and thus have had satisfaction *pro tanto* on their judgment from the proceeds of the real estate of the real debtor, and it was their duty to have done this. \* \* The principal could not take it out of court, but the bank could have done so, and if they did not they must lose it; for, having had the means of payment in their power, they could not pass them by and recover from a surety." <sup>32</sup>

§ 503. Same, continued—Creditor's failure to apply for payment from fund in court—Failure to insure mortgaged property as per agreement.—A being the maker of a note held by C, upon which B was surety, died, and his administrator having suggested the insolvency of his estate, filed a bill in the chancery court to remove the administration thither, and to have a sufficiency of A's lands sold to pay his debts. An order was made and published, requiring creditors to file their claims, and thereupon C filed the note with the clerk and master. A portion of the land was sold under a decree, and a fund sufficient to pay all the debts was collected before the civil war in the United States. C did not demand payment of the clerk, and nothing was paid on the note, and after the war he sued the surety. It did not appear what had become of the money in the clerk's hands. Held, the surety was discharged. The court said that by filing his claim in the chancery proceedings,

<sup>31</sup> *Saulet v. Trepagnier*, 2 La. Bank, 2 Pen. & Watts (Pa.) 203, Ann. 427, per Eustis, C. J.      per Smith, J.

<sup>32</sup> *Ramsey v. Westmoreland*

C signified his intention to obtain payment from the real estate, and could not afterwards remain passive. Having filed his claim it was his duty to apply for payment. The payment of the money into court was, under the circumstances, a discharge of the surety. The surety is entitled to the benefit of all securities held by the creditor, "and if the creditor who has or ought to have had them in his full possession or power loses them or permits them to get into the possession of the debtor, the surety will, to the extent of such security, be discharged."<sup>33</sup> By articles of agreement, H contracted with W to complete certain fittings for a warehouse for £3,450 to be paid by instalments during the progress of the work. The contract contained a stipulation, "that W shall and may insure the fittings from risk by fire at such time and for such amount as the architects may consider necessary, and deduct the costs of such insurance for the time during which the works are unfinished from the amount of the contract." A became surety for the due performance of the work by H. Fittings worth £2,300 were destroyed without insurance, and H became insolvent and failed to complete the contract. Held, that A was discharged by the failure of W to insure the fittings.<sup>34</sup> This judgment was, upon appeal, affirmed by the exchequer chamber, and the court there held that, as the surety had agreed to become responsible for an insured principal and not an uninsured one, he was not discharged simply to the extent that he was injured, as in the case where a security is lost, but the contract is not changed, but he was wholly discharged, as in the case where time is given, or any material alteration in the contract is made.<sup>35</sup>

**§ 504. When surety discharged by negligence of creditor in prosecuting suit or judgment against principal.**—A verdict was recovered against a principal and two sureties in 1868, but no judgment was entered thereon. In 1874 the plaintiff moved to enter judgment thereon nunc pro tunc. In 1868 the principal was solvent, and if judgment had been then entered it could have been collected of him, but he had since become insolvent. Held, this was an act of the creditor which injured

<sup>33</sup> Gillespie v. Darwin, 6 Heisk. (Tenn.) 21, per Nelson, J.

<sup>35</sup> Watts v. Shuttleworth, 7 Hurl. & Nor. 353.

<sup>34</sup> Watts v. Shuttleworth, 5 Hurl. & Nor. 235.



the surety, and exposed him to greater risk, and discharged him under the code, which provided that any act of the creditor which injured the surety or increased his risk, or exposed him to greater liability, should discharge him. The negligence of the creditor was considered his "act."<sup>36</sup> Where, in a suit on a contract made with the commissioners of a district of a parish, acting under an ordinance of the police jury for the erection of certain levees, the evidence showed that the contractor did not contemplate that the parish should be responsible in the first instance for the cost of the levees; and the failure to obtain payment from the source originally contemplated was attributable to the creditor, who attempted to collect the money from the parties primarily liable, and could certainly have done so, but did not pursue the proper course, it was held that the parish was discharged from liability by such negligence of the creditor.<sup>37</sup> A as principal, and B as surety, were bound to C for £1,000. A, desiring a further advance of £300, and getting it from C, gave C a warrant of attorney to confess judgment for £2,600, to secure both sums, and it was at the same time agreed between B and C that when C was requested by B, he should enter up judgment on the warrant of attorney, and levy execution on A's property. B notified C to enter up judgment, which he did, and levied on A's property, but neglected to file the warrant of attorney or affidavit of the execution, and by such neglect the property levied on was lost as a security. It was held that B was thereby discharged. The court said: "I think that \* \* (C), having entered into a stipulation with the surety that he should have the benefit of this security, were bound to do what was necessary to keep it effectual. It is by their omission that the benefit of the security has been lost, and I must, therefore, hold that the surety is discharged."<sup>38</sup>

<sup>36</sup> Hayes v. Little, 52 Ga. 555.

<sup>37</sup> Slattery v. Police Jury, 2 La. Ann. 444. See, also, on this subject, Clopton v. Spratt, 52 Miss. 251.

<sup>38</sup> Watson v. Alcock, 1 Smale & Giffard, 319, per Sir John Stuart, V. C. Affirmed on appeal, Watson v. Alcock, 4 De Gex, Macn. & Gor. 242. Holding that a judgment cred-

itor who omits to have his judgment on a forthcoming bond enrolled, and thereby lets in junior judgment creditors, who sweep away all the principal's property, does not thereby discharge the surety, see Pickens v. Finney, 12 Smedes & Mar. (Miss.) 468; McGee v. Metcalf, 12 Smedes & Mar. (Miss.) 535.

§ 505. **When surety discharged by neglect of creditor to record mortgage for security of the debt.**—If the creditor has a mortgage or other conveyance of property of the principal as a security for the debt, and neglects to record the same, and the property is consequently lost as security, this is such negligence on his part as will discharge the surety to the extent that he is injured thereby. Thus, where a principal gave the creditor a chattel mortgage on property sufficient to pay the debt, which the creditor failed to record, and in consequence the property was lost as security, it was held the surety was thereby discharged. The court said: “Had the principal debtor pledged to the creditor his gold watch, and the creditor afterwards allowed the debtor the use of it, and the latter had sold it to an innocent third party, there can be no question but that a surety could avail himself of such wrongful treatment of the pledge by the creditor. \* \* Wherein does the case before us differ from the illustration just made? In the latter case the wrong consists in doing something—passing the pledge back to the debtor; in the former the wrong arises from the plaintiff’s omission to do something—the simple act of filing and having the mortgage recorded. And it is just behind this distinction, between doing something and omitting to do something, that the plaintiff seeks to shield himself. It is true, the books speak of the creditor being under no obligation to exercise active diligence for the protection of the surety as long as the surety himself remains inactive, and that to discharge the surety the creditor must be guilty of some wrongful act, as by a release or fraudulent surrender of the pledge.” The cases holding this doctrine are mostly cases which decide that the creditor is not bound to enforce and realize upon securities held by him before proceeding against the surety. “But it is one thing to convert the securities given by the debtor into money, that they may be applied to satisfy the debt of the principal debtor, and quite another to preserve such securities that they may be made so available. While the creditor may be relieved from the former, he should be held responsible for the loss of any security arising from his wrongful acts, either of omission or commission. \* \* Can he who has taken the security stop short and omit to do that which renders it chiefly valuable, under the excuse that others did not urge him to file it or furnish the pittance necessary to pay

the recorder?"<sup>39</sup> In a similar case, where the same thing was held, the court said: "An act of omission on the part of the creditor, when the law requires him to act, may be quite as potent for mischief to the security as an act of commission."<sup>40</sup> In the case of a mortgage of real estate, where the creditor had failed to record it, and the surety was held to be thereby discharged, the court said: "Nor can it be gainsaid that where the creditor who has the securities suffers them by his laches to become valueless, he is in no better condition than if he had released that security."<sup>41</sup> In a leading case on this subject, A became surety for B in a bond conditioned for the payment of an annuity to C. Various securities for the annuity were put up by B., and among them he assigned two ships to C. The assignment was not recorded, as required by the ship registry acts, and B afterwards sold the ships and became insolvent, and the ships were lost as a security. Held, that C, by his neglect to record the assignment, discharged A to the extent of the value of the two ships.<sup>42</sup> But where a rule of court provided that a recognizance for the payment of the rent of property in charge of the court should be recorded, and a lien on property of a lessee was lost by the failure of the clerk of the court to record such a recognizance, it was held a surety for the rent was not thereby discharged, on the ground that the rule of court was not made for the benefit of sureties, and that the owners of the property should not be prejudiced by the negligence of the officers of the court.<sup>43</sup>

**§ 506. Cases holding surety not released by negligence of creditor—Exchange of collateral—Delay in foreclosing.—The**

<sup>39</sup> Burr v. Boyer, 2 Neb. 265, per Cronuse, J. To similar effect, see Wulff v. Jay, Law Rep. 7 Q. B. 756. See, also, Straton v. Rastall, 2 Durn. & East 366. Contra, Philbrooks v. McEwen, 29 Ind. 347; Vance v. English, 78 Ind. 80.

<sup>40</sup> Toomer v. Dickerson, 37 Ga. 428.

<sup>41</sup> Teaff v. Ross, 1 Ohio St. 469, per Thurman, J. Contra, Lang v. Brevard, 3 Strob. Eq. (S. C.) 59; Hampton v. Levy, 1 McCord, Eq. (S. C.) 107. As supporting the contrary, see, also, New York Nat.

Exch. Bank v. Jones, 9 Daly (N. Y. Com. Pleas) 248, wherein it was held that a surety was not discharged by the omission of the creditor to refile a mortgage upon property of the principal debtor, as required by law to continue the mortgage as a lien, although by such omission the value of the mortgage as a security was lost.

<sup>42</sup> Capel v. Butler, 2 Sims & Stu. 457.

<sup>43</sup> Jephson v. Maunsell, 10 Irish Eq. 38; affirmed, 10 Irish Eq. 132.

distinction between the cases where the creditor is bound to active diligence and those where he may remain passive is often extremely fine. As instances of the latter, the following may be mentioned: Principal and surety executed a note due in a year. At the same time the principal assigned to the creditor, as collateral security, a bond and mortgage, due after the note. The note was not paid, and the creditor did not proceed to foreclose the mortgage till more than two years after it was due, and then commenced foreclosure proceedings, and discontinued them. If he had foreclosed the mortgage at maturity, and obtained a judgment for the balance due, it might have been collected from the maker of the mortgage, but he failed to do this till the mortgagor became insolvent. Held, the surety was not discharged. The court admitted that where property is pledged by the principal for the payment of the debt, and it is lost by the negligence of the creditor, the surety is discharged, but said this was not such a case. The note became due before the mortgage, and should have been paid by the surety at maturity. The only loss which arose was from not getting judgment against the mortgagor for the balance above the value of the mortgaged premises. It was simply a case of failure to prosecute, which did not discharge the surety.<sup>44</sup> It has been held that the negligence of a sheriff, in permitting property levied on by him to be destroyed by fire before a sale thereof, does not discharge a surety for the debt.<sup>45</sup> Where a creditor had a judgment, which was a lien on real estate of the principal, and execution was issued on the judgment, but not levied on the real estate because the creditor was afraid it would not sell, and that levying on it would prevent the collection of the debt otherwise, and the lien was lost, but the creditor acted in good faith, it was held the surety was not discharged.<sup>46</sup> A sold land to B and took his notes, with C as surety for the purchase price. A gave B a title bond for a deed, conditioned that the land should be conveyed in twelve months, and might have retained the legal title as security, but did not contemplate doing so, and there was no agreement that

<sup>44</sup> *Scroepell v. Shaw*, 3 N. Y. 446.      <sup>45</sup> *Griff v. Steamboat Stacy*, 12 La. Ann. 8.  
To similar effect, see *Howe Machine Co. v. Farrington*, 82 N. Y. 121; *Vance v. English*, 78 Ind. 80; *Raynolds*, 13 Ohio 85.  
*Sheldon v. Williams*, 11 Neb. 272.

he should do so. More than twelve months after the date of the bond, A made B a deed for the land, and took back a mortgage upon the representation of B that he would sell the land and pay the debt, or would otherwise return the deed. A was induced by fraud not to record the mortgage, and the land was lost as security, but it was held that the surety was not thereby discharged.<sup>47</sup> Where a creditor was bound, if requested, to proceed and foreclose mortgages on the property of the principal, and such request was made, it was held that this did not impose upon him an absolute duty to enforce the securities without delay. It was only necessary that he should act in good faith, and be free from gross neglect. If he unreasonably delays or acts in bad faith, or is guilty of gross negligence, whereby the value of the securities is impaired, the sureties will be discharged pro tanto.<sup>48</sup> Other instances of negligence on the part of the creditor in not foreclosing, etc., which were held not to release the sureties are stated in a note.<sup>49</sup> Where collateral is changed without the surety's con-

<sup>47</sup> *Coombs v. Parker*, 17 Ohio 289.

<sup>48</sup> *Black River Bank v. Page*, 44 N. Y. 453.

<sup>49</sup> *London, etc., Bank v. Smith*, 101 Calif. 415, 35 Pac. Rep. 1027; *First National Bank v. Wilbern*, Neb., June, 1902, 90 N. W. Rep. 1126; *Carlisle v. People*, 27 Colo. 116 at 119. In *Steele v. Atlanta Land Co.*, 91 Ga. 64, 16 S. E. Rep. 257, plaintiff having recovered a joint judgment against principal and sureties dismissed a levy he had made on the principal's property and made a levy on the property of the surety. Held, that dismissal of the levy was equivalent to dismissal of the suit as to the principal but that did not affect the creditor's right to levy on the surety's land. In *Carver v. Steele*, 116 Calif. 116, 47 Pac. Rep. 1007, the holder of a note lost its second mortgage lien on real estate by failing to foreclose. Held, that his right to recover against the sureties was not impaired thereby. In

general," said the court, "unless some agreement or special circumstance imposes diligence upon the creditor as a duty, he does not, by mere failure to pursue the person primarily liable, discharge the guarantor, surety, or indorser, even though his passivity in this regard may result in barring his remedy against the original debtor." Citing *Bull v. Coe*, 77 Calif. 54-60, 11 Am. St. Rep. 235. The principal debtor in a promissory note, on which defendant was surety, mortgaged a crop of corn, which never came into the possession or under the control of the mortgagee. On the maturity of the note the surety took no steps to compel the mortgagee to foreclose or proceed against the principal debtor in the ordinary course of law, nor did he take any other means to entitle himself to the control of the mortgage. The corn was afterwards disposed of by the mortgagor—the principal debtor. Held, the surety,

sent but not varied in value, it is held the surety is not discharged.<sup>50</sup>

§ 507. Cases holding surety not discharged by negligence of creditor respecting statutory or other duty not owing to the surety, even when the creditor is a receiver and disobeys order of court.—A lessor permitted several months to elapse without proceeding against her tenants for the collection of rent, and when she commenced suit therefor the effects upon which the law established a privilege in her favor had been removed beyond her reach. Held, the surety for the rent was not thereby discharged.<sup>1</sup> Where a bond provided that the principal should

having stood passively by, was not entitled, because of the loss of the security, to be exonerated from liability on the note: *Grisard v. Hinson*, 50 Ark. 229. The mere fact that the holder of negotiable paper, who has a lien upon personal property for security, fails to enforce his lien, whereby the security is lost, held, not a defense to a surety or guarantor when the holder was not charged with responsibility for its custody or care: *Fuller v. Tomlinson Bros.*, 58 Iowa 111. A creditor's delay in collecting his debt held not of itself to discharge a surety, when there is no agreement for delay: *Hayes v. Knox*, 41 Mich. 529. In *U. S. v. Bee*, 54 Fed. Rep. 112, 4 C. C. A. 219, 7 U. S. App. 459, it was held that the sureties on the official bond of a U. S. Consul were not released by the delay of the government for twelve years before attempting to collect excess salary paid to the consul by mistake.

<sup>50</sup> In *Kelley v. Post*, 37 Ill. App. 396, collateral notes to a note on which defendant was surety were renewed by the giving of new notes on which the maker of the original collateral note was liable for the same amount. Held, that the surety was not discharged.

“The ground upon which debtors, whether principals or sureties, are discharged by the dealing of the creditor with collaterals, is prejudice to them in consequence of such dealing,” said the court. “Human ingenuity cannot explain how any injury could have resulted to anybody by the exchanges between Odell and West.”

<sup>1</sup> *Parker v. Alexander*, 2 La. Ann. 188. To same effect, see *Hill & Co. v. Bourcier*, 29 La. Ann. 841, where it was held that the mere neglect of a privilege creditor to sue for a balance due on a lease did not release the surety of the lessee for the debt, even though a new lease had been executed between the same parties, but without security, and rent paid thereon. Holding that a lessening in the value of securities by the mere passive delay of the creditor to enforce them where none of the securities are lost does not discharge the surety, see *Clopton v. Spratt*, 52 Miss. 251. To the effect that the surety is not discharged if collaterals in the creditor's hands depreciate because he does not realize on them as soon as he might, see *Brick v. The Freehold National Banking Co.*, 8 Vroom (N. J.) 307. Holding that the neglect of the creditor to make the



account for and pay over from time to time all such tolls as he should collect, it was held that the sureties were not discharged by the laches of the obligees in not examining his accounts for eight or nine years, and not calling upon him as soon as they might have done for sums in arrear or unaccounted for.<sup>2</sup> Certain notes, deposited for safe keeping with a bank, were assigned by the creditor to the surety for his indemnity. The bank did not cause them to be protested, so as to charge the indorsers, and it was held the surety was not thereby discharged. As the notes were deposited for safe keeping, and not for collection, the bank was under no obligation to do anywhere with them.<sup>3</sup> Where a statute required, and an order of court provided, that a mortgage should be taken for the purchase money of property sold at administrator's sale, and a surety became bound for the purchase money of property so sold, supposing that such mortgage would be taken, but no misrepresentation was made to him and no mortgage was taken, it was held he was not discharged.<sup>4</sup> This was because the duty neglected was regarded by the court as not owing to the surety unless he had made a special contract for its performance. Upon the same principle neglect by a receiver to obey the directions of the court has been held not to release the surety for a debt due to him.<sup>5</sup>

money out of property of the principal levied on by attachment will not release the surety after a judgment against him by law, see *Herrick v. Orange Co. Bank*, 27 Vt. 584. Holding that the neglect of the creditor in permitting the lien of a judgment against a principal to be lost by failing to revive and keep it alive does not discharge the surety, see *Mundorff v. Singer*, 5 Watts (Pa.) 172; followed in *Kindt's Appeal*, 102 Pa. St. 441. Holding that the surety is not discharged by the failure of the creditor to prosecute an appeal in a suit against the principal, see *Terrill v. Townsend*, 6 Tex. 149. Holding that a delay of the creditor for four years to levy an execution on real estate of the principal does

not discharge the surety, see *Lumsden v. Leonard*, 55 Ga. 374. See, also, on this subject, *Morgan v. Coffman*, 8 La. Ann. 56. Holding that failure of the creditor to prove a life insurance policy of the principal debtor taken as security against the principal's estate in bankruptcy did not discharge the surety for the debt, see *Rainbow v. Juggins*, Law Rep. (5 Q. B. Div.) 422.

<sup>2</sup> *Trent Navigation Co. v. Harley*, 10 East 34.

<sup>3</sup> *New Orleans Canal & Banking Co. v. Escoffie*, 2 La. Ann. 830.

<sup>4</sup> *Wornell v. Williams*, 19 Tex. 180.

<sup>5</sup> In *Joyce v. Cockrill*, 92 Fed. Rep. 838, 35 C. C. A. 38, a receiver having been ordered by court to sell

**§ 508. Surety not discharged by failure of creditor to present claim against estate of deceased or bankrupt principal—Other cases.**—If the principal dies, and the creditor fails to present his claim against the principal's estate until all remedy against the estate is lost by reason of such delay, the surety is not thereby discharged, even though the estate was solvent, and the claim would have been paid if presented. The creditor is under no greater obligation to present his claim against the estate than he would have been to sue the principal if he had not died. It is a case of mere passive delay, unaccompanied by any trust. The discharge of the estate of the principal is not in such case the act of the principal, but is the act of the law.<sup>6</sup>

the real and personal property of a corporation, take notes with personal security for deferred payments and reserve a lien on the real estate for such deferred payments, took defendant as surety on one of such notes and failed to reserve such lien on the real estate but conveyed it absolutely. Held, in a suit on the note that though the real estate might have been of sufficient value to pay the deferred payments and though the security of the lien was absolutely lost by the receiver's neglect, the surety was not thereby discharged, because the duty of reserving such lien was not for the benefit of the surety but for the benefit of the creditors. And, if the surety is discharged by the receiver's default, said the court, Lurton, J., "it will be at the expense of the creditors, who having lost one security through the negligence of the receiver, will be deprived of the benefit of another which he did take. Yet the negligence of the creditors thus to be punished does not equal that of the surety who seeks to make it available for his own release." Citing *Board v. Otis*, 62 N. Y. 88, 92; *Dye v. Dye*, 21 Ohio St. 93. The court distin-

guished from the case at bar cases where the surety has been held released by the creditor's loss of security by his failure to record an instrument, saying that they were cases in which an actual existing security was lost by the neglect of the creditor," while in the case at bar the only fault of the receiver was "that he did not reserve a lien when he might and should have done so in obedience to the order of the court." In this case the surety had given the receiver no notice that his suretyship was conditioned on the due observance of the order of court.

<sup>6</sup> *Cain v. Bates*, Adm'r, 35 Mo. 427; *People v. White*, 11 Ill. 341; *Hathaway v. Davis*, 33 Cal. 161; *Minter v. Branch Bank at Mobile*, 23 Ala. 762; *Johnson v. Planters' Bank*, 4 Smedes & Mar. (Miss.) 165; *Hooks v. Branch Bank at Mobile*, 8 Ala. 580; *Cohea v. Commissioners*, 7 Smedes & Mar. (Miss.) 437; *Fetrow v. Wiseman*, 40 Ind. 148; *Sibley v. McAllister*, 8 N. H. 389; *Ray v. Brenner*, 12 Kan. 105; *Halderman v. Woodward*, 22 Kan. 734; *Smith v. Smithson*, 48 Ark. 261; *Bull v. Coe*, 77 Cal. 54; *Vredenburg v. Snyder*, 6 Iowa (Clarke) 39; *Mitchell v. Williamson*, 6 Md.

§ 508 EFFECT OF CREDITOR'S LOSING SECURITY.

It is no defense to the sureties on a county collector's bond that they had no notice of the collector's default till more than three years after his death, when all remedy against his estate was barred by lapse of time.<sup>7</sup> Where a principal assigned all his property for the benefit of his creditors, and a creditor did not present his claim for payment to the assignee, it was held that the surety therefor was not discharged.<sup>8</sup> A made an assignment to B for the benefit of his creditors, and C became B's surety as such assignee. B realized enough from the assigned property to pay seventy-one cents on the dollar of A's debts. D, a creditor of A, did not present his claim to B for payment, and B having made an assignment for the benefit of his creditors, D failed to present his claim to B's assignee, and no part of it was paid by either assignee. Held, that C, as surety of B, was liable on his bond to D. It was a case of mere passive delay, which would not discharge a surety.<sup>9</sup> To hold the surety, the creditor need not prove the debt against the principal in bankruptcy.<sup>10</sup> Statutory changes of the rule as to the measure of diligence due from the creditor to the surety with respect to the collection of the debt are held not to be retrospective in their operation.<sup>11</sup>

210; *Moore v. Gray*, 26 Ohio St. 525; *Villars v. Palmer*, 67 Ill. 204; *M'Broom v. The Governor*, 6 Port. (Ala.) 32; *Macdonald v. Bell*, 3 Moore's Priv. Co. Cas. 315; *Pearson v. Gayle*, 11 Ala. 278; *Ashby v. Johnston*, 23 Ark. 163. To contrary effect, see *Dorsey v. Wayman*, 6 Gill (Md.) 59. See on this subject, *House v. Trustees of Schools*, 83 Ill. 368; *Tipton v. Carigan*, 10 Bradw. (Ill. App.) 318; *Stevens v. Hood*, 70 N. H. 177, 46 Atl. Rep. 29. In *United States v. Adams* (C. C., Nev.), 54 Fed. Rep. 114, it was held that the neglect of the plaintiff in failing to present its claim against the estate of a deceased United States marshal did not bar a suit against the sureties on his official bond. Citing numerous authorities.

<sup>7</sup> *Parks v. The State*, 7 Mo. 194.

<sup>8</sup> *Dye v. Dye*, 21 Ohio St. 86; *Read v. American Surety Co.*, Iowa, May, 1902, 90 N. W. Rep. 590.

<sup>9</sup> *Richards v. The Commonwealth*, 40 Pa. St. 146.

<sup>10</sup> *Morrison v. Citizens' National Bank*, 65 N. H. 253, 280, 20 Atl. Rep. 300, 303.

<sup>11</sup> In *Field v. Brokaw*, 148 Ill. 654, 37 N. E. Rep. 80, mortgage foreclosure, it was held that the Illinois statute by which the surety is released to the extent that the debt might have been collected from the estate of the deceased principal if the creditor fails to present the account for allowance within two years after the issue of letters of administration, does not apply to contracts of suretyship that were entered into prior to the enactment of such statute. As to indirect effect of such statutory

§ 509. **Surety who expressly or impliedly consents to risk of security not released by resulting loss.**—The positive act of the creditor resulting in loss of the security does not lessen the liability of the surety if the surety has expressly or by implication consented thereto. For instance, in a recent case in a Federal Court, a street railway company gave to an electric company, plaintiff's assignor, its note for \$3,400 with defendant Kister as surety, for the price of two electric power generators. The note contained a stipulation that the title and ownership of the generators should not pass until the purchase money notes were paid in full. The machinery was delivered and attached to stone foundations by the railway and the electric company so that it became part of the realty and subject to the lien of a \$50,000 mortgage of the railway's plant. It was impossible, without the mortgagee's consent, to attach the machinery without making it subject to the prior mortgage. It could not be used otherwise and it was the intention of all parties that it should be used. Held, that the creditor, the electric company, violated no agreement or obligation owing to the surety when it assisted in placing the machinery in position according to its contract with the street railway, although the annexation thereby resulting operated to give the existing mortgage precedence over the lien reserved.<sup>12</sup> In another case the surety consented to delay in selling a lot of sheep that the principal had placed in the hands of the creditor to sell and apply on the debt. Held, that he was not released by the resulting loss.<sup>13</sup> The accommodation indorser on a note secured by mortgage consented that the holder need not record the mortgage unless something should occur to render it necessary. The holder had no notice of any such necessity until it was too late. Held, the surety remained liable.<sup>14</sup> Nine sureties signed the note of their principal, the proceeds of which by agreement therein stated, were deposited by the principal with the railroad by which he was employed as agent, in lieu of an official bond. The agent quit his job, needed the money and

changes, see *Wright v. Shorter*, 56 Ga. 72, note 56, § 219, *Bleckley, J.*

<sup>13</sup> *Pimental v. Marques*, 109 Calif. 406, 42 Pac. Rep. 159.

<sup>12</sup> *Evans v. Kister* (Ky.), 92 Fed. Rep. 828, 85 U. S. A. 28, 88, *Lurton, J.*

<sup>14</sup> *Allentown National Bank v. Trexler*, 174 Pa. St. 497, 34 Atl. Rep. 195.

withdrew and absorbed it. Held, that the trial court properly directed a verdict against the sureties.<sup>15</sup>

§ 510. When new promise by released surety need not have new consideration—Waiver—Effect of pooling securities—Defense of loss of collateral available at law.—If a surety who is discharged afterwards, with full knowledge of the facts, promises to pay the debt, he is bound without any new consideration.<sup>16</sup> Defendant was surety on a note for which a bank held collateral. He gave a new note for the same indebtedness, in which he bound himself as principal. Held, that he could not escape liability thereafter, by proving that the bank had wasted the collateral security for the original note.<sup>17</sup> It has been held that the surety is not discharged by an agreement among various creditors by which various securities are pooled and shared pro rata.<sup>18</sup> The defense of release by loss or misappropriation of securities can usually be made at law.<sup>19</sup>

<sup>15</sup> Lumpkin v. Calloway, 101 Ga. 226, 28 S. E. Rep. 622.

<sup>16</sup> Bank at Decatur v. Johnson, 9 Ala. 621.

<sup>17</sup> Lamoille County National Bank v. Hunt, 72 Vt. 357, 47 Atl. Rep. 1078.

<sup>18</sup> Denniston v. Hill, 173 Pa. St. 633, 34 Atl. Rep. 452.

<sup>19</sup> In Brown v. First National Bank, 112 Fed. Rep. 901, 50 C. C. A. 602, the maker of a note assigned to the bank that held it a judgment to be held as collateral security. The bank released the judgment as to certain real estate and afterwards satisfied it in full without the consent of the maker or any of the sureties on the note. The trial court held that this defense was "complicated beyond measure" and could not be submitted to a jury. Held, that this if proven was a perfect defense both as to

the maker and the sureties and was matter of legal as well as equitable cognizance and not more complicated than thousands of cases that are submitted to juries. Citing New Hampshire Savings Bank v. Colcord, 15 N. H. 119, 122, 41 Am. Dec. 685, Parker, C. J.; Rogers v. Trustees of Schools, 46 Ill. 428 at 431; Price v. Dime Savings Bank, 124 Ill. 317, 15 N. E. Rep. 754, 7 Am. St. Rep. 367; Guild v. Butler, 127 Mass. 386; Ingalls v. Morgan, 10 N. Y. 178; Chester v. Bank, 16 N. Y. 336; Lewis v. Palmer, 28 N. Y. 271; Nelson v. Munch, 28 Minn. 314, 9 N. W. Rep. 863; Baker v. Briggs, 8 Pick 122, 19 Am. Dec. 311; Rush v. First National Bank of Kansas City, 71 Fed. Rep. 102, 17 C. C. A. 627; Lewis v. Armstrong, 80 Ga. 402, 7 S. E. Rep. 114; Clow v. Derby Coal Co., 98 Pa. St. 432.















